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AND COURT OF APPEALS
OF NEW YORK

WITH KEY-NUMBER ANNOTATIONS

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² Became Chief Justice June 3, 1919.

³ Resigned December 12, 1918.

⁴ Elected April 1, 1919, to fill unexpired term of George A. Cooke.

¹¹ Beginning May Term, 1919.

¹² Resigned September 16, 1919.

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THE NORTHEASTERN REPORTER

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CINCINNATI, R. & FT. W. R. CO. v. CLEVELAND, C., C. & ST. L. R. CO.
(No. 23229.)

(Supreme Court of Indiana. April 18, 1919.)

1. DEEDS ⇨118—RIGHT OF WAY—FAILURE TO FIX WIDTH—ACTION—EVIDENCE—PLAT OF ADJOINING TRACT.

In a controversy over the width of a right of way in a particular tract where the same deed conveyed from grantor to the railroad a right of way through this and an adjoining tract without fixing its width, a plat to the adjoining tract filed by grantor showing the width of right of way therein is admissible in evidence.

2. RAILROADS ⇨69 — QUITCLAIM DEED TO RIGHT OF WAY—FEE-SIMPLE TITLE.

Where grantor owning unplatted land quitclaimed a railroad right of way across the same to a company authorized by Loc. Laws 1848, c. 94, §§ 18, 21, to receive land for such purpose in fee simple, a fee-simple title vested in the company, particularly where it held the land for more than 40 years.

3. DEDICATION ⇨48—PUBLIC STREETS OR ROADS—EFFECT AS TO LAND PREVIOUSLY SOLD BY GRANTOR.

Where grantor by a deed vested a railroad company with a fee-simple title to the right of way through certain lands which he subsequently platted, dedicating to the public certain streets or highways, such dedication could not burden the railroad company's land with a street or highway.

4. MUNICIPAL CORPORATIONS ⇨648—STREETS—ESTABLISHMENT BY PUBLIC USER—RAILROAD RIGHT OF WAY.

The fact that the public as well as persons having business with a railroad company drove over a part of a right of way owned in fee by such company which was used for the purpose of loading and unloading cars does not show a use that is either exclusive or adverse so as to establish a street by public user.

Appeal from Circuit Court, Delaware County; Frank Ellis, Judge.

Suit by the Cincinnati, Richmond & Ft. Wayne Railroad Company against the Cleveland, Cincinnati, Chicago & St. Louis Rail-

road Company. Judgment for defendant, new trial denied, and plaintiff appeals. Judgment affirmed.

Roscoe D. Wheat and Frank B. Jaqua, both of Portland, and Orr & Clark, of Muncie, for appellant.

Frank L. Littleton, of Indianapolis, Charles P. Stewart, of Cincinnati, Ohio, and Macy, Nichols & Bales, of Winchester, for appellee.

MYERS, J. This was a suit by appellant against appellee, whereby the former sought to enjoin the latter from further entering upon its land and doing the things necessary for the permanent laying of a railroad switch track thereon; for a mandate requiring appellee to remove that part of the track in course of construction and to require it to restore the premises to its former condition.

The complaint was in one paragraph. The cause was tried by the court, special findings of fact made, and conclusion of law stated thereon; judgment in favor of appellee. The appellant's motion for a new trial was overruled, and this ruling is the only error assigned. The specifications relied on, in support of this motion are: (1) The decision of the court is not sustained by sufficient evidence; (2) the decision of the court is contrary to law; (3) the court erred in admitting in evidence, over objections by appellant, the plat of an extension of Mumma's addition to the city of Winchester, Ind.; and (4) error of the court in refusing to strike out this plat.

The questions here for decision make it unnecessary for us to set out the substance of the complaint, as the special findings furnish the basis for the controlling features in this case. Briefly stated, these findings show that on May 26, 1851, John Mumma was the owner of certain real estate adjoining the town of Winchester as originally laid out, and on that day conveyed by deed to the Indianapolis & Bellefontaine Railroad Company the right of way for a railroad east and west over the same. On June 9, 1851, Mumma platted a certain portion of this real estate as an addition to the town of Win-

chester. The ground thus platted abutted both sides of the right of way so deeded to the railroad company. On this plat the blocks, lots, and streets are shown. The width and names of the streets are given, and the size of the lots are designated in figures. Block 3 is described as being 169 feet east and west and 80 feet north and south, and is in possession of appellant as owner through successive conveyances from Mumma. This block abuts Meridian street on the east, Pearl street on the south, an alley on the west, and so-called "Railroad avenue" on the north. As shown on the plat, Meridian street is 82 feet wide, Pearl street is 66 feet wide, the alley 12 feet wide, and Railroad avenue 110 feet wide, and embraces the tract of the Indianapolis & Bellefountaine Railroad. On this plat block 3, and others east and west of it, are designated as "Commercial Row." On October 18, 1853, Mumma made an additional plat which included real estate belonging to him adjoining both sides of the right of way of the Indianapolis & Bellefountaine Railroad Company, and immediately to the east and adjoining the real estate which he had platted on June 9, 1851. This plat was filed and recorded and is known as "Mumma's Extension."

The right of way of the Indianapolis & Bellefountaine Railroad Company extends from the west to the east across the said extension, and is continuous with that portion of the right of way of the said railroad which crosses the plat of 1851; and the south line of said right of way, as shown on the plat of 1853, is a continuous line with the south line of the right of way as it appears on the plat of 1851. That the said right of way as it appears on the plat known as Mumma's Extension is 80 feet in width. In the years 1851-52, Mumma's grantee of said right of way entered upon the same and constructed thereon a main track, and to the south thereof a side track. That these tracks were constructed over the south 80 feet of Railroad avenue. That thereafter appellee became the successor and owner of all the rights, property, and privileges of the Indianapolis & Bellefountaine Railroad Company, situate and shown on said plat as Railroad avenue and immediately north of block 3. That, since the construction of said main track and side track, appellee and its predecessor have been continuously in possession of the 80 feet of ground north of the south line of Railroad avenue and abutting block 3, and during all of that time they have continuously occupied and used the same. That for more than 30 years appellee has used the space between its tracks and block 3 for a coalhouse, toolshed, and as a place for the storage of materials for use in the repair and construction of its railroad, as also by its customers and shippers for the purpose of loading and unloading cars. That in the year 1885 appellee constructed on the passageway between

its side track and block 3, and near the northwest corner of block 3, a telegraph and interlocking tower which obstructed and closed this way for the use by teams. That no part of the south 80 feet of Railroad avenue throughout its entire length was ever in any manner improved by the public, or by the town or city officials of Winchester. That the rails of the tracks so constructed as aforesaid within Railroad avenue projected above the grade on which they were laid, rendering it unsafe and inconvenient to drive over with teams. That in the year 1906 the city of Winchester improved the north 30 feet of Railroad avenue from the east side of Meridian street to the west side of Main street, with a brick pavement for which appellee's right of way was assessed benefits which it paid. Main street is the first street east of Meridian and intersects Railroad avenue. That for more than 40 years prior to the bringing of this suit appellee maintained upon the south side of Railroad avenue and to the east of Meridian street a third track known as the "Commercial" or "Stub" track, which extended from the east end of Railroad avenue to the east side of Meridian street and was continuously used by appellee as a loading and unloading track, especially for the purpose of loading and unloading from and into the buildings located on the south side of, and abutting upon, said Railroad avenue, which buildings were owned and used by divers persons and corporations. That some of these buildings were owned by appellant and occupied by its tenants. That this use of the third track was without objection on the part of appellant. That in May, 1914, appellee extended said third track to the west across Meridian street and south of the side track to a point near the telegraph and interlocking tower, and over the ground theretofore continuously used by it and its customers. That appellee and its predecessor since May 28, 1851, has been in open, notorious, exclusive, uninterrupted, and adverse possession under color of title of the south 80 feet of Railroad avenue as laid out on the plat, and especially that part located to the west of Meridian street north of block 3, which is the real estate in controversy. That appellee at the time of bringing this suit was not, nor since that time has it, engaged in digging up the soil or engaged in laying a switch track, nor has it laid any switch track upon block 3, the property of appellant. Upon these findings the court concluded that the law was with appellee; that the temporary restraining order should be dissolved.

We will consider the questions presented in their reverse order, and, in doing so, our attention will first be directed to the ruling of the court in admitting in evidence a certified copy of the plat of John Mumma's extension to Mumma's addition to Winchester.

[1] It appears that the plat in question

was acknowledged and filed for record by Mumma in the recorder's office of Randolph county on October 18, 1853, as an extension, to the east, of his former addition. It shows a strip of land 80 feet wide running east and west across the land so platted on which appears the name "Indianapolis & Bellefontaine Railroad Company." The south line of this strip, if extended west, would be the south line of Railroad avenue in the original plat, and the north line, if extended west, would be 30 feet south of the north line of Railroad avenue. Nothing is said in the deed from Mumma to the Indianapolis & Bellefontaine Railroad Company as to the width of the right of way so conveyed. In a case like this, where the width of a right of way may be of some importance or is questioned, and the instrument or deed thereto does not fix the width, the contemporaneous declarations and acts of the parties with reference to the same, as also subsequent acts if performed before a controversy arises, are admissible to fix such width. *Indianapolis & V. R. Co. v. Lewis*, 119 Ind. 218, 21 N. E. 660; *Indianapolis, etc., R. Co. v. Reynolds*, 116 Ind. 356, 19 N. E. 141; 2 Elliott on Contracts, § 1538. Such declarations or acts are admitted upon the theory that they tend to show how the parties understood the contract and may furnish a practical construction of it. Elliott on Contracts, § 1538.

While the plat in question did not include the particular strip of land in controversy, yet the same deed gave the right of way over the land covered by both plats.

Under the circumstances shown by this record, the making and recording of the last plat by Mumma, fixing the location and width of the "right of way," must be regarded as indicating to his grantee the width of the strip thus conveyed, not only over that particular tract, but over the land adjoining it on the west. The plat was properly admitted. *Rodgers v. Pittsburgh, etc., R. Co.*, 255 Pa. 462, 100 Atl. 271; *Fraley v. Fraley*, 150 N. C. 501, 506, 64 N. E. 381; *Powers v. World's Fair*, 10 Ariz. 5, 86 Pac. 15.

As we see this case, the controlling question is whether or not block 3 owned by appellant abuts on the south the right of way of appellee, or a public street known as Railroad avenue. If Railroad avenue for its entire width of 110 feet is a public street, and appellant is the owner of the servient estate to the center thereof, as it claims, then the judgment from which it appeals must be reversed; but, if appellee is the owner in fee simple of the south 80 feet and abutting block 3 as claimed by it, then the judgment must be affirmed.

The special findings of the trial court support the contention of appellee; but appellant insists that the evidence does not support the findings, and that the decision of the trial court is contrary to law. Appellant

first makes the point that appellee by its proposed use of the street is taking appellant's property without due process of law in violation of the Fifth and Fourteenth Amendments to the federal Constitution, and, second, that the proposed use will destroy one of its means of ingress and egress to its property without just compensation first assessed and tendered, in violation of section 21, art. 1, of the Constitution of Indiana.

Our conclusion on other questions here presented renders a discussion of these constitutional provisions unnecessary.

It is conceded that both parties to this appeal derived title to their respective parcels of land from a common source. John Mumma being the original owner of all this land, on May 26, 1851, by quitclaim deed released to appellee's predecessor "the right of way" for a railroad over the northeast quarter of section 20, township 20 north, range 14, not included in the original plat of the town of Winchester, nor a four-acre lot owned by one Smith. Shortly thereafter, Mumma's grantee, the Indianapolis & Bellefontaine Railroad Company, constructed a railroad over this land, and along the line on which appellee's tracks are now located.

[2, §] The Bellefontaine Company was incorporated under an act of the General Assembly of this state approved February 17, 1848. Local Laws 1848, p. 176. Section 16 of this act authorizes the construction of the railroad; section 18 authorizes it to receive from persons land necessary for the construction or location of its road; and section 21 provided that—

"When said company shall have procured the right of way as hereinbefore provided, they shall be seized in fee simple of the right to said land, and shall have the sole use and occupation of the same."

The trial court found, and the evidence supports the finding, that while Mumma owned the unplatted land he quitclaimed a railroad right of way across the same to a company authorized by law to accept land for that purpose. The executed deed had the effect to vest the fee-simple title in the company. Laws 1848, *supra*. The findings supported by evidence also show that the first plat was not made until after the execution of the deed from Mumma to the railroad company. Under this state of facts, it is quite clear that Mumma was not the owner of all the land covered by the plat at the time it was filed, and any attempt by him to dedicate to the public any other than his own was without authority and ineffective for any purpose. *Earl v. Chicago*, 136 Ill. 277, 26 N. E. 370; *Hague v. West Hoboken*, 23 N. J. Eq. 354; *Bruce v. Seaboard, etc., Corp.*, 52 Fla. 461, 467, 41 South. 883; *State ex rel. v. Morgan's, etc., Co.*, 111 La. 120, 35 South. 482; *City of Detroit v. Detroit & Milwaukee R. Co.*, 23 Mich. 173; *McShane*

v. City of Moberly, 79 Mo. 41; Ward v. Davis, 5 N. Y. Super. Ct. 502.

We have no fault to find with appellant's contention that the owner of a tract of land is held to dedicate such portion thereof as is designated for public use on a recorded plat with reference to which he sells lots. *Miller v. City of Indianapolis*, 123 Ind. 196, 24 N. E. 228. But the facts before us make an entirely different case, for here it appears from the evidence that the findings that the north 80 feet only of Railroad avenue Mumma was authorized to dedicate to the public, and that the 80 feet opposite and abutting on the north line of block 3 was for more than 40 years in the undisturbed possession of appellee and its predecessor; that this same 80 feet was taken possession of by the Indianapolis & Bellefontaine Railroad Company in the year 1851, and it, and its successor, have continuously used this strip of ground from that time until the present as a private right of way.

Under the evidence in this cause and the provisions of the act of February 17, 1848, it seems clear that the release executed by Mumma to appellee's predecessor must be construed as giving to appellee the fee simple title to the south 80 feet of Railroad avenue.

[4] The further contention of appellant that a highway over the strip of ground in question has been established by public user is not supported by the findings or evidence. The fact that the public, as well as persons having business with the railroad company, drove over that part of the right of way which was used for the purpose of loading and unloading cars, does not show a use that is either exclusive or adverse. *Baltimore, etc., R. Co. v. City of Seymour*, 154 Ind. 17, 55 N. E. 953, and authorities cited; *Cannon v. Cleveland, etc., R. Co.*, 157 Ind. 682, 62 N. E. 8.

Upon a careful review of the evidence, we hold that it supports the findings, and that the findings justify the conclusions of law.

There was no error in overruling appellant's motion for a new trial.

The judgment is affirmed.

(70 Ind. App. 40)

UNION TRACTION CO. OF INDIANA v. SMITH. (No. 9706.)

(Appellate Court of Indiana, Division No. 1. April 18, 1919.)

1. CARRIERS \S 356(4)—CARRIAGE OF PASSENGERS—EJECTION OF PASSENGER—LIABILITY OF CARRIER.

Where a passenger having paid fare entitling him to transportation is required to change cars by the rules and regulations of the carrier, and through mistake or negligence of carrier's agent is given a defective ticket on car designated by carrier, and is ejected by the conductor of such car, the carrier is liable.

2. CARRIERS \S 356(4)—CARRIAGE OF PASSENGERS—THROUGH TRANSPORTATION—CHANGE OF CARS.

Where passenger having purchased through ticket was required to change cars, and was ordered by conductor to take passage upon certain train, she was rightfully upon such train and entitled to passage thereon, though the conductor had given her a defective ticket.

3. CARRIERS \S 370 — CARRIAGE OF PASSENGERS—VIOLATION OF RULES BY PASSENGER.

In absence of statutory provision, a carrier may make reasonable rules and regulations respecting the time, places, and the circumstances of stopping certain trains, and it is the duty of a person taking passage via such cars and trains to inform himself as to such rules and regulations, and if he makes a mistake not induced by the carrier, he has no recourse against the carrier for ejection.

4. CARRIERS \S 248 — CARRIAGE OF PASSENGERS—DUTY OF CARRIER—RULES.

Carrier must provide reasonable means by which passengers may acquaint themselves with its rules.

5. CARRIERS \S 383 — CARRIAGE OF PASSENGERS—THROUGH TRANSPORTATION—CHANGE OF CARS—REFUSAL TO ACCEPT TICKET.

In passenger's action for refusal of conductor to accept ticket given by conductor of another train from which she had been required to change, whether she in changing trains had taken the wrong train voluntarily and without fault of carrier, in violation of its rules and stop-over privileges of ticket, *held* a question for the jury.

6. CARRIERS \S 382(4)—EJECTION OF PASSENGER—DAMAGES—MENTAL DISTRESS.

In passenger's action against carrier for refusal to accept ticket and threatening to eject plaintiff unless she paid a cash fare, humiliation and mental distress are properly considered in determining the amount of compensatory damages to which the passenger is entitled, regardless of physical injury.

7. CARRIERS \S 381(4)—CARRIAGE OF PASSENGERS—CONDUCTOR'S REFUSAL TO ACCEPT TICKET—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

In passenger's action for conductor's refusal to accept ticket given her by conductor of another train from which she had been required to change, evidence *held* to warrant finding that passenger's changing to such train in violation of stop-over provision of ticket, instead of taking another train, was due to negligence of carrier.

8. APPEAL AND ERROR \S 754(2)—BRIEF—WAIVER OF DEFECT—INSTRUCTIONS.

The giving of an instruction on the measure of damages failing to limit jury's consideration to the evidence applicable to the injuries received was waived by appellant's failure to present question of excessive damages in its brief.

9. APPEAL AND ERROR \S 1066—REVIEW—HARMLESS ERROR—INSTRUCTION.

The giving of an instruction on the measure of damages without limiting the jury to a con-

sideration of the evidence applicable to the injuries received was harmless, where there was no evidence which could furnish an incorrect basis for the assessment of damages.

Appeal from Circuit Court, Hendricks County; Geo. W. Brill, Judge.

Action by Pearl Smith against the Union Traction Company of Indiana. Judgment for plaintiff, and defendant appeals. Affirmed.

J. A. Van Osdol and Kittinger & Diven, all of Anderson, for appellant.

James M. Leathers, of Indianapolis, for appellee.

REMY, J. This is an action by appellee against appellant for damages. To the complaint appellant demurred for want of sufficient facts, which demurrer was overruled, whereupon appellant filed an answer in denial. The cause was tried by a jury, resulting in a verdict and judgment for appellee in the sum of \$300. The errors assigned are: (1) The overruling of appellant's demurrer to the complaint; and (2) the overruling of the motion for a new trial.

It is charged in the complaint, in substance, that the appellant operated a traction line between the cities of Logansport and Indianapolis, and that appellee, desirous of being transported from the former to the latter city, boarded one of appellant's cars at Logansport, having previously purchased from the appellant a through ticket, paying therefor the sum of \$1.55, by reason of which she "was entitled to passage" upon appellant's car "from Logansport to Indianapolis," which ticket was taken up by appellant's conductor soon after appellee boarded the car, and in lieu thereof appellee was given a small plain ticket or hat check; that while en route, and just before arriving at the city of Kokomo, appellant's said conductor announced to appellee, and to all on the car who were passengers for Indianapolis, that they would have to change cars at Kokomo, "that it was then and there necessary to leave said car and take another car" at said station of Kokomo in which to continue the journey; "that in pursuance to said request and demand" appellee "left said car and took passage on another car of defendant company at said station * * * for the purpose of being carried and transported thereby to her destination"; that in giving appellee the plain ticket or check, the conductor in charge of appellant's car from which she alighted at Kokomo wrongfully and negligently failed to provide her with a proper ticket, or with proper evidence of her right to be transported to the city of Indianapolis, upon the car upon which she took passage pursuant to his "request and

demand"; and that the car upon which appellee took passage at Kokomo had not proceeded far until appellant's conductor in charge thereof, and while taking fares, refused to accept from appellee the plain ticket or check as evidence of her right to be transported upon said car, although she fully explained to him that she had bought and paid for a ticket authorizing her to be carried from the city of Logansport to the city of Indianapolis, which ticket had been taken up by the conductor on the other car, which conductor had given her the plain ticket, and that she was presenting the same in accordance with directions given her by the former conductor; that said conductor not only refused to accept her explanation, but in the presence of other passengers wrongfully and in an offensive manner told her "that she would not get by or beat her way through on any such talk as that," and that she must pay a cash fare of \$1.10, covering her transportation from Kokomo to Indianapolis, or he would stop the car, and eject her immediately; that upon her refusal to pay the additional fare, the conductor did stop the car for the purpose of ejecting her, whereupon the appellee paid the extra fare to save herself the embarrassment of being ejected; and that by reason of said conductor's negligent and wrongful conduct, and by reason of all the facts alleged, she suffered great shame, humiliation, and distress, to her damage in the sum of \$1,000, for which sum judgment is demanded.

[1] If after a passenger has paid his fare entitling him to be carried from one point to another on the carrier's line, it becomes necessary for such passenger, under the rules and regulations of the carrier, to change cars, and such passenger, through the mistake or negligence of the carrier's agent on the first car, is given a ticket which is insufficient evidence of his right to continue his journey on the car designated by the carrier, and the conductor on the second car fails to heed the passenger's statement or explanation, and ejects him, the carrier will be liable. *Indianapolis St. R. Co. v. Wilson*, 161 Ind. 153, 66 N. E. 950, 87 N. E. 993, 100 Am. St. Rep. 261; *Indiana R. Co. v. Orr*, 41 Ind. App. 426, 84 N. E. 32.

[2] The only objection to the complaint presented by appellant in its brief, which was specified in its memorandum filed with the demurrer, is that the complaint does not aver facts showing that appellee was rightfully upon the car which she boarded at Kokomo, and that the ticket she had purchased entitled her to ride upon that car. It will be seen that it is specifically alleged in the complaint that appellee purchased from appellant, and delivered to the conductor on the car she boarded at Logansport, "a ticket which entitled her to be transported" over appellant's traction line "from the city of

Logansport to the city of Indianapolis," and that upon the arrival of the car at Kokomo Station appellant's conductor called upon appellee and all passengers for Indianapolis to change cars, and "that pursuant to said demand and request" appellee "took passage on another car" of appellant at said point. If, as alleged, appellee boarded the car on which she took passage at Kokomo "pursuant to the request and demand" of appellant's conductor who had taken up her through ticket, and who had given her the plain check, then she was rightfully upon, and entitled to passage upon, that car. There was no error in overruling the demurrer to the complaint.

It is contended with much earnestness that the verdict of the jury is not sustained by the evidence. The evidence shows that the ticket purchased by the appellee contained the condition, "No stop-overs allowed," and that such form of ticket had been filed with, and approved by, the Public Service Commission of Indiana, and that it was the rule of appellant company that no stop-overs would be allowed on local tickets; that it became necessary to change cars at Kokomo, and that when the car on which the appellee took passage at Logansport arrived at the Kokomo Station there was waiting at such station a car of appellant's known as the Winona Flyer, on which passengers to Indianapolis, other than appellee, took passage and that from Kokomo to Indianapolis the Winona Flyer was in charge of the same crew that brought from Logansport the car on which appellee had been a passenger; that appellee did not see the Winona Flyer, and did not know it was there, and that it was not pointed out to her by appellant's servants or any one else; and that she was not directed to board any particular car, but upon leaving the car on which she had come from Logansport, she entered the waiting station of appellant where she remained about an hour, and took the next car for Indianapolis. The remainder of the material evidence shows the facts to be substantially as averred in the complaint.

[3] It is contended by appellant that under its rules appellee was entitled to no stop-over at Kokomo, and that she was required to take the Winona Flyer at that station, and that the evidence shows that in taking the car she did she violated this rule and regulation, and was without right upon the car from which ejectment was threatened. It is the law that in the absence of a statutory provision a carrier may make reasonable rules and regulations respecting the time when, the places where, and the circumstances under which, certain cars or trains will stop, etc., and it is the duty of a person taking passage via such cars and trains to inform himself as to such rules and regulations, and, if he make a mistake not induc-

ed by the carrier, he has no recourse. *Evansville, etc., R. Co. v. Wilson*, 20 Ind. App. 5, 50 N. E. 90.

[4] It is also the law that the carrier must provide reasonable means by which passengers may acquaint themselves of its rules; and it has been held that if such rules are intended for the entire public, notice thereof must be such as to leave no doubt that it reaches all who are to be affected by it. *Louisville, etc., R. Co. v. Turner*, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

[5] It was not in evidence that appellant company had given notice to the public, or had promulgated a rule, that the car of appellant known as the Winona Flyer would be waiting at Kokomo, and that all passengers from Logansport to Indianapolis, leaving the former city, as did appellee, would be expected to transfer to said car. In fact the evidence showed no rule of the company except that no stop-over would be allowed on a local ticket. Under the facts in this case as shown by the evidence, it was proper to submit to the jury the question as to whether or not appellee had voluntarily and without fault of appellant, taken the later car, in violation of the company's rule, and in violation of the stop-over provision of the ticket.

[6] It is further claimed by appellant that there is no evidence showing that appellee suffered any physical injury, and that shame, humiliation, and mental distress, disconnected from physical injury, cannot be made the basis of any recovery. The complaint seeks to recover only compensatory damages, and the case was tried upon that theory. It is the settled law of this state that where a right of action has accrued in a cause of this character, humiliation and mental distress are properly considered in determining the amount of compensatory damages to which the plaintiff is entitled, regardless of physical injury. *Indiana R. Co. v. Orr*, supra, and cases cited. The verdict is sustained by the evidence.

Among the eight instructions given by the court which are complained of, No. 6, given at appellee's request, is pointed out as especially objectionable. It is as follows:

"I instruct you that if the passenger has done what is necessary under the rules of the carrier to entitle him to transportation, the carrier will be liable for his expulsion, or threatened expulsion, by reason of the mistake, or want of judgment on the part of the conductor, although the conductor, under the circumstances, acts in good faith."

[7] It is urged that this instruction is not applicable to the evidence in this: That there is no evidence that appellee had complied with the rules in boarding the car from which ejectment was threatened; it being

appellant's position that, under the rule of the company against stop-overs, appellee was required to board the car in waiting, upon her arrival at Kokomo. The evidence did not show any rule of appellant which required appellee to take the particular car known as the Winona Flyer. The evidence showed that appellee had no notice as to this car, and no notice that close connection would be made with any car. If appellee's failure to take the Winona Flyer could be considered a violation against a stop-over, then there is evidence from which the jury might have found that appellee's failure to comply with the rule was induced by the negligence of appellant.

[8, 9] Objection is made to instruction No. 5, given on the court's own motion. This is an instruction on the measure of damages. The objection is that it does not limit the jury to a consideration of the evidence applicable to the injuries complained of by appellee. The error, if any, in the giving of this instruction is waived by appellant's failure in its brief to present the question of excessive damages. However, if it could be said that appellant has presented the question as to excessive damages, the giving of the instruction could not have harmed appellant, since the record does not show that any evidence was introduced which could furnish an incorrect basis for the assessment of damages. *Inland Steel Co. v. Gillespie*, 181 Ind. 633, 104 N. E. 76.

We have examined the other instructions of which complaint is made. Some of them are incomplete; but, when taken in connection with all the instructions given, they fairly present the law of the case.

We find no reversible error. Judgment affirmed.

(72 Ind. App. 179)

AMEN v. STANDARD STEEL CAR CO.*
(No. 9735.)

(Appellate Court of Indiana, Division No. 2.
April 16, 1919.)

1. APPEAL AND ERROR ⇨928(3)—REVIEW—INSTRUCTIONS—EVIDENCE.

Where evidence is not in the record, the judgment will not be reversed because of alleged erroneous instruction which would have been proper under any state of facts provable under the issues.

2. MASTER AND SERVANT ⇨239—OPERATION OF BUZZ PLANER — CONTRIBUTORY NEGLIGENCE.

Where employé working buzz planer had duty of adjusting guard to have only such portion of knives exposed as was necessary to cut material, whether he was negligent depended upon manner in which planer was ordinarily operated, manner it was operated at time of

accident, the character of the guard furnished, and other surrounding circumstances.

3. MASTER AND SERVANT ⇨236(8)—OPERATION OF BUZZ PLANER—CONTRIBUTORY NEGLIGENCE—ADJUSTMENT OF GUARD.

Operator of buzz planer equipped with adjustable guard of such nature that ordinarily prudent man could and would have adjusted guard so as to cover all of knives except portion used in cutting material was negligent in not so adjusting guard.

4. MASTER AND SERVANT ⇨296(11) —INJURIES TO BUZZ PLANER OPERATOR—INSTRUCTION.

In buzz planer operator's action for injuries, instruction as to his duty to adjust guard attached to planer *held* not open to objection that it required him to adjust any guard, proper or improper.

5. MASTER AND SERVANT ⇨247(3)—OPERATION OF BUZZ PLANER—CONTRIBUTORY NEGLIGENCE—IMPROPER GUARD.

Buzz planer operator was not contributorily negligent in failing to adjust the guard on the planer, where the injury was not due thereto, but was caused by employer's failure to furnish proper guard.

6. MASTER AND SERVANT ⇨121(6) — BUZZ PLANER—GUARD.

In buzz planer operator's action for injuries, involving issue of whether employer had furnished a proper guard, instruction that employer was only required to furnish guard that would have protected operator when used in an ordinarily careful and prudent manner was proper.

7. MASTER AND SERVANT ⇨97(4)—OPERATION OF BUZZ PLANER — DUTY OF EMPLOYER—GUARD.

Employer was only required to furnish such guard on buzz planer as would protect operator from dangers and injuries which could reasonably have been anticipated when guard was adjusted with reasonable care by operator.

8. TRIAL ⇨253(4)—INSTRUCTION—IGNORING ISSUES.

In buzz planer operator's action for injury, instruction on contributory negligence of operator *held* not objectionable for omitting element of knowledge of danger on part of operator.

9. APPEAL AND ERROR ⇨1064(1)—REVIEW—HARMLESS ERROR—INSTRUCTION.

Where there is uncontradicted evidence that employé's method of doing his work exposed him to dangers so obvious that no reasonable man exercising ordinary care would have encountered them, instruction that employé was negligent if he voluntarily and without objection adopted a dangerous method when he might easily have adopted one which was safe, without stating that the standard of conduct was that of a reasonably prudent man under the circumstances, was harmless.

10. APPEAL AND ERROR ⇨882(12)—INVITED ERROR—INSTRUCTION.

Party who invites instruction by tendering one of his own cannot complain of the one given.

11. APPEAL AND ERROR ¶1064(1)—REVIEW—HARMLESS ERROR—INSTRUCTION.

In employe's action for injuries, instruction stating that credibility of an employe should be determined by same tests that determine credibility of other witnesses was not reversible error, where there is nothing in the instruction indicating that any part of it has special application to appellant's witnesses.

12. APPEAL AND ERROR ¶928(4)—REVIEW—PRESUMPTIONS.

In absence of evidence, it will be presumed that refused instructions were not applicable thereto.

13. TRIAL ¶252(1) — INSTRUCTIONS — EVIDENCE.

Instructions not applicable to the evidence were properly refused.

Appeal from Superior Court, Porter County; Henry L. Crumpacker, Judge.

Action by Charles E. Amen against the Standard Steel Car Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Following are instructions referred to:

Instruction No. 3. If the jury find from the evidence that the guide or fence on such machine could be adjusted by the operator thereof and that it was part of the plaintiff's duty to adjust said guide or fence so as to leave no more than a certain portion of said knives exposed or such portion as was necessary to cut the material being used, in determining the plaintiff's conduct in this regard you have a right to take into consideration the way in which such machine was usually or ordinarily operated, the device which was furnished, and any other fact and circumstance bearing upon that branch of the case, including the manner in which he operated the machine at the time in question.

Instruction No. 6. If defendant being required to furnish a guard which was proper to protect the operator on said buzz planer and the jury finds a guard could have been used thereon which was practicable and would not have interfered with the use of the machine, plaintiff did not assume the risk of using an improper guard if one was furnished.

Instruction No. 6½. If the jury find from the evidence that if the guard furnished by the defendant required adjustment, or, in other words, if the guard furnished was of such a character and the practicable use of the machine would necessitate that from time to time it be moved by the operator up against the board to be planed, and the defendant through its agents had theretofore instructed the plaintiff to so adjust it, or if a reasonably prudent man operating said machine would have so adjusted it and such adjustment would have prevented the injury which plaintiff suffered, and plaintiff was injured by reason of his failure to so adjust it by moving it up against the board, thereby leaving a portion of the knives exposed after having been instructed by the defendant to so readjust and cover such exposed portion of the knives, or if a reasonably prudent man would have so adjusted it and thereby have been pro-

tected, and under these circumstances the plaintiff was injured by his failure to so adjust said guard by moving it up against the board to be planed, he is guilty of contributory negligence, and inconvenience suffered by the plaintiff in reasonably adjusting it would not relieve him.

Furthermore, if you find from the evidence that said guard could not be readjusted without leaving small portions of the knives exposed, but that the injury to the plaintiff, of which he complains, did not occur by reason of the failure of said guard to cover all portions of the knives, but that on the contrary such injury occurred by reason of the failure of the plaintiff to readjust said guard as a reasonably prudent man, under the circumstances, such failure of the guard to cover all of the exposed portions of the knives would not be the proximate cause of plaintiff's injury, and the failure of said guard to so cover all of such exposed portions of the knives could not be the basis of any liability on the part of the defendant in this action, unless it is a reasonable conclusion from the evidence that change of the location of said guard would base other portions of said knives, and thereby render them dangerous in the operation which plaintiff was then engaged in.

On the other hand, if the guard furnished by the defendant was not a proper guard, and said guard could not have been adjusted by a reasonably prudent man exercising ordinary care and working under conditions such as plaintiff worked so as to have prevented the injury which plaintiff suffered, and the injury was caused, not by reason of plaintiff's failure to adjust said guard or move it from place to place upon the table of the planer, but by reason solely of defendant's failure to furnish a proper guard thereon, he would not be guilty of contributory negligence by reason of his failure to adjust the same by moving it back and forth upon the table.

Instruction No. 7. Defendant was not required to furnish the best possible guard that could be obtained for the purpose of guarding the knives on its buzz plane; it was only required to furnish a guard that was reasonably adapted to cover the exposed portions of the knives and to protect the person using it from injury when said guard was used in an ordinarily prudent and careful manner.

Instruction No. 8. The defendant was not bound to guard against dangers and injuries in the use of said buzz plane that could not reasonably have been anticipated. It was, however, bound to furnish a guard that was sufficient in its character and would prevent plaintiff from sustaining an injury that might reasonably be anticipated by the defendant when said guard was adjusted with ordinary care by the operator.

Instruction No. 9. The defendant is not liable by reason of the fact that machine in question was a dangerous one and that there was likelihood of injury to employes working thereon, providing you find that the guard used and placed thereon by it was such as might reasonably be expected to prevent injury when used in the usual and ordinary manner such a machine was intended to be used, and the plaintiff himself must have been injured by reason of the fact that such machine was not properly and

sufficiently guarded within the rules I have given you.

Instruction No. 10. If the plaintiff in this action, with a full knowledge of the conditions and dangers incident to the operation of the machine upon which he was working at the time he was injured, voluntarily and without objection adopted a dangerous method of doing the work because it was more convenient when he might easily have adopted a method of doing the work that would have been safe and thereby have prevented the injury of which he complains in this action, his failure to so adopt the said safe method of doing the work would constitute contributory negligence on his part.

Instruction No. 16. The jury are the judges of the facts, the evidence, and the credibility of witnesses; they take the law from the court. In weighing the evidence the jury may take into consideration the interest of any witness in the event of this suit, and weigh his evidence accordingly. They may take into consideration the evidence of all the witnesses, and should weigh their evidence carefully and impartially, their demeanor on the stand, their manner of testifying, their apparent candor and fairness, their knowledge of the facts about which they testify, their ability to have seen and known and heard the facts about which they testify, and any other circumstance appearing in evidence which will assist in determining the truth. If the jury believe any witness has willfully and knowingly sworn falsely to any material fact, they have the right to disregard the entire evidence of such witness, except when corroborated by other credible evidence or by facts and circumstances appearing in evidence. The jury has no right to disregard the evidence of any unimpeached witness because he is an employé of either party, but should weigh his evidence calmly and dispassionately with the sole effort of arriving at the truth; view the evidence of each witness in the light of all the evidence, determine the credibility of an employé by the same tests that determine the credibility of other witnesses. Both parties to this action are entitled to a fair and impartial trial.

Bomberger, Curtis, Starr & Peters, of Hammond, for appellant.

Peter Crumpacker, of Hammond, Grant Crumpacker, of Valparaiso, and Fred Crumpacker, of Hammond, for appellee.

NICHOLS, J. Action by the appellant against the appellee for damages sustained in the loss of a part of his hand, occurring while he was working a buzz planer in the appellee's factory.

The complaint was in one paragraph, to which the appellee filed an answer in general denial. There was a trial and a verdict for the appellee. Appellant filed a motion for a new trial, which was overruled, and judgment was rendered on the verdict in favor of the appellee. From the ruling and and judgment this appeal is prosecuted.

The only error assigned is the error of the court in overruling appellant's motion for a new trial. Under this motion the appellant

complains that instructions 3, 6½, 7, 8, 9, 10, and 16, given by the court, are erroneous, and that the court erred in refusing to give instructions 1, 2, and 3 tendered by appellant.

The complaint is in substance as follows:

The appellee was, at the time of the accident, a corporation engaged in the manufacture of railroad cars in the city of Hammond, Lake county, Ind. In its work it used a machine known as a buzz planer, which consisted of a table, in the top or flat surface of which were rapidly revolving steel knives, located in an opening extending across said table and of a width of about 2½ inches. On July 18, 1910, the appellant was employed to operate said buzz planer, and his duties were to use his hands to push the boards across the table, and over and in contact with the said revolving knives which planed the boards. Appellee, at said time negligently and carelessly equipped, and caused appellant to use, said buzz planer without providing a sufficient guard to prevent appellant's person from coming in contact with the revolving knives; appellee negligently maintained and operated said buzz planer without a sufficient guard thereon, the guard covering less than 10 inches of the exposed knives and leaving 12 inches open and unguarded, and said knives so unguarded constituted a dangerous machine. In the operation of the planer the operator, especially his hands, was immediately above and over, and liable to come in contact with, the exposed parts of the knives, and be injured thereby. It was practicable and feasible to place a sufficient guard to cover the knives entirely, except the part immediately under the board being planed. On said day the knives were so exposed, and were liable to injure the appellant. At said time appellant was in the discharge of his duties and in the course of his employment, and was holding a board with the edge on the knives. His hands were necessarily near the knives, that he might hold and push the board and plane the same. While so engaged, said board suddenly, and without any fault or negligence on appellant's part, tipped, turned, and thereby threw appellant's right hand into the knives, which were exposed and unguarded, and thereby appellant's hand was injured. He has suffered great pain and anguish; his hand has been permanently disfigured and his earning power impaired and reduced; he is unable to follow his occupation as a woodworker, and he has no other trade or occupation. There follows an allegation as to his earning capacity, a statement of the length of time that he remained in the hospital, and a prayer for damages in the sum of \$10,000.

[1] The evidence is not in the record, and in such a case the judgment will not be reversed because of an alleged erroneous instruction, where such an instruction would

be proper under any state of facts provable under the issues. *Olds v. Lochner*, 57 Ind. App. 269, 106 N. E. 899; *Thompson v. Miller*, 182 Ind. 545, 107 N. E. 74.

[2] Appellant complains of instruction No. 3 given by the court. The force of this instruction depends upon the interpretation given to the evidence in the case by the jury. It tells the jury that, if it should find from the evidence that the guard or fence on such machine could be adjusted by the operator thereof, and that it was part of the plaintiff's duty to adjust the same so as to leave no more than a certain portion of said knives exposed, or such portion as was necessary to cut the material being used, in determining the plaintiff's conduct in this regard the jury had a right to take into consideration the way in which the machine was usually or ordinarily operated, the device furnished, and any other facts or circumstances bearing upon that branch of the case, including the manner in which the machine was being operated at the time. We see nothing wrong with this instruction. The machine, being a planer, was evidently used upon lumber of various widths and thicknesses, and as the width or thickness of the material varied, the guard must have been adjusted to such changes. In determining the conduct of the appellant in the performance of this duty, or any other duty on the part of the appellant, with reference to the operation of the machine, it was proper to consider all surrounding circumstances and conditions. If in any particular it was harmful to the appellant, it must have been because of the evidence which is not in the record. On the face of the instruction it was entirely proper under the rule enunciated in *Pinnell v. Cut-singer*, 44 Ind. App. 419, 89 N. E. 493.

[3-5] Instruction No. 6½ is not open to the objection made to it by the appellant. It correctly instructs the jury with reference to the duty of the appellant to adjust the guard to the varying widths of the lumber being planed, and does not require of the plaintiff that he shall adjust any guard, proper or improper. After fully instructing the jury as to the duty of the plaintiff in making such adjustment of the guard, the instruction clearly distinguishes the character of the guard, about which such instruction was given, from an improper guard by the following language:

"On the other hand, if the guard furnished by the defendant was not a proper guard, and said guard could not have been adjusted by a reasonably prudent man exercising ordinary care and working under such conditions such as plaintiff worked, so as to have prevented the injury which plaintiff suffered, and the injury was caused, not by reason of plaintiff's failure to adjust said guard or move it from place to place upon the table of the planer, but by reason solely of defendant's failure to furnish a proper guard thereon, he would not be guilty

of contributory negligence by reason of his failure to adjust the same by moving it back and forth upon the table."

As far as can be determined without the evidence, the instruction seems to be a clear exposition of the law. Instruction No. 6 tells the jury as to the duty of the appellee to furnish a proper guard, and to the effect that the appellant did not assume the risk of using an improper guard.

[6] Instruction No. 7 is not erroneous when applied to facts that might have been proven within the issues in this case. If the guard provided was such as could have been safely used, with a proper adjustment, to the varying widths of the lumber planed, then it was reasonably adapted to cover the exposed portions of the knives, and such use of it, adjusting it as conditions required, would have protected appellant, and would only have been in "an ordinary prudent and careful manner." Such evidence would have been admissible as within the issues. *Grace v. Globe Stove & Range Co.*, 40 Ind. App. 326, 82 N. E. 99; *Vigo Oooperage Co. v. Kennedy*, 42 Ind. App. 440, 443, 85 N. E. 986.

[7] Instruction No. 8 tells the jury that the appellee was not bound to guard against dangers and injuries that could not have been reasonably anticipated, but was only bound to furnish a guard sufficient in its character to prevent plaintiff from sustaining any injury that might have been reasonably anticipated, when the guard was adjusted with reasonable care by the operator. This is a correct statement of the law.

Appellant complains of instruction No. 9 because it states, in effect, that the appellee was not liable if the guard was sufficient to prevent injury when the machine was used in the usual and ordinary manner. This statement of the instruction is within the issues in this case. It appears from the complaint that the machine in question was being used in the usual and ordinary manner at the time of the accident, but that a board which was being planed tipped and turned, causing the injury. It may have appeared by the evidence that this was because a proper guard furnished by the appellee was not properly adjusted, as it might have been, by the appellant. The appellant in his discussion of this instruction says that it directed the jury to find for the defendant if the guard was sufficient to guard against injury when the machine was used in the ordinary and usual manner, whereas the accident was proved to be one as alleged in the complaint of an unusual character. We are unable to say what was proved in this case, because of the absence of evidence. We can only measure the instruction by what might have been proven under the issues in the case, and by this measurement the instruction is not wanting.

[8, 9] Instruction No. 10 is complained of

by appellant as being erroneous because it omitted the element of knowledge of danger on the part of the servant, and for the further reason that it omitted to advise the jury that the standard of conduct was that of a reasonably prudent person under the circumstances, the court saying that if appellant voluntarily and without objection adopted a dangerous method when he might easily have adopted one which was safe, his failure to adopt one which was safe was contributory negligence. The first objection is not well taken, as the element of knowledge clearly appears in the instruction. As to the second objection we can readily imagine a state of facts provable under the issues that would have made the instruction erroneous as given, because of the omission therefrom of the element of reasonable care; but it might have been proven within the issues in this case that the method adopted by appellant in performing his work exposed him to dangers so obvious, imminent, and glaring that no reasonable man exercising ordinary care for his own safety would have encountered them; to illustrate, it might have been proven under the issues by uncontradicted evidence that the machine was easily susceptible of adjustment, by the move of a hand, so as to have made it entirely safe, and that without such adjustment it was absolutely dangerous, and that, while so operating it while it was so susceptible as aforesaid, appellant was emphatically warned, by his superior, not to so operate it without the proper adjustment, but that he then and there disobeyed, and willfully continued to operate it without the proper adjustment, and was thereby injured. With such evidence in the record uncontradicted, showing absolutely no exercise of reasonable care, the instruction would have been entirely harmless. *Jenney Elect. Mfg. Co. v. Flannery*, 53 Ind. App. 397, 98 N. E. 424; *New York, Chicago & St. Louis R. Co. v. Hamlin*, 170 Ind. 20, 83 N. E. 343, 15 Ann. Cas. 988; *Grace v. Globe Stove & Range Co.*, 40 Ind. App. 326, 82 N. E. 99. Appellant cites as additional authorities *Kokomo, etc., Co. v. Carson*, 119 N. E. 224, *Inland Steel Co. v. King*, 184 Ind. 294, 110 N. E. 62, and *Erie R. R. Co. v. Purucker, Adm'x*, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166, but in each of these cases the evidence or answers to interrogatories appeared in the record, and the facts could be definitely ascertained.

[10] The appellant himself tendered his instruction No. 5, a part of which is as follows:

"If there are two ways, one safe and the other dangerous, one known to the servant to be dangerous and the other known to him to be safe, both open to him for doing his work and equally convenient, he must choose the safe way."

By tendering this instruction, the appellant invited the error, if any, of which he complains in instruction No. 10; and, such being the case, he cannot be heard to complain. *Terre Haute, etc., Traction Co. v. Frischman*, 57 Ind. App. 452, 107 N. E. 296; *Indiana Union Traction Co. v. Jacobs*, 167 Ind. 85, 78 N. E. 325; *Cleveland, etc., R. R. Co. v. Simpson*, 182 Ind. 693, 104 N. E. 301, 108 N. E. 9.

[11] Instruction No. 16 goes to the question of the credibility of the witnesses, and which, after instructing the jury fully as to the things that may be taken into consideration in determining the credibility, states that the jury should "determine the credibility of an employé by the same tests that determine the credibility of other witnesses." Clearly, this statement in the instruction refers to the standards of credibility that preceded in the instruction and which are of general application. There is nothing in the instruction that indicates that any part of it has special application to any of appellant's witnesses who may have testified in the case, and without such application it is not reversible error. *Hess v. Lowrey*, 122 Ind. 225, 234, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355.

[12, 13] Appellant tendered three instructions which were refused by the court. In the absence of the evidence it will be presumed that such instructions were not applicable thereto; hence were properly refused. *Mace v. Clark*, 42 Ind. App. 506, 85 N. E. 1049. We find no available error.

Judgment affirmed.

(70 Ind. App. 684)

**WESTERN LIFE INDEMNITY CO. v.
COUCH. (No. 9739.)***

(Appellate Court of Indiana, Division No. 2.
April 18, 1919.)

**1. APPEAL AND ERROR ¶634 — RECORD—
RULES—SUBSTANTIAL REQUIREMENT.**

A substantial compliance with the rule requiring appellant to have the record paged and indexed and to have marginal notes made is all that is necessary to prevent dismissal of the appeal.

**2. INSURANCE ¶668(3)—ACTION ON POLICY
—QUESTION OF LAW — CONSTRUCTION OF
CONTRACT.**

In action upon policy issued by reinsuring company, where the original policy and the one sued on and the reinsurance contract were set out in the pleadings, it is a question of law whether the incontestable clause of the original policy became part of the new policy issued by the reinsuring company.

**3. INSURANCE ¶151(1) — CONSTRUCTION OF
CONTRACT—REINSURANCE.**

Where a reinsurance contract gave policy holders the option of continuing to pay the same

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied.

premiums, and receiving the amount of insurance specified in an annexed table, or of making application, with satisfactory proof of insurability, and receiving a new policy, upon surrendering the old for cancellation, the incontestable clause of the old policy does not become part of the new policy issued to one who chose the second alternative.

4. INSURANCE Ⓔ641(2)—ACTION ON POLICY—REPLY.

Where the answer in an action on a policy alleged false warranties by insured that he was in sound health and that he had never been refused insurance, a reply alleging knowledge by the insurer that insured had previously applied for insurance, but not knowledge of his disease, or of the refusal of insurance, is insufficient.

5. INSURANCE Ⓔ615—FORFEITURE OF POLICY—RETURN OF PREMIUM—REASONABLE TIME.

Where insured died April 30th, and insurer learned of breach of warranty August 10th following, a tender of the premiums paid, by payment into court, with accrued costs, on November 30th, after suit was brought, was within a reasonable time.

6. INSURANCE Ⓔ682—FORFEITURE OF POLICY—RETURN OF PREMIUMS—REINSURANCE.

Where a policy holder in an insolvent company exercised his option under a contract of reinsurance to take out a new policy in the purchasing company, the latter company, in forfeiting the policy for breach of warranty, need repay only the premiums paid to it.

7. INSURANCE Ⓔ266—FORFEITURE OF POLICY—Breach of Warranty—Medical Examination.

Where an application for new policy under a reinsurance contract referred to the medical examination for the original insurance and warranted the statements therein to be true, the reinsurer could forfeit the new policy for falsity of statement in the medical examination, though it was not made part of the original policy, and was not in itself a warranty.

8. INSURANCE Ⓔ255, 300—FORFEITURE OF POLICY—MISREPRESENTATION—HEALTH OF INSURED—REFUSAL OF PREVIOUS APPLICATION.

A false answer by an applicant for insurance that he had never been refused insurance, if only a misrepresentation, is material to the risk, and entitles the insurer to forfeit the policy.

9. INSURANCE Ⓔ265—APPLICATION—WARRANTY.

Answers to questions in application for insurance will not be construed as warranties, unless so intended by the parties but an expressed intention of the parties to consider them warranties makes them such.

10. APPEAL AND ERROR Ⓔ757(4)—BRIEF—INSTRUCTIONS NOT OBJECTED TO.

While appellant must see that all instructions given are in the record, he need set out in his brief only those to which he objects.

11. APPEAL AND ERROR Ⓔ699(4)—RECORD—REFUSED INSTRUCTIONS—UNCERTAINTY.

Where appellant contends that it tendered instructions numbered 1 to 19, and that the court erred in refusing to give certain of them, but the bill of exceptions shows that instructions numbered 1 to 20 were tendered, and fails to show which ones were refused, no question is presented on appeal.

12. INSURANCE Ⓔ396(6) — FORFEITURE OF POLICY—ESTOPPEL.

A letter by insurer, after it had information of breach of warranty, containing no intimation of intention not to insist on forfeiture, but requesting further proof, which the beneficiary procured at some expense, does not estop insurer from relying on the breach of warranty to forfeit the policy where beneficiary knew insurer would probably contest the validity of the policy.

Appeal from Circuit Court, Grant County; H. J. Paulla, Judge.

Action by Ida M. Couch against the Western Life Indemnity Company. Judgment for the plaintiff, and defendant appeals. Reversed, with instructions.

Thomas J. Graydon, of Chicago, Ill., Condo & Browne, of Marion, and Blackledge, Wolf & Barnes, of Kokomo, for appellant.

Charles & Gemmill, of Marion, Blaine H. Ball, of Rushville, and Arthur H. Jones, of Indianapolis, for appellee.

McMAHAN, J. This is an action to recover on a life insurance policy issued by the appellant on the life of Orlando H. Couch.

The first paragraph of the complaint alleged that on the 1st day of October, 1913, the appellant issued to Orlando H. Couch its policy of insurance for \$5,000, payable at death; that said Orlando H. Couch complied with all the requirements of the policy, and afterwards died; and that the appellee made all necessary proofs of death, but that appellant refused to pay the policy, and demanding judgment.

The second paragraph of the complaint alleged that on September 28, 1911, the Monarch Life Indemnity Company of Evansville, Ind., issued and delivered to Orlando H. Couch and the appellee a joint policy of insurance in the amount of \$5,000, payable to the survivor on death of either of said parties; that a receiver was thereafter appointed for the said Monarch Company, who sold the business of said company to the appellant, and that a written contract of said sale was entered into between the receiver and the appellant, which, among other things, provided that the holders of policies in the Monarch Company were given the right to continue the payment of the annual premiums which they had formerly paid to the

Monarch Company and receive from appellant such an amount of insurance as such premiums would pay for, under a rate set out in said contract; that said contract also provided that holders of policies like that issued to appellee and Orlando H. Couch should, by making written application therefor within one year from the date of said contract, receive, free of expense from appellant, a choice of three designated policies, provided that on said new policy the member should pay the premium rate of said Western Company applicable to the member's age at the time of acceptance by said Monarch Company; that on September 29, 1913, Orlando H. Couch and appellee, in accordance with said contract, made application to appellant for a new policy of insurance in the sum of \$5,000, and that the appellant company issued to them a "co-operative dual life policy," payable to the survivor of them; that Orlando H. Couch died April 30, 1914; that the appellant failed to pay the policy; and demanding judgment.

The appellant filed an amended answer, admitting all the material allegations of the complaint, and assumed the burden of proving a defense.

The answer set out the reinsurance contract mentioned in the complaint, and, after setting out the provisions thereof as alleged in the second paragraph of complaint, alleged that when the policy holders in the Monarch Company made application for insurance they were required to furnish satisfactory evidence of insurability at the time of making such application; that appellant company in said contract reserved the same rights of defense against any liability as could have been exercised by the Monarch Company in the absence of said agreement.

It was also alleged that, after the execution of said reinsurance contract, Orlando H. Couch and appellee did not elect to carry their joint life policy, for the reason that the premiums theretofore paid by them would only pay for an insurance of \$2,000.99; that they elected to apply to appellant for the co-operative dual life policy upon their lives for \$5,000, and that they made application for such new insurance on forms prescribed by appellant, a copy of which application is set out; that with their said application said parties furnished and delivered to appellant certain written statements, which were intended by the parties as satisfactory evidence of the insurability of said parties at the time of making such application, said written statement of Orlando H. Couch being also set out in full; that the policy of insurance sued upon was issued by appellant by reason of the foregoing facts, and not otherwise, and that the insurance policy theretofore held by said parties in the Monarch Company was surrendered and canceled; that said policy of insurance so issued by

appellant company was issued in consideration of and in full reliance upon certain statements and warranties contained in the said application made and signed by said Orlando H. Couch September 29, 1913, and delivered by him to appellant prior to the execution by it of the policy sued upon; that as a part of said application Orlando H. Couch delivered therewith a "health certificate," which was signed by him and which was as follows:

"I hereby apply to the Western Life Indemnity Company for a dual life policy of \$5,000 on my life, in substitution for policy No. 804 now held by me, which latter policy shall be void upon acceptance of this application by said company. * * * And as a basis of and consideration for said new policy, I hereby submit and warrant that I am now in sound health, that there is no cause in connection with my physical condition that would be a bar to my securing life insurance or in any way shorten my life; that I am not afflicted with any physical or mental defect or infirmity; that I have never suffered from * * * diseases of the liver or kidneys."

It is then alleged that the statements in said health certificate were false and untrue, in that the said Orlando H. Couch was not in sound health September 29, 1913, and at the time the policy sued upon was issued; that at said time his health and physical condition were such that they would be a bar to his securing life insurance and were such as to shorten his life; that he was at said time afflicted with a physical defect or infirmity, was suffering from a disease of the liver and kidneys, and other named diseases, which continued to exist and afterwards caused his death; that on several occasions prior to the 29th day of September, 1913, and also prior to September 21, 1911, said Orlando H. Couch had had physical examinations made by reputable physicians, in which examinations his urine was tested, and it was discovered that there was present in the urine albumen; that said condition of the urine indicated the existence or the approach, of the diseased condition of said Orlando H. Couch hereinbefore described; that Orlando H. Couch was informed of the existence of said condition, and for the purpose of obtaining the insurance policy sued upon fraudulently concealed said information from appellant, although he knew at the time that appellant would not issue said policy of insurance, or assume said insurance risk, if it knew of the existence of said condition, and he also fraudulently concealed said information from the Monarch Company for the same purpose, knowing that, if it possessed said knowledge and information, it would not issue its policy of insurance; that all of said conditions existed prior to September 21, 1911, and Orlando H. Couch, for the purpose of obtaining the insurance at the time of making his application to said

Monarch Company, fraudulently concealed said information from said Monarch Company, and never thereafter disclosed such facts to either said Monarch Company or to the appellant company; that Orlando H. Couch, on the 21st day of September, 1911, and on the 29th day of September, 1913, knew that said conditions existed.

It is then alleged that the application made to the appellant company for the policy sued upon contained the following provisions:

"I hereby make the following warranties:
* * * Inasmuch as the policy hereby applied for in the Western Life Indemnity Company is issued in consideration of my present membership in, or contract with, the Monarch Life Indemnity Company, and as such latter membership or policy is based upon my application therefor to said Monarch Life Indemnity Company, I hereby expressly warrant to said Western Life Indemnity Company that my said application to said Monarch Life Indemnity Company and the statements and warranties contained in said application, together with all agreements, medical examinations, revival applications and health certificates made by me to said Monarch Life Indemnity Company for the issuance, revival of or continuance in force of my said membership or policy therein, are and were true when made, and, if the same, or any part thereof, was untrue when made, then, and in that case, the policy hereby applied for in said Western Life Indemnity Company shall be void and of no effect."

It is also alleged: That, when Orlando H. Couch made application to the Monarch Life Company for said insurance policy, he made a statement in writing dated September 21, 1911, to his medical examiner, which became and was a part of his application to said Monarch Company for said policy of insurance, which medical statement and application contained the following question and answer: "Have you ever been refused insurance in any company or order? A. No." That said statement and warranty was false, in that the said Couch had theretofore made application for insurance upon his life with the Hartford Life Insurance Company, which application for insurance was refused and rejected by said Hartford Life Insurance Company prior to September 21, 1911. That said statement and warranty was false when made, in that, prior to making said application, he had applied for life insurance in the Mutual Life Insurance Company of New York which application was also rejected and refused prior to September 21, 1911. That each of the foregoing statements of Orlando H. Couch were warranties, and were material to the risk incurred by appellant, and that appellant, at the time of issuing the policy sued upon, had no knowledge of the falsity of such representations or warranties, but relied upon said statements and warranties, and would not have issued said policy sued upon, if it had known that any part of said

representations and warranties were false. That it did not learn of the untruthfulness of said statements until August 10, 1914, on which day appellant notified the appellee that the appellant had canceled and rescinded the policy sued upon by reason of the misrepresentations and breaches of warranty on the part of Orlando H. Couch and that appellant held itself accountable for the amount of premiums which had been paid on such policy, and on said day mailed a check to appellee for \$188.35, drawn upon, accepted by, and certified to by the Central Trust Company of Illinois, the above sum being the full amount of the premiums which had been paid on the policy sued upon. That all the transactions between the parties theretofore had been by checks on banks. That appellee knew that said check was valid. That she was unwilling to receive and accept the amount of the premium paid by Orlando H. Couch on said policy, and would not have accepted the same, had tender been made in legal tender. That she returned said check to appellant without making objection to the form of the tender. That appellant, knowing the appellee was unwilling to receive the return of said premium, made no further offer to repay said money, except as hereinafter stated. That the appellee refused to join in the cancellation of said policy of insurance, and filed her complaint herein August 19, 1914, for the full amount of the policy and interest. That a summons was issued for appellant, returnable October 1, 1914. That appellant was required to answer November 10, 1914, at which time appellant filed its first answer herein, and paid to the clerk of the court the full amount of the premiums paid upon said policy, to wit, \$188.85, and in said answer declared said policy of insurance rescinded and canceled. That thereafter, on November 30, 1914, appellant tendered and offered to pay appellee, in legal tender coin of the United States, the sum of \$201.62, being the principal and interest on said premiums, and that it also paid into the clerk's office the additional sum of \$21.72, covering all the accrued court costs. That appellee refused to accept the return of said premium. That all of said money was on said day paid into court, and is now in the hands of the clerk for appellee's benefit and use, by reason of which facts it is alleged that the policy of insurance sued upon is null and void, and was not in force at the time of Orlando H. Couch's death.

The appellee filed a reply in five paragraphs, the first of which was a general denial. A demurrer was sustained to the second and third paragraphs. The fourth paragraph alleged the issuing of the policy by the Monarch Company in September, 1911; the execution of the reinsurance contract between the receiver of the Monarch Life Company and the appellant company; the application

of Orlando H. Couch to the appellant for the policy sued upon; that the policy sued upon was issued in the place of, and as a continuance of, the policy issued by the Monarch Company, in which it was agreed that said policy of insurance and application therefor was the entire contract between the parties, said policy and application therefor being set out and made a part of the reply; that no medical examination was attached to or made a part of said policy; that by the express provision of said policy the medical examination referred to in appellant's answer was excluded therefrom; that according to the terms of the Monarch Life policy, it was incontestable after one year from its date, except for nonpayment of premiums; that more than one year had elapsed after it was issued before the death of Orlando H. Couch; that the Monarch Life Company, at the time of issuing the policy, had full knowledge and information of the fact that Orlando H. Couch had formerly made "applications" for insurance upon which policies had not been issued, and that the Monarch Company issued the policy to Orlando H. Couch with the information and knowledge of the facts and circumstances connected therewith; and that, at the time when the appellant company issued the policy sued upon, it had knowledge and information of such former "application" for insurance by Orlando H. Couch.

The fifth paragraph of reply alleged that, within a few days after the death of Orlando H. Couch, appellee prepared all the proofs of death as she believed to be necessary under the terms of the policy sue upon and forwarded same to appellant; that appellant, after the receipt of said proofs of loss, and with full knowledge of all the facts set out in its second answer, requested and required appellee to make additional affidavits and proofs of death, which she did at great expense and trouble; and that, although appellant was fully advised and knew all the matters set up in its answer, it did not notify appellee, until long after the receipt by it of said additional proofs, that any objection would be made by it to the payment of said policy of insurance sued on herein, and did not until long after said time inform her of its refusal to pay any sum due thereon by reason of the matters set forth in its answer. Wherefore she says appellant has waived its defense in this action, and ought to be estopped to defend on account of the matter set forth in the answer.

The appellant filed a demurrer for want of facts to the fourth paragraph of reply, which was overruled and exception saved. There was a trial by jury, which resulted in a verdict in favor of appellee for \$5,773.24. Appellee filed a remittitur for \$369.24, and judgment was rendered for \$5,414.

Appellant filed a motion for a new trial,

for the reasons that the verdict is not sustained by sufficient evidence, is contrary to law, and also because of alleged errors in the giving of certain instructions tendered by appellee, and in refusing to give certain instructions tendered by the appellant.

[1] Appellee contends that the appellant has failed to have the record paged and indexed and to have the marginal notes made as required by the rules of this court, and that the appeal should be dismissed. There has been a substantial compliance with the rules in relation to the preparation of the record, and when that is done the cause will not be dismissed.

The first error assigned is that the court erred in overruling the demurrer to the fourth paragraph of appellee's reply. This paragraph of reply contains two purported avoidances of the answer: (1) That the policy issued by the Monarch Company contained a provision that after one year it should be incontestable, and that more than one year had passed after it was issued and before the death of the insured; and (2) that when the Monarch Company issued its policy to Orlando H. Couch it knew that he had formerly made "applications" for insurance upon which policies had not been issued, and that appellant, at the time it issued the policy sued upon, had knowledge and information of such former "application" for insurance.

[2, 3] The insurance policies issued by the Monarch Company and the one sued upon, together with the applications for insurance, the medical examinations, health certificate, and the reinsurance contract, are all set out in the pleadings, so that it is a question of law whether the incontestable clause in the Monarch policy became a part of the policy issued by the appellant. Under the terms of the reinsurance contract, Orlando H. Couch, as a member of the Monarch Company, was given a choice of two options: (1) To continue paying to the appellant the same premium for the same period as was theretofore to be paid by him to the Monarch Company, and be thereafter insured against death in the appellant company for such an amount of insurance as the premiums paid by him to the appellant would purchase according to the table of rates set out in the reinsurance contract; (2) within one year to make a written application on the form prescribed by the appellant, and by furnishing satisfactory evidence of insurability at the time of making such application to receive from appellant, free of expense, a choice of three policies for any desired amount within the limits fixed by the by-laws of the appellant, and for such new policy paying the rates applicable to his age at the time of becoming a member of the Monarch Company. He chose the second option, entered into a new contract with the appellant, received a new pol-

icy insuring him against death, and no other contingency, and surrendered for cancellation his policy which had been issued by the Monarch Company. The reinsurance contract expressly eliminated and excluded from the new policy "all benefits, privileges, or conditions contained in the policy issued by the Monarch Life Indemnity Company other than the amount payable at death," which death benefit was made subject to the conditions expressed in the policy issued by the appellant.

The rights of the insured and the appellant were fixed by the terms of the policy issued by the appellant. The incontestability clause in the policy issued by the Monarch Company had no bearing upon the policy sued upon; it was not made a part thereof, and did not bind appellant.

[4] We next pass to that part of the reply relative to the former applications of Orlando H. Couch for insurance. According to the terms of the reinsurance contract appellee's decedent was not required to undergo a medical examination in order to secure the policy in suit, but he was required to furnish "satisfactory evidence of insurability" at the time of making his application, and this he undertook to do by signing the statement hereinbefore set out, in which he "expressly warranted" that his application and the statements and medical examination made by him to the Monarch Company for insurance are and were true when made, and if the same, or any part of the same, were untrue, the policy applied for in the appellant company should be void.

When the insured made his application for membership in the Monarch Company, he submitted therewith, and as a part thereof, a medical examination, wherein he was asked if he had ever been refused insurance in any company or order, to which he answered "No." Appellant's answer alleged that prior to said time he had made application for and had been refused insurance in two different companies, which facts were unknown to appellant when it issued the policy in suit.

It will be observed that the reply does not meet all the allegations of the answer. The language of the reply is that the defendant had knowledge and information of such former "application" for insurance made by Orlando H. Couch. If we should hold that it was the intention of the pleader to allege knowledge of both applications mentioned in the answer, the reply would still be subject to demurrer on account of the failure to allege that appellant had knowledge that insurance had been refused. *Supreme Tribe v. Lennert*, 178 Ind. 122, 98 N. E. 115. There are other allegations in the answer to the effect that the insured was afflicted with certain diseases, including kidney diseases, at the time he made application for the policy

in suit, and that he knew of his diseased condition, and that appellant, if it were possessed of such information, would not have issued the policy in question; that he fraudulently concealed such facts from appellant; that such diseases continued, and caused his death. The reply also fails to respond to this part of the answer, and is subject to demurrer for that reason. The appellee makes no attempt to uphold the reply, except on the theory that "a bad reply is good enough for a bad answer."

[5] The appellee, in support of this theory, insists that the answer is not sufficient, because it does not allege that all the premiums received by the Monarch Company had been tendered to appellee, and that the appellant did not give notice of its intention to rescind the contract, or make tender of the premiums, within a reasonable time. The insured died April 30, 1914. Appellant, in its answer, alleges that it did not learn of the untruthfulness of the statements made by insured until the 10th day of August, 1914, when it notified appellee of its intention to rescind and mailed her a check for the amount of the premiums paid; that appellee returned said check, without objection to the form of the tender, and filed her complaint in this action, August 19, 1914; that on November 30, 1914, appellant tendered to appellee \$201.62, that being an amount sufficient to cover the premiums paid to appellant, together with all interest thereon, and that the further sum of \$21.72, an amount sufficient to cover and pay all the costs of this action, was tendered to appellee; that appellee refused to accept said tender, and that thereupon said money was paid into court for the use of appellee.

[6] The tender of the \$201.62, plus \$21.72 costs, made November 30th, was, under the circumstances, made within a reasonable time, and was sufficient in amount. This being true, it is not necessary for us to determine whether the mailing of the check was a sufficient tender. The appellant was not required to return any of the premiums paid to the Monarch Company, and was only required to return the premium which it had received from the insured, which was \$188.35.

[7] The appellee next contends that the medical examination referred to in the answer contains no specification or stipulation of warranty, and is not shown to have been made a part of the policy issued by the Monarch Company, and that a breach of warranty cannot be based upon it.

It is not necessary that the medical examination should contain any stipulations of warranties, or that it should have been made a part of the policy issued by the Monarch Company. It was made by the insured to the Monarch Company, and in his application to the appellant he referred to this medical examination and warranted the state-

ments in it to be true, thus making the said statement a part of his application for the policy sued upon. Under the conditions of the policy issued by appellant, a breach of warranty could be founded upon false statements made by the insured in his application to the Monarch Company.

The answer alleged that at the time the insured made his application to the appellant for insurance he was not in sound health; that he was afflicted with certain diseases, which continued to exist and afterwards caused his death; that he had been examined by physicians, and was informed of his condition; that, for the purpose of obtaining the issuance of the policy sued upon, he fraudulently concealed said information, although he knew appellant would not issue the policy if it knew of his condition; and that appellant had no knowledge of his condition.

The health certificate, which was a part of his application presented to the appellants, contained the following statement:

"As a basis of and consideration for said new policy, I hereby submit and warrant that I am now in sound health; that there is no cause in connection with my physical condition that would be a bar to my securing life insurance or in any way shorten my life; that I have never suffered from" certain diseases, naming them.

Stipulations and conditions like these in an application are regarded in the nature of conditions precedent to the policy becoming effectual. The answer does not disclose the existence of a temporary ailment or indisposition not related to the permanent health of the insured, but rather to a serious and incurable condition of such a nature as to shorten his life, antedating the application, and continuing without interruption thereafter until it terminated in his death. The facts alleged show the existence of such a condition and such a breach thereof as rendered the policy void at the election of the insurer. *Ebner v. Ohio, etc., Co.*, 121 N. E. 315; *Metropolitan, etc., Co. v. Solomito*, 184 Ind. 722, 112 N. E. 521.

The answer set out in full the express warranty of the insured that the statements and warranties contained in his application and medical examination to the Monarch Company for insurance were true when made, and alleged that in said medical statement he falsely stated that he had never been refused insurance in any company or order; that he had prior thereto made application for insurance upon his life with the Hartford Life Insurance Company, and also with the Mutual Life Insurance Company of New York; that both of said applications had been rejected and refused prior to the time when he so answered said question; that said statements were warranties and material to the risk incurred by appellant in the policy sued upon; that appellant had no knowledge of the falsity of said answer, and would not

have issued the policy if it had known that said answer was false.

[8] Under the application and policy of insurance involved in this case, the insured warranted the truthfulness of his statement that he had never been refused insurance. But, if this were treated as a representation, it would make no difference in our holding, for the answer alleges that his answer to said question was material to the risk, that it was false, and that its falsity was unknown to appellant.

A false answer by an applicant for insurance that he had never been rejected or refused insurance in any other company, in the absence of waiver or estoppel, renders the policy voidable at the election of the insurer. *Supreme Lodge v. Miller*, 60 Ind. App. 269, 110 N. E. 556; *Kelly v. Life Ins. Co.*, 113 Ala. 453, 21 South. 361; *March v. Metropolitan, etc., Co.*, 186 Pa. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; *Finch v. Modern Woodmen*, 113 Mich. 646, 71 N. W. 1104; *Finn v. Metropolitan, etc., Co.*, 70 N. J. Law, 255, 57 Atl. 438; *American, etc., Co. v. Judge*, 191 Pa. 484, 43 Atl. 374; *Security, etc., Co. v. Webb*, 106 Fed. 808, 45 C. C. A. 648, 55 L. R. A. 122; *Webb v. Security Co.*, 126 Fed. 635, 61 C. C. A. 333; *Home Life Ins. Co. v. Myers*, 112 Fed. 846, 50 C. C. A. 544; *Nat. Life Ass'n v. Hopkins*, 97 Va. 187, 33 S. E. 539; *Moore v. Mutual, etc., Ass'n*, 133 Mich. 526, 95 N. W. 573; *Langdeau v. John Hancock, etc., Co.*, 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190; *Clemans v. Supreme Assembly, etc.*, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; *Ætna, etc., Co. v. Moore*, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356; *Prudential, etc., Co. v. Moore*, 231 U. S. 560, 34 Sup. Ct. 191, 58 L. Ed. 367.

This is the rule, even though the policy by its terms provides that such a statement shall be treated as a representation and not as a warranty. See *Ebner v. Ohio, etc., Co.*, supra, where this court had before it a policy which expressly made all statements in the application representations and not warranties. The court, speaking through Caldwell, J., said:

"Knowing that he had made the application, he was bound to know that it had either been rejected or that it was pending, and, if pending, his answer was likewise false. * * * His answer that no physician had within the last ten years expressed an unfavorable opinion concerning his health was untrue, and likewise his answer that he did not have at the time of the application, and * * * never had had, any disease of the heart. Under a provision embodied in the incontestability clause as above set out, the statements now under consideration should be dealt with as representations rather than warranties. Their nature is such that they should be regarded as material to the risk. * * * We then have a case of representations, false in fact and material to the risk. A material false representation is a ground for the avoidance of an insurance policy the same as

any other contract. 14 R. C. L. 1021. Such a representation may be designated as a misrepresentation. A misrepresentation, as that term is used in * * * insurance policies, is the statement of something as a fact which is untrue in fact, and which the assured states, knowing it to be untrue, with an intent to deceive the underwriter, or which he states positively as true, without knowing it to be true, and which has a tendency to mislead; such fact in either case being material to the risk. *Daniels v. Hudson, etc., Co.*, 66 Mass. (12 Cush.) 416, 59 Am. Dec. 192; *Clark v. Union, etc., Co.*, 40 N. H. 333, 77 Am. Dec. 721; 14 R. C. L. 1021. Such a misrepresentation has the force and effect of a positive fraud."

If this be true in cases where the statements are to be treated as representations, there is certainly more reason for so holding in a case like the present, where the contract makes them warranties.

[9] Answers to questions propounded by an insurance company in an application for insurance will not be construed as warranties, unless they are clearly shown by the form of the contract to have been so intended by the parties. But the parties have a right to make them warranties if they so desire, and when the contract so provides they must be literally true, or the insurance is voidable. A reading of the policy now under consideration and the application which is made a part of the policy leaves no doubt as to the intention of the parties. The statement, "I hereby expressly warrant * * * that my application to said Monarch Life Indemnity Company and the statements and warranties contained in said application, * * * medical examination, and health certificate made by me to said Monarch Life Indemnity Company are and were true when made," is as explicit as any language can make it, and makes it clear that a warranty was intended.

The appellant's answer was sufficient, and it was therefore error to overrule the demurrer to the fourth paragraph of reply.

[10] The next assignment of error relates to the overruling of the motion for a new trial. It is claimed that the court erred in giving instructions Nos. 8 and 18, given at the request of the appellee, and No. 3 given by the court on its own motion. The appellee calls our attention to the fact that the appellant has not set out all the instructions given, and insists that it is the duty of the court to refuse to consider any question as to whether or not there is error in giving or refusing said instructions, and cites *Chicago R. R. Co. v. Williams*, 168 Ind. 276, 79 N. E. 442, and *Ellison v. Ryan*, 43 Ind. App. 610, 87 N. E. 244, in support of that contention. The rule was formerly as stated by appellee, but since the decision in the case of *Simplex, etc., v. Great Western, etc., Co.*, 173 Ind. 1, 88 N. E. 682, the rule has been otherwise. The rule now is that, when an

appellant desires to challenge the correctness of any of the instructions given, he must see that all of the instructions given are in the record; but it is only necessary that he set out in his brief those that he claims are erroneous. If there are other instructions given or tendered by appellant, which overcome the alleged error, it is the duty and privilege of the appellee to call our attention to them and to set them out in his brief.

We have examined the instructions about which complaint is made. There was no error in the giving of any of them.

[11] The appellant contends that it tendered instructions numbered from 1 to 19, and that the court erred in refusing to give certain of them. The appellee calls our attention to the fact that the record discloses that the bill of exceptions shows that appellants tendered instructions numbered 1 to 20, and that the record fails to show which were given and which refused. We have examined the bill of exceptions, and are of the opinion that appellee's point is well taken, and that no question is properly presented on the refusal of the court to give the instructions tendered.

The appellant also contends that the verdict of the jury is not sustained by sufficient evidence and is contrary to law. The undisputed evidence shows that in 1911, and prior to the time when the insured applied to the Monarch Company for insurance, he had applied to the Hartford Life Insurance Company and also to the New York Mutual Life Insurance Company, and that both of said companies had refused him insurance because of the condition of his health; that on September 21, 1911, he applied to the Monarch Company for insurance and submitted to a medical examination, in which he stated that he had never been refused insurance by any company; that his said statement was false; that he knew it was false; that he signed and presented his application to the appellant company as alleged in the answer, wherein he warranted that all the statements made by him in his application and medical examination to the Monarch Company were true; that the appellant, when it issued the policy sued upon, did not know that he had been refused insurance; that it relied on the truthfulness of his statements, and did not learn of the untruthfulness of his statement until August 10, 1914, when it elected to rescind the insurance contract, and, as we have heretofore stated, mailed a check to appellee for the amount of premiums paid to appellant, and afterwards tendered her a sufficient amount of money to pay such premiums, interest, and costs, and afterwards paid the same into court for the use of appellee; that the insured died April 30, 1914; that proof of death was received by appellant May 8, 1914;

that this proof of death consisted of an affidavit made by appellee in which she gave the cause of death as "chronic nephritis" (which is a disease of the kidneys); that she did not know how long the insured had had this disease, and that Charles N. Brown had been the attending physician of the deceased for the last five years.

The affidavit of Dr. Brown as the attending physician was also made a part of the proof of death. His affidavit, dated May 5, 1913, stated that he had attended the deceased during his last sickness, and that the health of the deceased began to be affected about a year before. (The policy in question was issued October 1, 1913.) Dr. Brown also stated in his affidavit that he was first consulted by the insured concerning the disease which caused his death in September or October, 1913, and that, in his opinion, the deceased had been afflicted with such disease one year, and that the final illness was not complicated with or preceded by any other disease. On the 26th day of June, 1914, appellant wrote a letter to appellee, calling her attention to the fact that her affidavit stated the cause of death to be "chronic nephritis," and that the insured's health first began to be affected about 7 or 8 months prior to his death, and asking her to strengthen her memory to the utmost, to indicate more exactly, if possible, when it became known to her or to the insured that he was afflicted with nephritis, and also calling her attention to the statements in the affidavit of Dr. Brown, and also asking her to favor appellant with her knowledge as to the condition of Mr. Couch's health for the last two years, and that she supply appellant with what information she had concerning applications which he had made for insurance in recent years. This letter ended by telling her that, when appellant received her reply, it would act promptly in disposing of her claim.

On July 8, 1914, appellant again wrote to appellee, saying that no reply had been received to the letter of June 26th, requesting further information, and insisting that appellee give the information requested before appellant would make any definite disposition of the death claim, notwithstanding the threats made by her attorney to bring suit in case the claim was not paid before the 15th of July. On July 16th, appellant wrote a letter to J. L. Crouse, attorney for the appellee, acknowledging the receipt of his letter of the 11th instant, inclosing proofs of loss, and stating that additional affidavits which it deemed necessary were that day being mailed to appellee; that if, after a thorough review of all the available proofs, the appellant felt compelled to deny payment of the claim, it would frankly give him the reasons for so doing, and that if, on the other hand, it found that the proofs supported the claim, no time would be lost

in making payment. The appellant had employed the Hooper Holmes Bureau to investigate the facts, and on the 14th of July received a letter to the effect that the bureau had information to the effect that the insured was in bad health when he applied for the insurance and that he had been rejected by two different companies. July 16th appellant wrote to appellee to the effect that it had learned that her husband had been treated by Drs. Davis, Holliday, and Greenleaf during the past three years, and inclosing blank affidavits, with a request that she secure an affidavit from each of these physicians, and promising to make prompt disposition of the claim upon receipt of these affidavits. The appellee secured these three affidavits and mailed them to appellant some time in July. Appellant continued its investigations through the Hooper Holmes Bureau until the 10th of August, 1914, when it wrote to appellee, giving her a full report of the facts disclosed by the investigation, informing her that it elected to rescind and cancel the policy, and inclosing her a check for the premiums paid to appellant. It also appears from the undisputed evidence that, after appellee received the letter of July 16th, she secured the three affidavits called for; that her expenses in securing them were \$25, not including her personal expenses.

[12] The claim of appellee that the appellant ought to be estopped is based upon the fact that, after it received the letter from the investigating bureau on July 14th, it called upon appellee for the affidavits of the three physicians, which she secured, and which cost her \$25. The claim of appellee that appellant should be estopped cannot be upheld. When appellant requested that appellee secure these affidavits, it informed her and her attorney that if, upon full investigation, her claim was found to be valid, it would be paid without delay, but if it was determined otherwise, she would be frankly informed of the facts and the reasons why it would not be paid. Appellee and her attorney both knew that appellant was investigating the facts connected with the application for insurance, and that the validity of the policy would probably be contested. Appellee is therefore in no position to claim that she was misled by appellant.

An insurance company is estopped to declare a forfeiture of an insurance contract, if, with full knowledge of the facts, it states to the beneficiary, or causes the beneficiary reasonably to believe, that the insurance company does not intend to stand upon the right of forfeiture, and with such representations and actions causes the beneficiary to do any act entailing expense and trouble, upon the belief that the company had waived the right of forfeiture. No such state of facts is shown to exist in this case. There is no evidence that appellee was misled by anything that appellant did, or that

appellant did anything which can be construed as a waiver or estoppel.

The statement of the insured that he had never been refused insurance was a warranty, and, as such, must be absolutely and literally true. Such a statement cannot be deviated from in the smallest particular. Its falsity is sufficient to avoid the policy. *Catholic Order v. Collins*, 51 Ind. App. 285, 99 N. E. 745.

Our conclusion is that the verdict is not supported by the evidence and is contrary to law. The court, therefore, erred in overruling the motion for a new trial.

Judgment reversed, with instructions to sustain the motion for a new trial, to sustain the demurrer to the fourth paragraph of reply, and for further proceedings not inconsistent with this opinion.

(71 Ind. App. 58)

ROSS v. FELTER. (No. 9788.)*

(Appellate Court of Indiana, Division No. 2.
April 24, 1919.)

1. INJUNCTION ⇨150 — TEMPORARY RESTRAINING ORDER—EXPIRATION.

When a temporary restraining order is issued until a fixed date, and the party is given leave on that day to move for a temporary injunction, but no further action is taken, the temporary restraining order expires on the date fixed.

2. INJUNCTION ⇨150 — TEMPORARY RESTRAINING ORDER—EXPIRATION OF OWN FORCE.

An order restraining defendant from cutting any wheat or removing it from land in litigation until notice and further order, it being ordered that defendant be notified that an application for temporary injunction would be heard on a fixed future date, did not fix a definite limit as to when it should expire, so that, no further action having been taken, it did not expire on any date fixed.

3. INJUNCTION ⇨235—ACCRUAL OF LIABILITY ON BOND—"FINAL JUDGMENT"—JUDGMENT FOR COSTS.

Where there was trial on the issues, evidence was heard, and a general finding made for defendant, whereon it was adjudged that plaintiff pay the costs, such judgment was "final" as disposing of the entire controversy, settling the rights of the parties, and leaving nothing for further consideration, so that defendant could sue on an injunction bond given by plaintiff.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

4. EVIDENCE ⇨332(1)—TRANSCRIPT OF PROCEEDINGS—ACTION ON INJUNCTION BOND.

In action against surety on injunction bond, transcript of, proceeding in injunction suit by defendant's principal against plaintiff held admissible.

5. EVIDENCE ⇨286—TRIAL ⇨54(1)—TESTIMONY AS TO DECLARATIONS—LIMITATION TO PURPOSE OF IMPEACHMENT.

Declarations and statements of a party made out of court may be proven, not merely to impeach the party, but as substantial proof of the fact in controversy; but, where the particular matter involved in declarations was not in controversy in suit on an injunction bond, but had been disposed of in the injunction proceedings, testimony of witness was properly limited to show statements made by plaintiff out of court in conflict with statements made in court.

6. INJUNCTION ⇨252(4)—INJUNCTION BOND—MEASURE OF RECOVERY.

In suit against surety on injunction bond given plaintiff tenant when enjoined from cutting or removing wheat, plaintiff was entitled to recover fair market value of wheat when taken by surety's principal, and personal expenses and loss of time necessarily spent in action, together with reasonable attorney fees incurred on account of injunction proceedings.

Appeal from Circuit Court, Howard County; A. B. Kirkpatrick, Special Judge.

Action by Wiley S. Felter against John A. Ross. From a judgment for plaintiff, defendant appeals. Affirmed.

Kent & Ryan and O. E. Brumbaugh, all of Frankfort, and Bell, Kirkpatrick & Voorhis, of Kokomo, for appellant.

Wolf & Barnes, of Kokomo, and Sheridan & Gruber, of Frankfort, for appellee.

McMAHAN, J. This is an action for damages on an injunction bond given by Walter Stigleman as principal and the appellant as surety in an action brought by Walter Stigleman against the appellee. The cause was tried by a jury, and resulted in a judgment being rendered against appellant in the sum of \$300.

The only error assigned and not waived is that the court erred in overruling appellant's motion for a new trial.

Appellant's contentions that the verdict of the jury is not sustained by sufficient evidence and is contrary to law will be considered together. The facts are, in substance, as follows: On June 20, 1910, Walter Stigleman filed a complaint against the appellee in the Clinton circuit court, and on the same day he applied to the court for a temporary restraining order, gave the bond sued on, which was signed by appellant as surety, and the court on said day issued a temporary restraining order, restraining the appellee, until notice and further order of the court, from cutting, harvesting, and disposing of certain wheat which was on a farm which said Stigleman had recently purchased, and which had been occupied by appellee as tenant.

The said order provided that the defendant, appellee, be notified that an applica-

tion for a temporary injunction in said cause would be heard on the 24th day of June; this order was served on appellee the same day it was issued. No action was taken in said cause on the 24th of June, and nothing further was done until in September when the appellee appeared and filed his answer.

The cause was submitted to the court for trial, and in January, 1912, the court entered a judgment against the appellee, perpetually enjoining him from cutting or removing said wheat. A new trial being granted, the cause was again tried, and on this second trial the court, on the 6th day of June, 1914, made a general finding against the plaintiff in that action and in favor of appellee upon the issues presented by the pleadings, and on the same day rendered a judgment in favor of appellee for costs.

[1, 2] Appellant claims that the evidence shows that no injunction was granted, but that a mere temporary restraining order was granted to be and remain in force until notice thereof be given and a hearing on June 24th of an application for a temporary injunction could be had, and that by the terms of said restraining order, as well as by the law authorizing the same, it expired June 24th, leaving the appellee thereafter unrestrained and free to remove and dispose of the wheat in controversy at his will, and that appellee could recover only such damages as were the direct result of the restraining order between June 20th and June 24th. We do not think the appellant can be upheld in this contention. We agree with the appellant that, when a temporary restraining order is issued until a fixed date, and the party is given leave on that day to move for a temporary injunction, and no further action is taken, a temporary restraining order expires on the date fixed. But the order under consideration did not fix a definite limit as to when the temporary restraining order should expire. The order read as follows:

"It is ordered that the defendant be and is hereby restrained from cutting any wheat or removing the same from the following described real estate * * * until notice and further order of this court. It is further ordered that the defendant be notified that an application for a temporary injunction herein will be heard * * * on the 24th day of June 1914."

No application was made for a temporary injunction, and nothing was done except to put the cause at issue until December 11th, when the cause was submitted to the court for trial. The court found the facts specially, and, after stating its conclusions of law, rendered a judgment against the appellee, wherein it was adjudged that the "temporary injunction heretofore granted, entered and issued in this cause be, and the same hereby is, made perpetual." Thus it

would appear that the judge who had issued the temporary restraining order and the parties acted upon the theory that the temporary restraining order was in force and effect and it was carried into the final judgment, although it was improperly referred to as a temporary "injunction."

If the temporary restraining order had been limited by its terms to expire June 24th, instead of until further order of the court, we would have a very different proposition before us. *Terre Haute, etc., v. St. Joseph, etc., R. Co.*, 155 Ind. 27, 57 N. E. 530.

[3] Appellant also contends that no final judgment was rendered in the second trial; that the judgment of the court that the plaintiff pay the costs is an interlocutory and not a final judgment. We cannot agree with the appellant in this contention. There was a trial upon the issues, evidence was heard, and there was a general finding for the appellee, whereupon it was adjudged and decreed that the plaintiff in that cause pay the costs of the action. There was nothing further to do in that case. The issues were fully disposed of, and a final judgment rendered. A judgment is final if it at once disposes of the entire controversy, settling the rights of the parties, and leaving nothing for further consideration. No particular form or words is usually considered necessary to show the rendition of a judgment. *Kelley v. Augsperger*, 171 Ind. 155, 85 N. E. 1004; *State ex rel. v. Lung*, 168 Ind. 553, 80 N. E. 541.

Complaint is also made because the court allowed the appellee to introduce the transcript in the case of Stigleman against the appellee in evidence.

[4] From what we have heretofore said in discussing the temporary restraining order and the final judgment, it follows that the court committed no error in admitting the transcript of the proceedings in the injunction suit in evidence.

[5] Appellant next says that the court erred in refusing to admit the answer to question No. 8 in the deposition of Joseph P. Gray for the purpose of showing ownership of the wheat in Walter Stigleman and in admitting and limiting such answer for the purpose of showing statements made by appellee out of court in conflict with statements made in court. The witness in his said answer stated that appellee had told him that he had sold the wheat to his father-in-law, from whom Stigleman had purchased the land, and that this statement was made before Stigleman purchased the land. It is true, as appellant contends, that declarations and statements of a party made out of court may be proven, not merely to impeach the party, but as substantial proof of the fact in controversy. But the ownership of the wheat was not a matter in con-

trovercy in the case now before us. That controversy was disposed of in the injunction proceedings. There was no error in thus limiting the testimony of the witness.

Complaint is also made that the court erred in giving instructions Nos. 3, 4, and 5, tendered by appellee, and in refusing to give No. 5, tendered by appellant. The objection made to Nos. 3 and 4 is that there was no final judgment in the injunction proceedings. We have held otherwise. These instructions were not objectionable.

[8] Instruction No. 5 related to the measure of damages, and told the jury that, in case they found for the appellee, he was entitled to recover the fair market value of the wheat when taken, personal expenses and loss of time necessarily spent in the action, together with such reasonable attorney fees as he may have incurred on account of the injunction proceedings. This is a correct statement of the law.

Instruction No. 5 tendered by appellant asked that the jury be instructed that the judgment rendered in the injunction proceedings was not a final judgment. We have held otherwise. There was no error in refusing this instruction.

Appellant also contends that the amount of the verdict is excessive, but that contention is also based on the theory that there was no final judgment in the injunction proceedings, and that there could be no recovery for that reason.

There was no error in overruling the motion for a new trial.

Judgment affirmed.

(70 Ind. App. 75)

EQUITABLE SURETY CO. OF ST. LOUIS
et al. v. **INDIANA FUEL SUPPLY**
CO. (No. 9815.)

(Appellate Court of Indiana, Division No. 1,
April 25, 1919.)

HIGHWAYS §113(5) — CONSTRUCTION CONTRACT—MATERIALMEN.

A materialman may recover on a public contractor's bond without complying with Burns' Ann. St. 1914, §§ 5901a-5901c, providing that materialmen must file their claims within 30 days from completion of work "with agent of county," since such act expressly provides it is supplementary to, and does not exclude, other remedies.

Appeal from Circuit Court, Shelby County; Alonzo Blair, Judge.

Action by the Indiana Fuel Supply Company against the Equitable Surety Company of St. Louis and another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Major A. Downing, of Indianapolis, for appellant.

Quincy A. Myers, Edward E. Gates, and Samuel M. Ralston, all of Indianapolis, for appellee.

ENLOE, J. Action by appellee, as relator, upon two bonds, executed by one Denny J. Bush, as principal, and appellant, Equitable Surety Company of St. Louis, Mo., as surety thereon, to secure the due performance by said Bush of his contract for the making of certain improvements in a public highway, in Marion county, Ind.

The cause was tried upon two paragraphs of amended complaint, to each of which a demurrer for want of facts was interposed, and overruled. The only alleged error we are called upon to consider, upon the record before us, is the action of the trial court in overruling the demurrers to the amended paragraphs of complaint. A consideration of the alleged error necessitates a construction of Acts 1911, p. 437 (sections 5901a, 5901b, Burns' R. S. 1914).

The issue between the parties to this appeal is clear-cut; the appellant insisting that, before suit can be maintained on the bond, the materialman (appellee in this case was such) must have filed his claim therefor with the "agents of the county" within 30 days from the time such materials were furnished, as a prerequisite to his right of suit. Appellees, on the other hand, insist that the remedy given by the act in question is cumulative; that the materialman has a choice of remedies; that he may, if he desires, so file his claim with the agents of the county, and obtain his money directly from such source, and without the expense and delay of litigation, or he may, in case his claim is not paid, have his action on the bond.

The third section of the act in question (section 5901c) provides:

"This act shall not be construed as conflicting with any other laws for the protection of labor, subcontractors or materialmen, but is supplemental thereto."

This statute was designed to further protect the parties named therein, as it expressly declares. The construction thereof contended for by the appellant would deprive these persons of rights they theretofore had, and make any right they sought to enforce dependent upon the doing by claimant of a preliminary act, filing his claim within 30 days, etc. Such a construction would turn the act in question into one for the protection of bondsmen on contractors' bonds, by having the effect of limiting the liability, and would in no way give additional protection to those who are, by its express terms, made within its provisions. *Illinois Surety Co. v. State ex rel.*, 122 N. E. 30.

The evidence is not in the record, and no other assigned error is available.

The judgment is therefore affirmed.

(72 Ind. App. 189)

HARTER v. MORRIS. (No. 9730.)*

(Appellate Court of Indiana, Division No. 2.
April 24, 1919.)

1. APPEAL AND ERROR ¶766—BRIEFS—COMPLIANCE WITH RULES—GOOD-FAITH EFFORT.

Appellant's brief will be considered by the Appellate Court notwithstanding his failure to strictly comply with clause 5, rule 22 (55 N. E. vi), in preparing his brief, where his brief contains enough and is so arranged as to advise the court of the questions presented, and a good-faith effort to comply with the rules is shown.

2. SPECIFIC PERFORMANCE ¶114(1)—COMPLAINT—DEFINITENESS.

A complaint for specific performance should allege facts that would be sufficient upon a default to enable the court to draft the decree from its averments.

3. SPECIFIC PERFORMANCE ¶114(2)—COMPLAINT—CONTRACT.

A complaint, in action for specific performance of a land exchange contract, providing that defendant should execute to plaintiff a mortgage and that the note evidencing the mortgage debt should provide for "the usual prepayment privilege," *held* insufficient because of indefiniteness of the contract alleged as to amount and time of prepayment.

4. SPECIFIC PERFORMANCE ¶28(1) — CERTAINTY OF CONTRACT.

More certainty is required in a contract where specific performance is invoked than is required where the remedy is sought at law by way of damages.

5. PLEADING ¶216(1)—DEMURRER—DETERMINATION—CONSTRUCTION OF CONTRACT BY PARTIES.

On demurrer to a complaint for specific performance, in respect to the certainty of the contract alleged therein, the court cannot consider the construction put upon the contract by the parties as making it certain and definite, where the complaint does not plead the construction placed on the contract by the parties.

6. SPECIFIC PERFORMANCE ¶8—DISCRETION.

An application for specific performance is not a matter of right, but is addressed to the sound discretion of the court, in view of all the circumstances.

7. SPECIFIC PERFORMANCE ¶28(1), 49(1), 51—CONTRACTS ENFORCEABLE.

To be specifically enforceable, a contract must be certain, just, and equal in all its parts, and for an adequate consideration; it must not have been obtained under unfair circumstances, and it must not be hard or unconscionable.

8. SPECIFIC PERFORMANCE ¶28(1) — CONTRACT—CERTAINTY.

To be specifically enforceable, a contract must be capable of being performed without adding to its terms; and nothing must be left to the future.

9. SPECIFIC PERFORMANCE ¶5—ADEQUATE REMEDY AT LAW.

To obtain specific performance, it must appear that plaintiff has no adequate remedy at law.

10. SPECIFIC PERFORMANCE ¶51—FAIRNESS OF CONTRACT.

Although there be no blame or fraud attaching to plaintiff, if there is want of equality and fairness in the contract, the court will not exercise its extraordinary jurisdiction in specific performance.

11. SPECIFIC PERFORMANCE ¶51—FAIRNESS OF CONTRACT.

In determining the fairness of the contract, the court will look to the surrounding circumstances, such as incapacity or inequality of the parties, the manner of the execution of the contract, the experience or inexperience of the contracting parties, and their opportunity to advise with others of experience.

12. SPECIFIC PERFORMANCE ¶16—BALANCE OF CONVENIENCE.

If greater wrong is likely to result to the defendant on account of the granting of specific performance than the plaintiff will suffer in case it is withheld, equity will deny it.

13. SPECIFIC PERFORMANCE ¶12—STATUS OF PLAINTIFF.

The court will consider the facts that the plaintiff has not parted with any consideration, and that he is in statu quo at the commencement of his suit for specific performance.

14. SPECIFIC PERFORMANCE ¶121(3)—EVIDENCE—EQUITIES.

In suit for specific performance of land exchange contract, evidence *held* to show the equities of the case were with defendant.

15. FRAUDS, STATUTE OF ¶117—DELIVERY OF ACCEPTANCE.

Burns' Ann. St. 1914, § 7462, requiring contract of sale of real estate to be written and signed, is not satisfied, as to a contract for exchange of lands, by one party's signing his acceptance of such contract and then placing it in his pocket without delivering it.

16. SPECIFIC PERFORMANCE ¶32(1) — MUTUALITY.

A contract which could not be enforced against plaintiff for want of his valid acceptance could not be specifically enforced by him.

Appeal from Circuit Court, Marion County; Louis B. Ewbank, Judge.

Action by J. Edward Morris against Richard R. Harter. From judgment for plaintiff, defendant appeals. Reversed, with instructions.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 123 N. E. 719. Transfer denied.

Hall & Campbell, of Rushville, James L. Murray, of Indianapolis, Wm. A. Hughes, of Greenfield, David R. Major, of Columbus, Ohio, and Urban C. Stover, of Indianapolis, for appellant.

Weyl & Jewett, of Indianapolis, for appellee.

NICHOLS, J. This is a suit in equity by the appellee against the appellant to compel the specific performance of a contract for the exchange of real estate. The appellant demurred to the second amended complaint, which demurrer was overruled, and to which ruling appellant excepted. Appellant then answered by general denial and other special answers to which a reply was filed by the appellee. The cause was tried by the court, and a finding and judgment rendered for appellee decreeing specific performance of the contract sued on. After motion for a new trial which was overruled, the appellant prosecutes this appeal. The errors assigned and relied upon for the reversal of the judgment are:

(1) The court had no jurisdiction over the subject-matter of the action.

(2) The court erred in overruling the demurrer to the second amended complaint.

(3) The court erred in overruling the motion for a new trial.

The second amended complaint filed by the appellee is, in substance, as follows:

On August 17, 1911, the appellant was the owner in fee simple of the following described real estate in Rush county, Ind. (description), containing in all 84.17 acres. On said date appellant made a written offer or proposition to the appellee to exchange said real estate for 360 acres of land owned by the appellee in Starke county, Ind. (description). By the terms of said written proposition appellant agreed to accept the farm of the appellee subject to a \$3,000 mortgage due January 1, 1913, and drawing 6 per cent. interest, and it was therein stipulated that the said Harter should retain possession of his farm until January 1, 1913, with the exception that the appellee would be permitted to sow wheat during the fall of 1911, upon any part of the farm of said appellant; appellant was to have possession of said Starke county farm as soon as the deal between appellant and appellee was closed and consummated, and appellant was also by said proposition to give the appellee a first mortgage of \$1,800 on the Starke county land in the manner provided for in said proposition; appellee and appellant were each to furnish a good abstract of title brought down to date showing good fee-simple title in said parties respectively, free and clear from any and all liens and incumbrances, except those mentioned in said proposition, and appellant and appellee were to assume and pay the taxes for 1911 on each farm so exchanged. In order to be effective, said proposition was to be accepted by the appellee and his wife on or before 7 o'clock p. m. of August 18, 1911. Appellee and his wife accepted said proposition at 9:30 o'clock a. m. August 18, 1911, and at said

time so notified appellant of such acceptance, and such acceptance was indorsed on said proposition and a copy of said proposition sent to said appellant. The contract and acceptance are marked Exhibit A and made a part of the complaint. The Starke county land was worth of the reasonable value of \$25 per acre, and the appellant's land was worth of the reasonable value of \$110 per acre, and said farms were of such respective values at all times hereinbefore referred to. The Rush county land owned by appellant was at all times referred to of "peculiar" value to the appellee by reason of the location thereof; said land is located near the Indianapolis & Eastern Traction Company's line of railway and on and near the National Road and is of easy access to the city of Indianapolis, in which the appellee resides; that, unless appellee is granted specific performance of this contract, he will suffer irreparable damages and injury which cannot be fully compensated in damages, and appellee has not an adequate remedy at law; that appellee had duly performed all conditions of said agreement on his part to be performed and prior to the bringing of this action tendered to appellant the deed in fee simple of the Starke county land, duly executed and acknowledged by appellee and his wife with covenants of general warranty, and demanded of appellant that he perform his part of said contract by executing to this appellee a deed, mortgage, and note as provided in said contract. Appellant refused and still refuses to perform his part of the contract. Appellee is still willing to comply with his said contract and to deliver said deed for the said Starke county land, and now brings the same into court together with the abstract of title down to date showing a good fee-simple title in appellee, free and clear from all incumbrances for the use of the appellant. There is a demand that the appellant be required specifically to perform said agreement.

Exhibit A, which is the offer and acceptance and which is made the basis of the suit, is as follows:

"Indianapolis, Ind., August 17, 1911.

"Mr. J. Edward Morris, City—Dear Sir: I hereby agree to the following exchange of farms and on the basis hereinafter mentioned as follows: I will give you my farm upon which I now reside consisting of 84.17 acres more or less and located about 1¼ miles south of Charlottesville, Indiana, and in the northwestern part of Ripley township of Rush county, Indiana, the same being all and the only land now owned by me in said township and county at this time, for your tract of 360 acres of land being the N. E. quarter and the north half of the S. E. ¼ and the east ½ of the N. W. ¼ and the N. E. ¼ of the S. W. ¼ all in section 11, township 35 north, range 1 west, Washington township, Starke county, state of Indiana.

"You are to accept my farm subject to a \$3,000 mortgage due January 21, 1913, and drawing 6 per cent. interest and allow me possession until January 1, 1912, with the exception that you will be permitted to sow wheat this fall on any part of the farm you desire.

"It is understood that I am to have possession of the Starke county farm as soon as the deal is closed and I am to give you a first mortgage of \$1,800 on the land drawing 6 per cent.

from date of closing, said note to mature January 21st, 1913, and to provide the usual prepayment privileges.

"It is understood that each of us are to furnish good abstract brought down to date showing good fee-simple title in us free and clear of any and all liens and incumbrances whatsoever except those herein mentioned and except also that each of us agree to assume and pay the taxes of 1911 due and payable in 1912 on each farm.

"It is also understood that conveyances are to be made by good and sufficient general warranty deed properly executed.

"This proposition to be effective must be accepted by you and your wife on or before 7:00 o'clock p. m. August 18, 1911.

"R. R. Harter.

"Accepted 9:30 a. m. August 18, 1911.

"J. Edward Morris.

"Isa Morris."

The demurrer to this complaint was for want of facts to constitute a cause of action against the appellant.

[1] Appellee contends that appellant has presented no question for the consideration of this court for the reason that he failed to comply with clause 5, rule 22 (55 N. E. vi) of the court in the preparation of his brief. While it is true that appellant has not strictly followed said rule, still his brief contains enough, and is so arranged as to advise the court of the questions presented. A good-faith effort is shown, and the purpose of the rule has been served. *Repp v. Indianapolis, etc., Traction Co.*, 184 Ind. 675, 111 N. E. 614; *Howard v. Adkins*, 167 Ind. 184, 78 N. E. 665; *Foote v. Foote*, 53 Ind. App. 673, 102 N. E. 393; *Berkey v. Rensberger*, 49 Ind. App. 226, 96 N. E. 32; *Gelsendorff v. Cobb*, 47 Ind. App. 573, 94 N. E. 236.

[2-4] It has been expressly held by both the Supreme and Appellate Courts of this state that a complaint for specific performance to be sufficient should allege facts that would have been sufficient upon a default to enable the court to draft the decree from its averments. *Burke v. Mead*, 159 Ind. 252, 259, 64 N. E. 880; *McCauley v. Schatzley*, 44 Ind. App. 262, 88 N. E. 972. Applying this principle of law to the complaint in suit, we must hold that it is insufficient to withstand the appellant's demurrer. The complaint is based upon a contract that provides, among other things, that an \$1,800 first mortgage is to be executed by appellant to appellee which should draw 6 per cent. interest from date of closing to maturity, January 21, 1913, and that such note should provide for "the usual prepayment privileges." We are not prepared to say what such usual prepayment privileges are. Sometimes the privilege granted is to make prepayment at the will of the mortgagor, sometimes to make payments at interest paying dates, sometimes quarterly, or semiannually, or annually. There is no certain amount which appellee will be permitted to prepay. The contract is certainly in-

definite as to the privileges of payment that should be granted to appellant, and we do not see how the court in rendering a decree for specific performance upon default could have determined upon the privilege to be extended. If he could not do so, then the complaint does not measure up to the requirements of the authorities cited. It is not necessary for the purpose of the demurrer to the complaint that we shall decide that the contract is an illegal contract, or that there is no remedy at law under it. We do decide, however, that more certainty is required in a contract where specific performance is invoked than is required where the remedy is sought at law by way of damages. The contract may be legal and yet of such a character that specific performance thereof will not be enforced.

[5] Appellee, in his brief, has quoted at length the opinion of the trial court in which such court, speaking with reference to the \$3,000 mortgage, states that from the language alone it would necessarily follow that he (appellee) assumed what was due on the mortgage, further accrued interest, or interest from and after the transaction. This statement is ambiguous to us; but, if we rightly interpret it, it does not seem to have been the interpretation placed upon this particular part of the contract by the appellee. It appears by appellee's original complaint, which was introduced in evidence, that, at the time certain papers were thereafter placed in the hands of a third person, it was mutually agreed between the appellee and the appellant that the appellee should assume the interest on such mortgage at the rate of 6 per cent. interest per annum from the date of the consummation of the transaction. We quote this, together with the statement from the opinion of the trial court, for the purpose of showing the confusion in the minds of the persons involved in the transaction, and of the court as to the matter of the interest upon the \$3,000 mortgage, and for the purpose of confirming our opinion that the contract was uncertain and indefinite as to this interest. Appellee contends that the construction which the parties thereafter put upon the contract by the execution of the deeds and mortgage, which were deposited with a third party, may be considered by the court in determining the intention of the parties; and that such construction was put upon it by the acts of the parties as to make the contract certain and definite, even if it be conceded by appellee that there was any uncertainty in it. But we are now passing upon the sufficiency of the complaint which is based upon the contract, in which complaint we find nothing pleaded that shows the construction placed upon the contract by the parties. The complaint is insufficient, and the demurrer to it should have been sustained. *Williams v. Stewart*, 25 Minn. 516; *Burnett v. Kullak*, 76 Cal. 585, 18 Pac. 401;

Moore v. Galupo, 85 N. J. Eq. 194, 55 Atl. 628.

[6-13] In his motion for a new trial, appellant challenges the sufficiency of the evidence to sustain the finding and judgment of the court. In determining this question, we do so with the following established principles of equity jurisprudence before us:

An application for specific performance is not a matter of right, but is addressed to the sound discretion of the court, in view of all the circumstances. The application of the principle is guided by established rules and practice in equity, which are advisory rather than mandatory. The contract must be certain, just, and equal in all its parts, and for an adequate consideration. It must not have been obtained under unfair circumstances, and it must not be hard or unconscionable. It must be capable of being performed without adding to its terms, and nothing must be left to the future. It must appear that the plaintiff has no adequate remedy at law, and that a refusal to perform the contract would be a fraud upon him. It is not necessary that the plaintiff be convicted of fraud in order that specific performance be denied him. There may even be no blame attached to him; but, if there is a want of equality and fairness within the contract itself, the court will not exercise its extraordinary jurisdiction in specific performance. In determining the fairness of the contract, the court will look to the surrounding circumstances, such as incapacity, or inequality of the parties, the manner of the execution of the contract, the experience or inexperience of the contracting parties, and their opportunity to advise with others of experience in such transactions. If greater wrong is likely to result to the defendant on account of the granting of specific performance than the plaintiff will suffer in case it is withheld, equity will deny it. The court will consider the facts that the plaintiff has not parted with any consideration, and that he is in statu quo at the commencement of the suit. *Ash v. Daggy*, 6 Ind. 259; *Modisett v. Johnson*, 2 Blackf. 431, 439; *L. N. A. & Chi. R. W. Co. v. Bodenschatz*, 141 Ind. 251, 263, 39 N. E. 708; *Gas Light & Coke Co. v. City of New Albany*, 139 Ind. 660, 39 N. E. 462; *Ames v. Ames*, 46 Ind. App. 597, 91 N. E. 509; *Horner v. Clark*, 27 Ind. App. 6, 60 N. E. 732; *Mather v. Simonton*, 73 Ind. 595; *Shubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509; *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S. E. 524, 9 L. R. A. (N. S.) 913, 123 Am. St. Rep. 990; *Friend v. Lamb*, 152 Pa. 529, 25 Atl. 577, 34 Am. St. Rep. 672; *Falcke v. Gray*, 4 Drury, 651; *Elliott on Contracts*, § 2277; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501.

[14] It appears by the undisputed evidence in this case: That appellee was, at the time of the transaction involved, a real estate agent of several years' experience, and located in the city of Indianapolis. That he was

at said time president of the Indiana Real Estate Association. That he owned 360 acres of undrained, unimproved, and uncultivated land in Starke county, Ind., which he had advertised in the Indianapolis News, and by this means his negotiations opened with appellant. That appellant was a farmer, owning a farm in Rush county, Ind., consisting of 84.17 acres of well-improved land in a good state of cultivation, upon which he had lived alone, and which he had farmed for about 12 years. That he knew nothing of Starke county land, and farming conditions in that country, and, except for the hour, or at most two hours of inspection of the 360-acre tract involved, he necessarily depended in a large measure upon appellee for his knowledge thereof. On August 17, 1911, appellant met appellee in Indianapolis, and, together, they visited the Starke county land. Arriving at Plymouth, a few miles from the land, appellant says:

"Had some difficulty in getting a conveyance. I ran into Mr. Garns that I had met before. We took lunch along and went out to the land in an automobile. Mr. Garns having lived in the neighborhood, Mr. Harter asked him some questions."

Mr. Garns later testified that he was a real estate agent, and had been for about nine years, and that he lived at Plymouth; that he had this land listed for sale, and on this day had a talk with appellee before he met appellant, after which he took them to the land in his automobile. Appellee did not know of Mr. Garns' agency. Without going into details of the hour, or two hours of inspection of the land, we note that by some means appellant received an exalted impression of its present and prospective possibilities and value as compared with that given by appellee's witnesses who lived near the land and were acquainted with it. Appellant says that appellee told him that 140 acres of the land, or like that, was suitable for onion culture, while appellant's witness Haines says that it is not onion land. Witness Boots says some onion land in north east corner; witness Watkins says if land were cleared only small part would be suitable for onions; witness Peters says that he understands that the north part would be suitable for onion culture, might be 40 to 60 acres suitable, and that he knows of "raise in price of from \$7 to \$100 per acre on onion land." This possible increase in the value of the onion land, together with appellee's representation of the onion acreage, which representation he does not dispute, may account for the appellant's exalted impression of its present and prospective value as compared with its value as an onion proposition as given by appellee's own witness. This value as fixed by appellee's witness is much discounted by appellant's witnesses. After the inspection of the land, the parties returned

to Indianapolis, where they arrived at about 11 o'clock at night negotiating the terms of their deal on the way.

Arriving in Indianapolis, they went to the appellee's private office, where the appellee wrote the proposition involved in this suit, which was thereupon signed by the appellant between 11 and 12 o'clock at night, and then left with the appellee for acceptance by himself and wife. We do not deem it necessary to go further into details regarding the negotiations between the appellant and the appellee for the purposes of this decision, though, viewing the transaction as a whole, we are satisfied that the equities of the case are with the appellant and that specific performance should not be enforced; but we do not rest our decision on this conclusion alone.

[15, 16] At 9:30 on the next morning, the acceptance was signed by the appellee and his wife. However, it was never delivered to the appellant. That afternoon, appellee testifies, he told appellant that they had accepted the proposition and says that he had the contract there and exhibited it to Mr. Hughes. He also says that he showed appellant that he had accepted, but appellant says that he did not see it until long after the suit was brought. Witness Hughes, one of the attorneys for the appellant, says that the contract was not produced, that it was not shown to him the next day, and that he never saw it until it was thereafter produced for inspection by attorneys for the appellee in their office in the city of Rushville. There is no claim made anywhere that there was a delivery of the acceptance by the appellee to the appellant. This failure to deliver an acceptance of the contract to the appellant, or to place it with certain papers prepared upon that occasion and deposited with Mr. Hughes, may be accounted for by the fact that it appears by the evidence that both the appellee and the appellant had stated that they might not want to go ahead with the deal. The contract being for the sale of real estate, in order to bind the appellee under the statute of frauds, must of necessity be in writing and signed by him. Section 7462, Burns' Ann. St. 1914. An oral acceptance of a contract of sale of land has been held sufficient, but this was in a contract of sale in which there was a money consideration. In the case now be-

ing considered, the contract was for an exchange of lands which contemplates a sale, not only by appellant, but also by the appellee, and he could not satisfy the statute by signing an acceptance of such a contract and then placing it in his pocket without delivering, thereby keeping it within his own control. He did not thereby bind himself to convey his tract of real estate to the appellant. *Montauk Ass'n v. Daly*, 32 Misc. Rep. 558, 87 N. Y. Supp. 312. It will hardly be contended that, if appellant had brought this action against appellee to compel him to convey to appellant the Starke county land, under this same contract he could have prevailed in his suit; for appellee would have been permitted to show that there has been no valid acceptance of the contract on his part. If the contract could not be enforced against the appellee because of the want of valid acceptance, then certainly appellee should not be permitted to enforce performance of the contract when he himself is not bound thereby. If there was a valid acceptance of this contract, and its specific performance were enforced, then the appellant would be put in possession of the Starke county land, undrained, uncultivated, and without improvements, incumbered with an \$1,800 mortgage, and without the necessary means of paying it, with which mortgage the land must be incumbered as a part of the transaction. The appellee has not parted with any consideration for the real estate, the conveyance of which he seeks to enforce, and was at the commencement of the suit in statu quo. The refusal to enforce performance of the contract can work no fraud upon him. We are satisfied that a greater wrong is likely to result to the appellant if specific performance is enforced than the appellee would suffer in case it is denied. We cannot hold in this case that the appellee will suffer irreparable injury by reason of any failure in the performance of the contract, and that at the time of the commencement of the suit, if he had made a valid acceptance, we hold that he had a complete remedy at law. The judgment is reversed, with instructions to the trial court to grant a new trial, and to sustain the demurrer to the second amended complaint, and for such other proceedings as are in harmony with this decision.

(70 Ind. App. 49)

KIPFER et al. v. POLSON. (No. 9828.)(Appellate Court of Indiana, Division No. 1.
April 24, 1919.)**APPEAL AND ERROR** ¶635(3)—**QUESTIONS PRESENTED FOR REVIEW—ABSENCE OF EVIDENCE.**

Where the questions presented by the appeal require a consideration of all the evidence, and the bill of exceptions affirmatively shows that the evidence is not all in the record, the judgment must be affirmed.

Appeal from Circuit Court, Marshall County; Smith N. Stevens, Judge.

Action between James E. Kipfer and another and Edward W. Polson. Judgment for the latter, and the former appeal. Affirmed.

W. B. Hess and Chas. Kellison, both of Plymouth, and Hays & Hays, of Sullivan, for appellants.

H. A. Logan, L. M. Lauer, and J. W. Kitch, all of Plymouth, for appellee.

REMY, J. Each of the questions properly presented by this appeal would require for its determination a consideration of all the evidence. The bill of exceptions affirmatively shows that the evidence is not all in the record. Under such circumstances the judgment of the trial court is conclusive, and on the authority of *Thorne v. Indianapolis Abattoir Co.*, 152 Ind. 317, 62 N. E. 147, the judgment in this case is affirmed.

(70 Ind. App. 712)

CHILDS et al. v. GOETSCHEUS et al.
(No. 9747.)

(Appellate Court of Indiana. April 25, 1919.)

Appeal from Superior Court, Delaware County; Harry H. Orr, Special Judge.

Action by Laura B. Childs and another against James Roy Goetscheus, trustee, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Timothy S. Owen, of Muncie, for appellants. McClellan, Hensel & Guthrie, of Muncie, for appellees.

PER CURIAM. Judgment affirmed.

(287 Ill. 465)

TAZEWELL COAL CO. v. INDUSTRIAL COMMISSION et al. (No. 12623.)

(Supreme Court of Illinois. April 15, 1919.)

1. MASTER AND SERVANT ¶397—**WORKMEN'S COMPENSATION—JURISDICTION—PRESUMPTION.**

There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction, such as the Industrial Board.

2. MASTER AND SERVANT ¶417(3)—**WORKMEN'S COMPENSATION—CERTIORARI—SUFFICIENCY OF RETURN.**

Return to writ of certiorari commanding Industrial Board to certify to the court a complete record of proceedings whereby the board, under Workmen's Compensation Act, § 9, had commuted compensation to lump sum, on claimant's petition therefor, must show what notice of the proceedings was given employer, and must contain the testimony upon which board's decision was based, in order that employer may not be deprived of its right to a judicial review of the proceedings.

Error to Circuit Court, Tazewell County; J. M. Niehaus, Judge.

Proceeding under Workmen's Compensation Act by Martina Lipnick, administratrix of the estate of Andrew Lipnick, deceased, for compensation for the death of Andrew Lipnick, opposed by the Tazewell Coal Company, employer. Award to claimant by Industrial Board was commuted upon claimant's petition therefor, and employer petitioned for writ of certiorari. Writ quashed by circuit court, and employer brings error. Reversed and remanded.

William A. Potts, of Pekin, for plaintiff in error.

J. P. St. Cerny, of Pekin (W. B. Cooney, of Pekin, of counsel), for defendant in error.

CARTWRIGHT, J. The Industrial Board awarded compensation to defendant in error, Martina Lipnick, administratrix of the estate of Andrew Lipnick, deceased, on account of his death while in the employment of plaintiff in error, the Tazewell Coal Company. On September 12, 1917, plaintiff in error filed its verified petition in the circuit court of Tazewell county, alleging that on July 2, 1917, defendant in error, Martina Lipnick, filed her petition for payment of the compensation in a lump sum, and upon a hearing an order was made on August 21, 1917, by which the compensation was commuted to a lump sum of \$3,093.74, and notice of the order was received by plaintiff in error on August 25, 1917, that no notice of the filing of the petition was given to plaintiff in error, and it had no notice of the pendency of the petition and no opportunity to appear and oppose, by evidence or otherwise, the commutation of the award to a lump sum, and that the Industrial Board had no jurisdiction of the cause or the person of the plaintiff in error. The petition prayed for a writ of certiorari commanding the Industrial Board to certify to the court a full and complete record of the proceedings. The writ was issued and a return was made certified as a full and complete record, which showed a petition for the commutation of the compensation to a lump sum and alleging facts upon which the petition was based. Concerning jurisdiction

and the basis for the finding and order of the board the record is as follows:

"The said board having given proper notice to the parties hereto, and said matter now coming to be heard, the board, upon proper showing of the parties hereto, and having made careful inquiry and investigation of said matter, and being fully advised in the premises, doth find that it is for the best interest of the parties hereto that compensation be paid in a lump sum."

The court quashed the writ of certiorari, dismissed the petition, rendered judgment for costs against plaintiff in error, and certified that the cause was one proper to be reviewed by this court.

[1, 2] Section 9 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 134) provides that upon a petition to the Industrial Board, if, upon proper notice to the interested parties and a proper showing made before the board, it appears for the best interest of the parties that the compensation be paid in a lump sum, the board may order commutation to an equivalent lump sum. The statute does not prescribe the character of notice which shall be given, or the length of time or manner of service, but only that there shall be proper notice. The record does not show any rule or regulation of the board as to what is regarded as proper notice, or what notice is to be given, which would be subject to judicial review to determine its reasonableness. *Kettles v. People*, 221 Ill. 221, 77 N. E. 472. The Constitution affords protection against the imposition of any liability without notice and an opportunity to be heard. There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction, such as an Industrial Board. Nothing is taken by intendment in favor of such jurisdiction, but the facts upon which the jurisdiction is founded must appear in the record. The record filed in return to the writ does not show what notice was given to plaintiff in error, or what method of informing plaintiff in error of the proceeding was adopted or regarded proper by the Industrial Board, and the record fails to show jurisdiction over plaintiff in error or any authority of the board to hear and decide the question presented by the petition. Plaintiff in error had a right to a judicial review of the proceeding, and the record must show that the board acted upon evidence and contain the testimony upon which the decision was based, in order that the court may determine whether there was any evidence fairly tending to sustain the order. *Forschner & Co. v. Industrial Board*, 278 Ill. 99, 115 N. E. 912. The record contains no fact or evidence upon which the order was founded but only the conclusion of the board that it was for the best interest of the parties that compensation be paid in a lump sum. Such a record practically de-

prives a party of any review of the proceeding.

The judgment of the circuit court is reversed; and the cause is remanded.

Reversed and remanded.

(233 Ill. 39)

BARRETT CO. v. INDUSTRIAL COMMISSION et al. (No. 12530.)

(Supreme Court of Illinois. April 15, 1919.)

1. MASTER AND SERVANT §405(1) — WORKMEN'S COMPENSATION ACT—NOTICE OF ACCIDENT.

Where the only notice of an accident given an employer was by the injured person at a time which he estimated to be from a month to 2 months after the accident, there was no evidence from which it could be found that notice was given within 30 days.

2. MASTER AND SERVANT §398—WORKMEN'S COMPENSATION ACT—NOTICE OF ACCIDENT.

The Workmen's Compensation Act requires that notice of an accident be given the employer within 30 days, and this requirement is jurisdictional.

Error to Circuit Court, Peoria County; O. V. Miles, Judge.

Proceedings by L. O. Eagleton, administrator, under the Workmen's Compensation Act, to obtain compensation for the death of Henry Keefe. Opposed by the Barrett Company, the employer. There was an award by the Industrial Commission, which was set aside by the circuit court, and the claimant brings error. Affirmed.

Roscoe Herget, of Peoria, for plaintiff in error.

Frank M. Cox, of Chicago, and George W. Sprenger, of Peoria, for defendant in error.

DUNN, J. Henry Keefe died on December 19, 1916, and a claim for compensation for his death was presented under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) against the Barrett Company. The arbitrator found that notice of the accident was not given to the employer, and demand for compensation was not made upon it within the time required by the provisions of the act. The Industrial Commission reviewed this decision and made an award in favor of the claimant. Upon a writ of certiorari the circuit court of Peoria county set aside the finding of the commission, and the claimant has sued out a writ of error to reverse this judgment.

[1, 2] No one saw the supposed accident in which the deceased received his injury. There is no evidence in the record of such accident except the statements of the de-

ceased made to the foreman under whom he worked and the superintendent of the defendant in error's plant. The deceased was a paper maker and millwright, and had been employed by the defendant in error for 17 years. His death occurred from infection of his right hip and bone, which there is evidence tending to show had been caused by an external injury which did not break the skin. Dr. Trewyn began treating him some time in September. W. R. Holmes was the foreman under whom the deceased worked, and he testified that Keefe quit work on Saturday, September 23d; that he had complained for 3 or 4 weeks of having rheumatism, and on September 23d Holmes told him he had better stay home the next day and when he got well to come back. About a week later Keefe told him that he had been struck on the hip by a rag truck pushed by a negro employé of the defendant in error while he was engaged in his work. He could not state how long before the 23d the deceased told him he got struck, but as near as he could state it was a month or 6 weeks. He could not say whether it was less than a month. Hennessy, the superintendent of defendant in error, testified that Keefe came down to see him and said that he thought for a long time his trouble was rheumatism, but that he believed now it was due to being squeezed between the truck and the beaters. He said that the truck was moved or being pushed by some one and crowded him in between the truck and the beaters. He did not fix the time or any approximate time. He gave the approximate time as a month or 2 months. As to the time he had been struck by the truck he could not remember himself. This was all the evidence in regard to when the accident occurred.

The statute requires that notice of the accident be given the employer within 30 days, and this requirement is jurisdictional. *Bushnell v. Industrial Board*, 276 Ill. 262, 114 N. E. 496. Since there is no evidence in the record from which it can be found that notice was given to the employer within 30 days after the accident, the Industrial Commission was without jurisdiction, and its award was properly set aside.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(287 Ill. 420)

ARKIN v. PAGE. (No. 12529.)*

(Supreme Court of Illinois. April 15, 1919.)

1. PARENT AND CHILD §13(1) — LIABILITY FOR TORTS OF CHILD—RELATIONSHIP.

A parent is not liable for the tort of his minor child merely from relationship.

2. MASTER AND SERVANT §300—DANGEROUS AGENCY—AUTOMOBILES—LIABILITY OF OWNER—AGENCY OF DRIVER.

An automobile is not so dangerous an agency as to make the owner liable for injuries caused by it to travelers on the highway, regardless of the agency of the driver.

3. MASTER AND SERVANT §301(1)—AGENCY OF SON DRIVING FOR HIS OWN PLEASURE.

The relation of master and servant is not established by the mere fact that the purpose for which the father purchased the automobile was the pleasure of the family, and he is not liable for the death of a third person caused by the negligent driving of his own son, whom he permitted to use the automobile for the son's own pleasure.

Cartwright, Farmer, and Carter, JJ., dissenting.

Error to First Branch Appellate Court, First District, on Appeal from Circuit Court, Cook County; Kichham Scanlon, Judge.

Action by Ben H. Arkin, administrator of Annie Marie Christiansen, deceased, against Seth H. Page, for damages for wrongful death. From a judgment of the Appellate Court affirming a judgment of the circuit court in favor of the plaintiff and against the named defendant, the latter brings certiorari. Reversed and remanded.

Landon & Holt, of Chicago (Robert N. Holt, of Chicago, of counsel), for plaintiff in error.

Thomas D. Nash and J. A. Arkin, both of Chicago (Michael J. Ahern, of Chicago, of counsel), for defendant in error.

DUNN, J. On June 24, 1914, Annie Marie Christiansen, a little girl 3½ years old, was run over by an automobile on one of the streets of the city of Chicago and received injuries from which she died. Her administrator brought suit to recover damages for her death against George J. Page, the driver of the car, and Seth H. Page, its owner. On the trial the plaintiff dismissed the action as to George J. Page and recovered a judgment for \$1,700 against Seth H. Page, who appealed to the Appellate Court, where the judgment was affirmed. Upon the petition of Seth H. Page a writ of certiorari was awarded, and the record has been brought to this court for review.

George J. Page is the son of Seth H. Page, and in June, 1914, was 20 years old. At the time of the accident he was on his way from his home to the Lewis Institute for the purpose of seeing if he could register in a course of study at the summer school. He was alone in the automobile, which he had taken from the garage at his home without telling anybody that he was going to take the car out or that he was going to the Lewis Institute. He had not talked with his father about going to the school or the question of paying tuition, which he expected to pay him-

self out of money of his own which he had in the bank. The automobile belonged to his father and was bought in 1911. The family consisted of the father and mother, the young man, and his sister. George had learned to drive a car the year before the automobile was bought, and during the first year that his father owned the car he was the only one of the family who drove it. Later both his father and sister learned to drive. In June, 1914, all the members of the family drove the car except the mother, and when she went out in it one of the other members of the family would drive. George had the whole mechanical care of the car. The father knew that George was in the habit of taking out the car, and, though he had not said either that he might or might not take it out at any time, he did not object to his taking it out, and it is to be inferred that George took the car whenever he wanted to, when it was not in use.

The defendant asked the court to instruct the jury to find a verdict in his favor, and it is argued that there is no evidence in the record of any negligence in the management of the car. Other questions also are argued; but the important question in the case is whether, assuming that negligence was shown in the driving of the machine, the plaintiff in error is liable for that negligence.

[1, 2] A parent is not liable for the tort of his minor child merely from the relationship. There is no evidence or claim that George J. Page was not a competent chauffeur. An automobile is not so dangerous an agency as to make the owner liable for injuries caused by it to travelers on the highway, regardless of the agency of the driver. *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670; *Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382, 19 Ann. Cas. 1227; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915. The owner of an automobile who merely permits another to use it for his own purposes is not liable for the negligence of the borrower in the use of the machine. *Hartley v. Miller*, 165 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81. The owner of an automobile is not liable for an injury occasioned by the negligent use of the machine by his servant if the servant was at the time at liberty from the service of his master and not engaged in doing his master's business but was pursuing his own interests exclusively. *Reilly v. Connally*, 214 N. Y. 536, 108 N. E. 853, L. R. A. 1916A, 954, Ann. Cas. 1916A, 656; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598.

[3] The liability of Seth H. Page, if any, must rest upon the agency of George J. Page. Is the owner of an automobile, who has provided it for the use of his family for their pleasure, liable for an injury caused through the negligent driving of the automo-

bile by a member of the family while using it for some personal purpose of his own? This question has arisen in many cases and the decisions of the courts have been directly contrary, though all agree that the liability, if any, must rest upon the relation of master and servant between the driver of the automobile and the owner; that is, upon the fact that the driver of the automobile was at the time engaged in doing the owner's business. Those courts which have held the owner liable have done so on the theory that, when a father has bought an automobile for the pleasure of the family, he has made it his business to furnish entertainment for members of his family, and therefore, when one of them was permitted to use the automobile, even for his own personal and sole pleasure, he was carrying out the purpose for which it was owned and so was using it in the owner's business, who was therefore the principal and liable for the agent's neglect. Such was the view of the Supreme Court of Washington in *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59, which holds that a daughter driving, for her own pleasure, her father's car, kept for the use of the family, is his servant, for whose negligence in operating the car he is liable. It was said that such use of the car was in furtherance of the very purpose for which the car was owned and was used by one of the persons by whom it was intended that purpose should be carried out, and that the car was in every just sense being used in the owner's business by his agent.

"It seems too plain for cavil that a father, who furnishes a vehicle for the customary conveyance of the members of his family, makes their conveyance by that vehicle his affair—that is, his business—and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in the vehicle at the time is in no sound sense a differentiating circumstance abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one as well as by all. In this there is no similitude to a lending of a machine to another for such other's use and purpose unconnected with the general purpose for which the machine was owned and kept."

Other cases in which, under varying conditions, a parent has been held liable for the negligence of his child in the operation of the parent's car owned and used for the family convenience and pleasure, are *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775; *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224; *Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N. S.) 970; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487; *Griffin v. Russell*, 144 Ga. 275, 87 S. E. 10, L. R. A. 1916F, 216,

Ann. Cas. 1917D, 994; *King v. Smythe*, 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918F, 293; *Crittenden v. Murphy* (Cal. App.) 173 Pac. 595. In some of these cases the child was driving with other members of the family, so that the question is not exactly the same as that presented here and in *Birch v. Abercrombie*, supra, and the distinction is noticed in *McNeal v. McKain*, supra, where, in referring to the case of *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351, which held that where a father purchases an automobile for the use of his family and their pleasure and his minor son uses the car for his own pleasure, having in it neither any members nor any guests of his father's family, the relation of master and servant exists in the operation of the car by the son for his own pleasure, the Supreme Court of Oklahoma says that it is not to be understood as approving the length to which the rule is extended in that case, since it was not essential to determine that question in order to dispose of the case before the Oklahoma court. The doctrine of *Daily v. Maxwell*, supra, and of other cases in the Missouri Court of Appeals, was later overruled by the Supreme Court of Missouri in *Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C, 715, Ann. Cas. 1918E, 1127, as unsound in principle and unsupported by the weight of authority; the court saying that—

"After a careful consideration of all the authorities cited, we have reached the same conclusion, and hold that the mere ownership of an automobile purchased by a father for the use and pleasure of himself and family does not render him liable in damages to a third person for injuries sustained thereby, through the negligence of his minor son while operating the same on a public highway, in furtherance of his own business or pleasure; and the fact that he had his father's special or general permission to so use the car is wholly immaterial."

The cases cited by the defendant in error fully sustain the rules of law under which he claims the right to recover. On the other hand, there are many authorities which hold precisely the contrary. The doctrine announced in *Hays v. Hogan*, supra, which has just been quoted, is in accordance with the rules of law declared in *Doran v. Thomsen*, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677; *Van Blaricom v. Dodgson*, 220 N. Y. 111, 115 N. E. 443, L. R. A. 1917F, 363; *Parker v. Wilson*, 179 Ala. 361, 60 South. 150, 43 L. R. A. (N. S.) 87; *McFarlane v. Winters*, 47 Utah, 598, 155 Pac. 437, L. R. A. 1916D, 618; *Blair v. Broadwater*, 121 Va. 301, 93 S. E. 632, L. R. A. 1918A, 1011; *Loehr v. Abell*, 174 Mich. 590, 140 N. W. 926; *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876; *Linnville v. Nissen*, 162 N. C. 95, 77 S. E. 1096.

It seems rather a fantastic notion that a son in using the family automobile to take a ride by himself for pure pleasure is the

agent of his father in furnishing amusement for himself, is really carrying on his father's business, and that his father, as principal, should be liable for the result of the son's negligent manner of furnishing the entertainment to himself. It is said in the case of *Hays v. Hogan*, supra, that—

"The creation of the relation of master and servant should not be based upon the purpose which the parent had in mind in buying the automobile and the permissive use by a member of his family. One might keep an automobile for the use of the members of a club, the students of a certain school, the residents of a certain town, or for the general public; yet who will say, in case he permits such persons to use the machine and they injure a third party, that the relation of master and servant existed, and that, in using the automobile for one of the purposes for which it was bought, the club man or the student, or a member of the general public, was in the business of the owner, and that he is therefore, liable for their acts."

The proposition announced is that a father, by the furnishing of the means of amusement to his family, has made their amusement his business, so that each member of the family, in using for his own personal enjoyment, upon his own initiative, any of the means so furnished, though engaged exclusively in the pursuit of his own peculiar ends, without the direction, control, advice, consent, or knowledge of any other person, is still engaged, as agent, in carrying on the business of another. If the son is his father's agent to amuse himself with an automobile, he must also be a like agent for his own amusement with bicycles, horses, and buggies, guns, golf clubs, baseballs and bats, row boats and motor and sail boats, if these should happen to be provided, and if, in carrying on his father's business by the use of any of these articles, as his father's agent, to amuse his father's son, he should negligently injure any one, his father would be liable as principal. Such a refinement of reasoning has not been recognized until since the advent of the automobile or in the case of any other instrumentality. A parent who has permitted his child to have firearms or use horses for his own amusement has not been held liable for the child's negligence in using them as the father's agent. He has been held liable only for his own fault and not for the child's, and accordingly, where a son was driving a horse for his own amusement and not in his father's business, the father was not liable for his negligence. *Brohl v. Lingeman*, 41 Mich. 711, 3 N. W. 199; *Mad-dox v. Brown*, 71 Me. 432, 36 Am. Rep. 336. Where one was injured by the negligent use of a gun by a child, the parent was held liable, not for the child's negligence, but his own in permitting the gun to come into the possession of one who was incompetent to use it. *Meers v. McDowell*, 110 Ky. 926, 62

S. W. 1013, 53 L. R. A. 789, 96 Am. St. Rep. 475.

The relation of master and servant is not established by the mere fact that the purpose for which the father purchased the machine was the pleasure of the family and that he permitted his son to use it for his own pleasure. In *Doran v. Thomsen*, supra, an instruction was given which stated, substantially, that these facts would create the relation of master and servant, and the court, in commenting upon the instruction, said:

"It bases the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. The proposition ignores an essential element in the creation of that status as to third persons—that such use must be in furtherance of and not apart from the master's service and control—and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs. The reason for liability is founded on the idea of control which a master has over his servant. The court, although attempting to rest the liability upon the relation of master and servant, yet actually tested the liability by the fact that she was intrusted with the operation of the machine for her own pleasure, if purchased for that object, whereby she, ipso facto, became a servant. So that the charge thus, in fact, left the legal relation of master and servant out of account and raised it in name only, because the daughter was allowed to drive the machine. In this there was also error."

In *Parker v. Wilson*, supra, it is said:

"The meager facts before us, though interpreted with favor to the appellant, present the case of a mere permissive use of the father's vehicle by the son for his own purposes of business or pleasure. On what principle can it be said, in this state of the case, that the son was the servant of the defendant and acting within the course or scope of his employment? It seems clear that the ordinary rule of master and servant has no application to such a case, and, prior to the advent of the automobile, the contrary doctrine had no general currency in this country or England. * * * The doctrine contended for amounts to this: That the pleasure of the family, in its utmost detail, is the business of the father. As applied to the case at hand, it means that the son, in pursuit of his own pleasure, with an automobile owned by his father, was engaged in the business of the father. But the doctrine, we think, has no firm foundation in reason or common sense. In theory it overlooks well-settled principles of law; in practice it would interdict the father's generosity, and his reasonable care for the pleasure or even the well-being, of his children, by imposing a universal responsibility for their acts."

Again it is said:

"Automobiles are not to be classed with such highly dangerous agencies as dynamite or savage animals. They are not dangerous per se. Prudently driven, they are safer than the horse-drawn vehicle. But the special training needed

for their operation, though simple and easily acquired, as well as the temptation to speed which they constantly present, should impose upon owners a special degree of care in the selection of experienced and judicious drivers for them. No doubt liability will arise where the owner intrusts a machine of such dangerous potentialities to the hands of an inexperienced or incompetent person, whether child or servant. In the case of a mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner and driver—negligence of the one in intrusting the machine to an incompetent driver, of the other in its operation. No such case is presented by either the pleading or the evidence shown in this record."

The new doctrine really seems to have its origin in the belief that there should be a distinction between an automobile and other vehicles and instrumentalities, and a greater liability on the part of the owner because the danger arising from its negligent use is greater. Thus, in *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125 (which the Supreme Court later reversed), the Missouri Court of Appeals, in affirming the judgment of the trial court, said:

"We think that when an automobile * * * is being used by another member of the family than the owner, but with the owner's consent, that he should not be heard to say that such other is not his agent or servant. No dangerous rule is thus established but one in harmony with and conducive to the proper recognition of the legislative enactment."

And in *Birch v. Abercrombie*, supra, it is said:

"We think that both on reason and authority the daughter, in the present instance, should be held to be the agent of her parents in the use of the automobile. Any other view would set a premium upon the failure of the owner to employ a competent chauffeur to drive an automobile kept for the use of the members of his family, even if he knew that they were grossly incompetent to operate it for themselves. The adoption of a doctrine so callously technical would be little short of calamitous."

So in *Crittenden v. Murphy*, supra, it is said, after a quotation from *Birch v. Abercrombie*, supra:

"We are satisfied that the rule thus laid down is the correct one, not only because of the fact that the use of the machine by the son for his own pleasure was contemplated when it was purchased, but also because of the very nature of the automobile itself. While it is true that the automobile is not, in itself, a dangerous instrument, nevertheless it demands a very high degree of care and skill in its management upon the highway; and it must be recognized that, in the hands of an incompetent or reckless youth, it has immense potentiality for harm to others."

In *King v. Smythe*, supra, the Supreme Court of Tennessee said:

"It is true that an automobile is not a dangerous instrumentality so as to make the owner liable, as in the case of a wild animal loose on the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and, when moving rapidly upon the streets of a populous city, it is dangerous to life and limb and must be operated with care. If an instrumentality of this kind is placed in the hands of his family by a father, for the family's pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained. A judgment for damages against an infant daughter or an infant son, or a son without support and without property, who is living as a member of the family, would be an empty form. The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether. He must know the nature of the instrument and the probability that its negligent operation will produce injury and damage to others. We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent. If owners of automobiles are made to understand that they will be held liable for injury to person and property occasioned by their negligent operation by infants or others who are financially irresponsible, they will doubtless exercise a greater degree of care in selecting those who are permitted to go upon the public streets with such dangerous instrumentalities. An automobile cannot be compared with golf sticks and other small articles bought for the pleasure of the family. They are not used on public highways, and are not of the same nature as automobiles."

This argument may be sound enough, but it has no application to the doctrine of master and servant.

The instruction to find a verdict for the defendant should have been given.

The judgments of the Appellate Court and of the circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

CARTWRIGHT, FARMER, and CARTER, JJ. (dissenting). The opinion adopted by the majority is contrary to the weight of authority, as perhaps is sufficiently apparent from the opinion. In 20 R. C. L. 629, the conclusion of the courts on the question is stated as follows:

"Where the parent purchases an automobile for the use of his family, a child using it for his own pleasure is held by the weight of authority to be the servant of his parent in doing so, and, if in the course of his travels he negligently manipulates the machine, the act is within the scope of his employment."

The same doctrine is stated in *Berry on Automobiles* (section 653):

"The rule is followed in most of the states in which the question has been decided, that one who keeps an automobile for the pleasure and convenience of himself and his family is liable for the injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family."

In *Babbitt on Motor Vehicles* (Blakemore, 2d Ed. § 902) the same rule is stated:

"There is a class of cases where the head of a family buys an automobile for the use and pleasure of his family, and the courts incline to hold that when a car bought for family use is used for that purpose the owner is liable for negligence in its operation"—and this is followed by cases supporting the doctrine.

In section 903 of the same work, it is said the weight of authority now is that when a father provides an automobile for the pleasure of his child he is liable for the child's negligence in running the car, with this statement:

"If a father owns an automobile and permits his son to run it, the son is, as a matter of law, his agent"—citing *Winn v. Haliday*, 109 Miss. 691, 69 South. 685, in which case a son of the owner was driving an automobile with his brother and friends to a ball game.

We see nothing fantastic in these statements of the relation between the owner of an automobile furnished for general family use and a member of the family operating it in the authorized use, nor in the decisions of many courts to the same effect. The relation is not based upon the purpose which the parent has in mind in buying the automobile but upon the authorized application to the family use, and there is no similarity whatever between providing an automobile for the use of the owner's family and keeping one for use of a club, school, or general public, between whom and the owner there is no relation or obligation to furnish an automobile or anything else. Neither is there any ground for comparison between furnishing golf clubs, baseballs and bats, or the like, to be used on private grounds, and furnishing an engine-driven car to be used on the public streets and highways, where the owner must anticipate that negligence in operation may produce the most serious results.

The leading case in support of the opinion adopted in this case is *Doran v. Thomsen*, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677, which is generally cited by the courts adopting the same theory; but in *Missell v. Hayes*, 86 N. J. Law, 348, 91 Atl. 322, the court stated rules at variance with the former decision. In the later case the question was one of agency, where the son was driving his father's automobile with his mother and sister and guests, and the court said:

"It was within the scope of the father's business to furnish his wife and daughter, who were living with him as members of his immediate family, with outdoor recreation, just the same as it was his business to furnish them with food and clothing, or to minister to their health in other ways."

The refusal of the trial court to direct a verdict against the plaintiff was approved and judgment affirmed. The court said that the relation of principal and agent may be either expressed or implied, and the real question is whether the act is done with the assent of the person charged, whether expressed or implied. The court saw some ground of difference between that case and the former one, but declared that the operation of an automobile furnished by a parent for the use of his family is his business and the authority to use it may be either expressed or implied.

There is no possible ground of difference concerning liability whether there is one member of the family in the automobile or the whole family. If it is within the scope of a father's business to furnish members of his family with an automobile for family use just the same as it is his business to furnish them with food and clothing or to minister to their health in other ways, it was just as much the business of the plaintiff in error, when his son drove the automobile for his convenience, as if all the family had been riding in it. The only ground upon which it can be said that he was not liable for negligence in the operation of the automobile would be that it was none of his affair, which is not only contrary to the weight of authority but against the public interest and natural justice. It is not contended that the liability arises out of the mere fact of the relation of parent and child or upon the duty of a parent to furnish an automobile for the use of the members of his family, but it rests on the doctrine of agency, which is not confined to commercial business transactions and which arises from the fact of the parent furnishing an automobile for family use, with a general authority, expressed or implied, that it may be used for the pleasure, comfort, and entertainment or outdoor recreation of members of the family. The correct doctrine has been stated and applied in numerous cases under similar conditions to those shown by the record in this case. *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224; *Ploetz v. Holt*, 124 Minn. 169, 144 N. W. 745; *Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N. S.) 970; *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Griffin v. Russell*, 144 Ga. 275, 87 S. E. 10, L. R. A.

1916F, 216, Ann. Cas. 1917D, 994; *King v. Smythe*, 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918F, 293; *Crittenden v. Murphy* (Cal. App.) 173 Pac. 595.

(238 Ill. 29)

WISE v. WOUTERS et al. (No. 12588.)

(Supreme Court of Illinois. April 15, 1919.)

1. DEEDS §90—CONSTRUCTION.

Where a deed is so worded that the meaning is doubtful, that meaning will be adopted which is adverse to the grantor.

2. COVENANTS §70, 74—COVENANTS RUNNING WITH THE LAND — USE OF PASSAGEWAY.

Where grantee had told grantor that he could not use land without passageway, and grantor agreed to keep a 10-foot strip of the lot an "unobstructed passageway or private alley in connection with lodge hall thereafter to be constructed," the right to have the strip kept open as a passageway was a covenant running with the land, and was in no way limited or restricted by the grantor's right to abandon its intention to build a hall.

Appeal from Circuit Court, Cook County; Merritt W. Pinckney, Judge.

Bill by Alma F. Wise against Jennie H. Wouters and others. Decree of dismissal, and plaintiff appeals. Affirmed.

Brown, Brown & Brown, of Chicago, for appellant.

George W. Brown, of Chicago, for appellees.

FARMER, J. Woodlawn Park Lodge, No. 825, Independent Order of Odd Fellows, originally owned lots 5 and 6 in Towle & Evoy's subdivision of lots 1, 2, 5, and 6, block 1, second plat of Woodlawn. Said lots fronted on the west side of Woodlawn avenue, between Sixty-Third and Sixty-Fourth streets, and each was fifty feet in width. The lodge appears to have acquired the lots with a view to the erection thereon, or on a part of them, of a lodge hall. On November 11, 1915, the lodge conveyed by warranty deed to Jennie Wouters lot 5, except the south 10 feet thereof. The deed contained this provision:

"Said first party agrees that it will keep the south 10 feet of said lot 5, except the west 25 feet thereof, as an open, unobstructed passageway or private alley in connection with a lodge hall hereafter to be constructed, and said passageway or private alley shall be kept and maintained as such, as required by the ordinances of Chicago, for hall and amusement purposes."

Subsequently the lodge decided not to build a hall on the property, and sold and conveyed by warranty deed to Alma F. Wise, on January 24, 1917, lot 6 and the south 10 feet of

lot 5. This deed contained the following provision:

"The south 10 feet of lot 5 is hereby granted, with a covenant running with the land that the said grantee will keep the south 10 feet of lot 5, except the west 25 feet thereof, as an open, unobstructed passageway or private alley, subject to the conditions relating to said south 10 feet of lot 5 contained in the deed from said Woodlawn Park Lodge, No. 825, Independent Order of Odd Fellows of Illinois, to Jennie Wouters."

After the conveyance to Jennie Wouters by the lodge, she took possession of the premises and erected on lot 5 a brick building covering the entire 40 feet frontage and extending back about 54 feet. Immediately in the rear of said building she erected a garage building of seven individual garages, the garage building being about 21 feet wide north and south by 78 feet long east and west. The remainder of said 40 feet of lot 5 in front of said garages was improved with a cement pavement and furnished access to the passageway. The improvements were completed November, 1916. The brick building on the front of the lot was in part used by Jennie Wouters and her husband as a laundry distributing office, and part of it by a tailor as a tenant of the owner, and the seven garages were rented to various parties at \$7 per month each. After the conveyance to Mrs. Wise, she improved the property conveyed to her up to, but not upon, any part of the south 10 feet of lot 5, except the west 25 feet thereof. She caused to be paved the east 55 feet of the alleyway with brick laid in cement, and the remainder of it with cement blocks and cinders. Both Mrs. Wise and Mrs. Wouters used the alleyway for vehicles and otherwise for access to and ingress from the buildings in the rear of their respective premises. There were no other means of access to said buildings from any direction.

In December, 1917, Mrs. Wise notified Mrs. Wouters she intended to close up said alleyway, and proceeded to place a board fence across it. This was torn down, and Mrs. Wouters notified Mrs. Wise she would tear down any obstruction she placed in said alleyway. Thereupon Mrs. Wise filed a bill to enjoin Mrs. Wouters from interfering with the complainant's free and unrestricted use and occupation of the south 10 feet of lot 5. After answer filed, the cause was referred to a master in chancery to take the proofs and report his conclusions of law and fact thereon. The master heard the testimony and reported that the defendant to the bill had an easement in the 10-foot strip of land in question without limitation or restriction, and not dependent upon the building of a lodge hall by Woodlawn Park Lodge, No. 825; that said alley was for the joint use and benefit of Mrs. Wouters, the lodge, and those claiming under them. He recommended that the in-

junction be denied and the bill dismissed. Exceptions to the master's report were overruled by the chancellor, and the bill dismissed at complainant's costs. From that decree complainant has prosecuted an appeal to this court.

Appellant contends that the deed to defendant did not create a covenant running with the land; that the obligation to keep the 10-foot alley open was upon condition that the lodge erect a hall and maintain the alley in connection therewith, and it is contended that whatever interest defendant took in the 10-foot strip left for an alleyway was that of a mere licensee, which only attached upon the erection of the lodge hall and the opening of the alley, and could be revoked by the grantor at pleasure. We do not think this a proper construction of the effect of the deeds, both of which must be construed together. It is no doubt true that, when the deed was made by the lodge to defendant, the lodge had in contemplation the erection of a hall on lot 6, and the deed provided that the south 10 feet of lot 5, except the west 25 feet thereof, should be kept as an open, unobstructed passageway or private alley in connection with a hall thereafter to be built, and which passageway or private alley should be kept and maintained as required by the ordinances of the city. The ordinances require a lodge hall seating 800 persons to have a frontage upon two public places, one of which shall be a street, and the other, if not a street shall be a public or private alley, not less than 10 feet wide, opening directly on a public street or alley. The references to the alley in connection with a hall to be built and its maintenance as required by the ordinances were words of description, and were not a condition of the grant of the easement. That the grant of the easement was without limitation or restriction, and not dependent upon building a lodge hall, seems clear from the provisions in the deed to complainant. That deed expressly recognized that the conveyance to defendant created a covenant running with the land that the private alleyway should be kept open and unobstructed upon the conditions contained in the deed from the grantor to the defendant. The reference to the conditions in the deed to defendant could not have meant that continuance of the easement depended upon the building of a lodge hall, for the lodge, by the deed to complainant, put it out of its power to build a hall on the premises, and the deed imposed no obligation on the grantee to build a hall for the lodge.

[1] We are of opinion that the provision that the alley was to be kept and maintained was on its face an unconditional covenant running with the land. But, even if the language were ambiguous, the surrounding facts and circumstances make it clear that such was intended by the parties. Complainant's

grantor recognized and recited in its deed to her that it had by its deed to defendant created a covenant running with the land to keep the alleyway open. Where a deed is so worded that it will be understood in one way by some and in another way by others, that meaning is to be adopted which is adverse to the interest of the grantor. *City of Alton v. Illinois Transportation Co.*, 12 Ill. 38, 52 Am. Dec. 479; *United States Mortgage Co. v. Gross*, 93 Ill. 483. Where the meaning is doubtful, the doubt will be solved in favor of the grantee. *Kirby v. Wabash, St. Louis & Pacific Railway Co.*, 109 Ill. 412.

The appellant concedes that, where the terms of a deed are ambiguous, to ascertain the intention of the parties, the court will take notice of the surrounding circumstances. Some of the facts in this connection disclosed by the proof are that the lodge proposed to sell part of lot 5 to raise money to be used in building the contemplated hall, and appointed J. C. Kimball, one of its trustees, who was engaged in the real estate business, to sell the property. Kimball applied to Wouters, defendant's husband who acted as her agent in the transaction, to buy part of lot 5. The lodge would not sell the property without imposing restrictions against its use for laundry purposes, but consented a building might be erected thereon to be used as a collecting and distributing station in connection with the laundry business of defendant's husband and for other purposes. Wouters was engaged in the laundry business, and had in course of construction on West Harrison street a building with stores in front and garages in the rear. Kimball desired to know what kind of a building would be constructed on lot 5, and Wouters sent him to see the building he was constructing on West Harrison street, with which Kimball was satisfied. Wouters pointed out that he could not use the buildings he desired to construct, if he purchased lot 5, unless he had a passageway from the street to and from the rear. He made a sketch of the plans of the building he proposed if he bought the property, which required a 10-foot alleyway, and provision for it was a condition of the purchase of the property. Defendant paid \$6,700 for the property, and after acquiring it spent something over \$9,000 in improving it by the erection of buildings thereon. The building erected for garages in the rear of the one-story brick on the front 54 feet of the lot had no communication with any street, except through the private alleyway on the south side of said lot 5. After the complainant bought lot 6 and the south 10 feet of lot 5, subject to the easement, she improved the property with buildings up to the line of the south 10 feet, but never encroached upon the alleyway until December, 1917.

[2] Both parties used the alley for vehicles

to pass to and from the street to the rear of their respective premises. It was clearly the intention of defendant and her grantor that she was to have a 10-foot passageway for vehicles in connection with the use of her property, and the appellant had both actual and constructive notice of this fact. The right to have the 10-foot space kept open as a passageway for her use was a covenant running with the land, and was in no way limited or restricted by the grantor's right to abandon its intention to build a hall, and liability for its performance, or the right to enforce it, passed to the assignee of the land. *Gerling v. Lain*, 289 Ill. 337, 109 N. E. 972; *Dorsey v. St. Louis, Alton & Terre Haute Railroad Co.*, 58 Ill. 65.

The decree of the circuit court is supported by the law and the evidence, and is affirmed. Decree affirmed.

(287 Ill. 513)

DETTMER et al., Drainage Com'rs, v. ILLINOIS TERMINAL R. CO. (No. 11756.)

(Supreme Court of Illinois. April 15, 1919.)

1. WATERS AND WATER COURSES ¶78—DIVERSION OF WATER COURSE — RIGHTS OF OWNER.

Owner of land may change the channel of a water course thereon if he returns the stream to its natural channel on his own land without damage to servient land below him by causing waters of stream to flow onto or against such land, and thereby create artificial channels or flows of water out of natural channel, though he cannot deprive upper or dominant owners of their right to have old channel kept open when that would deprive them of their equal right to drainage.

2. WATERS AND WATER COURSES ¶119(3)—RIGHT OF DRAINAGE—EASEMENT.

The right of drainage through a natural water course is an easement appurtenant to each tract of land through which the water course runs, and each owner is bound to take notice of the easement possessed by other owners.

3. DRAINS ¶44—ARTIFICIAL CHANNEL—OBSTRUCTIONS.

A railroad cannot legally fill up a part of an old water course and make a new channel that is insufficient to provide for an increased flow of water that will be occasioned by needed drainage by proper artificial means and then require upper owners to pay for removing obstructions to such drainage and for an increase in amount of bridging.

4. EMINENT DOMAIN ¶2(3) — TAKING OF PROPERTY.

That an artificial drain is to be constructed enlarging the channel of a creek and making it necessary to remove a railroad's embankment at the channel would not be a taking of its property without just compensation.

5. DRAINS \Rightarrow 44 — ARTIFICIAL CHANNEL— CLEARING OBSTRUCTIONS.

A railroad claiming that an artificial channel of a creek under its bridge was the true channel because made entirely on its own property, if right in its claim, would be compelled to remove all obstructions placed there by it to make way for a drainage system, and to construct any further bridging necessary at its own expense, and to deepen the channel if contemplated by the drainage plans, as required by Levee Act, §§ 55 and 56.

6. DRAINS \Rightarrow 44—DRAINAGE DISTRICT—CONSTRUCTION—ARTIFICIAL WATER COURSE.

Where a railroad has exercised its right to change channel of a creek entirely on its own land, commissioners of a drainage district would be required to construct their ditch through such artificial channel under railroad bridge if that would afford them an efficient system of drainage, and, if not, might construct ditch through old channel of creek and require railroad to remove its obstructions there and to put in a new bridge at its own cost.

7. DRAINS \Rightarrow 41—DRAINAGE DISTRICT—CONSTRUCTION OF DITCH—COST.

The difference in cost of construction of a drainage system would only be material if it was shown that an efficient ditch through an artificial channel of a creek on a railroad's land would be at a prohibitive cost exceeding benefits, and, if no such efficient and feasible ditch could be constructed through such channel, the drainage commissioners might construct ditch in old channel of creek and through railroad's embankment.

8. DRAINS \Rightarrow 44—DRAINAGE DITCH—ARTIFICIAL CHANNELS—SUFFICIENCY.

For an opening at a railroad bridge over artificial channel of a creek to be sufficient for a drainage ditch under the law, it must not only be sufficient to carry off waters brought to it within banks of the ditch, but also sufficient to care for flood waters that would come to it after unusually heavy rainfalls which may reasonably be expected to occasionally occur.

9. DRAINS \Rightarrow 44—DRAINAGE DITCH—ARTIFICIAL CHANNEL.

A railroad cannot be legally required to construct a larger opening or more bridging than is necessary or proper for carrying the waters of a drainage system through a natural outlet, or an artificial outlet which it has substituted for the natural outlet.

10. DRAINS \Rightarrow 41 — DRAINAGE DITCH—COURSE.

Commissioners of a drainage district had the right to have a ditch cross a railroad in natural channel of a creek, and it was error to change the ditch so as to run south of a 60-foot bridge and to run across a railroad at a point where there was no natural depression or water course.

11. DRAINS \Rightarrow 43—MAIN OUTLET.

It is the duty of drainage commissioners to provide and construct a main outlet when it is required to give efficient drainage, so that a railroad required to remove its embankment so

as not to interfere with construction of a ditch might show by any competent evidence that drainage system would not have a sufficient outlet as bearing on question whether drainage system was feasible.

12. DRAINS \Rightarrow 34—DRAINAGE PROCEEDING— WATER COURSE—REOPENING CASE.

In a drainage proceeding wherein a railroad had been ordered to remove part of its embankment at an old channel of a creek and build any required bridge at its own cost, it could not reopen case to show that price of steel had been raised by the war and that government had advised it to avoid other than necessary expenses, where there was no showing that that could not have been shown earlier or that it would affect issues, as railroad could not complain of any matters prejudicial to government or the Director General, but only matters prejudicial to it.

Appeal from Madison County Court; Henry B. Eaton, Judge.

Proceedings by Henry F. C. Dettmer and others, Commissioners of Cahokia Creek Drainage and Levee District, for the organization of a drainage district, with objections to the confirmation of the report by the Illinois Terminal Railroad Company and others. Report modified and confirmed, and district declared organized by county court and the Illinois Terminal Railroad Company appeals, and the drainage commissioners assign cross-errors. Reversed and remanded.

A. M. Fitzgerald, of Springfield, George D. Burroughs, of Edwardsville, and H. S. Baker, of Alton, for appellant.

Leland B. Buckley, of Edwardsville (Charles E. Gueltig, of Edwardsville, of counsel), for appellees.

DUNCAN, C. J. Appellees, Henry F. C. Dettmer, John Steinmetz, and John Gremer, commissioners of Cahokia Creek drainage and levee district, filed in the county court of Madison county, December 11, 1916, under section 11 of the Levee Act (Hurd's Rev. St. 1917, c. 42), their report, stating among other things that they had determined the starting point, route and terminus of the proposed works and the lands to be included in the proposed drainage district, to be known as Cahokia Creek drainage and levee district, and found by their report that the lands included within the boundaries of the proposed district would be benefited by the construction of the proposed works and that the aggregate amount of benefits would far exceed the cost of the proposed works, recommended that the proposed district be organized, and asked for the confirmation of the report. Appellant and certain other landowners filed objections to the confirmation of said report. The court heard evidence and modified the report by changing the route of the proposed

ditch or drain, approved the report as modified, made the usual statutory findings, and declared the district duly organized. Both parties in this appeal prayed and were allowed appeals. Appellant, the Illinois Terminal Railroad Company, has perfected its appeal, and appellees, the drainage commissioners, have assigned cross-errors.

The scheme of the proposed district is to drain the Cahokia Creek valley. The watershed of the proposed district comprises about 213 square miles, of which about 170 square miles are above the Illinois Terminal Railroad Company's bridge and the remainder is below the bridge. Cahokia creek is a winding, tortuous stream, and by reason thereof, and because it is impeded by brush, trees, and other obstructions, does not allow a free flow of the water in time of heavy rain. It rises above the upper part of the proposed drainage district and empties into Diversion canal. The Diversion canal is an artificial ditch 100 feet wide on the bottom, constructed to carry off the water of Cahokia creek and Indian creek into the Mississippi river. Indian creek flows into the Cahokia creek above Diversion canal and below the proposed district. The Chicago & Alton Railroad bridge crosses the Diversion canal below the mouth of Cahokia creek. Diversion canal is about $2\frac{1}{2}$ miles below the proposed district. It is not proposed by appellees to deepen, widen, or otherwise improve the channel of Cahokia creek below the proposed district. The watershed of the Diversion canal district is about 258 square miles. The improvement proposed by appellees is an open ditch, which is to form an additional channel for Cahokia creek, and begins at the center of the creek, near the Chicago, Indianapolis & St. Louis Railroad, and extends to the Bohm public road northwest of Edwardsville, a distance of about 6 miles. The distance meandered by the creek channel between said two points is about 16 miles. The open ditch is to be of the average width of 30 feet for the upper half of the district and is to have a space between waste heaps for the passage of water of about 70 feet. In the easterly half of the lower portion of the district the ditch is of the average width of 40 feet with a space between waste heaps of 80 feet, and in the westerly part of the district from a point near the Springfield public road west, an average width of 50 feet with a space of 90 feet between waste heaps. The proposed improvement will provide a new channel on as straight a line as possible between the termini aforesaid. It is intended to prevent many overflows, reduce the time of other overflows, and very greatly increase the speed and discharge of flood waters through the valley and reduce the height of such flood waters. The natural channel of the creek is about 40 feet between the banks, but in time of heavy rains and freshets it leaves its banks and covers its valley. There are 3,124

acres of land in the proposed district and lying in said valley.

Appellant's railroad was constructed in 1903 and 1904, and as constructed ran north and south on a high trestle from bluff to bluff across the valley of the creek, a distance of more than a quarter of a mile. This railroad across that valley is about 3,300 feet east of and runs parallel with the Bohm road, the western terminus of the proposed ditch. The Alton public road runs northwest across the ditch and the creek at a point about one-quarter of a mile east of appellant's road, and the Springfield road runs northeast across the proposed ditch at a point about 5,100 feet east of appellant's railroad and across the creek at a point about 400 feet southwesterly of the crossing of the road and the ditch. The Wabash Railroad runs about east and west on or near the south edge of the creek valley on an embankment from 4 to 8 feet high, and crosses appellant's road a very short distance south of appellant's bridge on the south side of the creek valley, and also crosses the creek between the Alton road and the Springfield road about a half mile east of appellant's road and about 300 yards south of the proposed ditch. There is a 30-foot bridge at the crossing of the Wabash Railroad and appellant's railroad, the bottom of the opening being about 4 feet higher than the top of the bank of the creek just north of this opening.

When appellant's railroad was first constructed, a high trestle 329 feet long at the top, with an opening about 140 feet wide at the bottom, spanned the old channel of Cahokia creek, and a concrete and steel bridge with about a 60-foot opening in the clear was constructed south of the trestle and against the bluff on the south side of the creek valley. Cahokia creek runs south and west in a meandering line until it crosses the Springfield road, and then it runs in a northwesterly direction in a similar line across the Alton road and the proposed ditch against the bluff on the north side of the valley. From the latter point it meanders southwest across the valley, and after striking the bluff a few hundred feet east of appellant's road it then runs about due west to a point about 125 feet east of appellant's bridge aforesaid. Until some time after 1904 the old channel of the creek at said last point took a course north for about 400 feet, then crossed appellant's right of way in a curve to the northwest under appellant's trestle, thence curved and ran southwest to a point about 300 feet west of appellant's bridge, and then abruptly turned and flowed in a meandering line northwesterly to the Bohm road, at which point is the western terminus of appellees' ditch. A complete horseshoe in figure was thus made by the creek around appellant's right of way on the north and through its trestle and thence southwest, the toes of the horseshoe being east and west of appellant's

bridge and more than 400 feet apart. A new creek channel connecting the two points of the horseshoe was constructed by appellant about the time it completed its bridge and trestle there, thus causing the creek to run a new channel under its bridge. This new channel is all on appellant's right of way. Later it filled up the old channel running under its trestle and filled up the trestle there, making a large and high embankment. This construction did not leave sufficient opening for the water to pass through appellant's embankment, and as a consequence it caused the water above the embankment to be banked up several feet higher when the usual big rains would fall, until finally in 1915 the bridge was washed out by reason of a very heavy rain and was replaced soon after by the present railroad bridge there, which has an opening of about 104 feet at the surface of the ground and has two wings on either side of about 54 feet, making the opening at the top about 212 feet. Appellees' ditch first follows the general course of the creek, crossing it many times, and running southwesterly to its crossing on the Springfield road. It then runs about due west in a straight line to the old channel of Cahokia creek and under appellant's old trestle. After passing through appellant's embankment in the old channel, it then runs northwesterly to its terminus, at the crossing of the Bohm road and the creek. It is 80 feet wide between its banks at the surface where it passes through appellant's embankment and crosses the creek four times between appellant's road and the Springfield road, one of these crossings being on the Alton road, where there is a bridge. The ditch will carry about four times as much water as the creek channel. Appellees claim in their report that an opening of the width of 120 feet through appellant's embankment at the old channel would be required to take care of the water that would be carried through their ditch, and that the width of such opening is based upon the further assumption that the present opening under appellant's bridge 400 feet south of the old channel crossing would also be maintained.

After hearing the evidence on the objections, the court overruled all objections except that of appellant as to the location of the proposed ditch; ordered the report of the commissioners to be modified, changing the route of the proposed ditch so that its center line would pass through the embankment of appellant 138 feet north of the center of the present bridge of appellant; made a finding that the line through the embankment where the court located the ditch is in a natural depression or water course of said creek, and that it is necessary that an opening 120 feet wide north of the north pier of appellant's bridge be made through said embankment at that point, and that the present channel and opening under the

bridge be maintained. The court then made a further change in the route of the ditch by ordering it to cross the Alton road south of the junction of said public road and Cahokia creek and at a point where no natural depression or water course or bridge crossed the public road, and ordered that \$9,000 be included in the engineer's estimate of \$81,000 to pay the cost of the bridge across the ditch on the public road required by this change. The court then entered an order that appellant remove its embankment for a distance of 120 feet northwardly of the present north pier of its bridge across the entire width of the right of way down to the natural surface, so as not to interfere with the construction of the ditch or the flow of water through the same, and that any bridge built by it should have a clear span of 120 feet between its piers or abutments and to be built at its cost, and that appellant should comply with said order within sixty days after notice shall be given to it by appellees to remove said embankment, etc., as provided by statute.

Appellant complains of the order of the court in so far as it directs that it remove its embankment and build a new bridge or lengthen its present bridge at its cost, on notice of appellees. Appellees complain of the order of the court in directing the change of the course of their ditch and for its failure to approve their report and plans as submitted, on the ground that it gives them a ditch or improvement less efficient and at much greater cost. Both parties urge that the court's finding is erroneous that there is or was a natural depression or water course under the appellant's embankment where it ordered the ditch to be located and constructed. As a matter of fact, the court by its order relocated the ditch through appellant's embankment on the line contended for by it on the hearing as the one most feasible and least expensive. Appellees' engineer first recommended that the proposed ditch be constructed through the appellant's artificial channel under its present bridge and that the opening at that place be enlarged. For some reason that plan was abandoned.

[14] Appellant's real contention is that the court erred in ordering it to pay the cost of extending its bridge and removing its embankment. This argument is based upon the general proposition that its property cannot be thus taken without just compensation, and that an owner of land has a legal right to change the channel of a water course on his own land, provided he does so and returns the stream to its natural channel on his own land and without damage to the servient lands below him by causing the waters of the stream to flow onto or against the servient lands, and thereby create artificial channels or flows of water on the servient lands out of the

natural channel. The second rule of law, as contended, is a well-established rule. *Daum v. Cooper*, 208 Ill. 391, 70 N. E. 339. While this is a true proposition of law, it is to be further understood that the natural course of a stream of water cannot be thus changed so as to deprive upper landowners or owners of dominant tracts of their legal right to have the old water channel kept open when the failure to do so would deprive them of their legal right to drainage. The right of drainage through a natural water course is an easement appurtenant to each tract of land through which the water course runs, and each owner is bound to take notice of the easement possessed by other owners. *Chicago, Burlington & Quincy Railway Co. v. People*, 212 Ill. 103, 72 N. E. 219. A railroad company cannot legally fill up a part of an old water course and make a new channel that is insufficient to provide for an increased flow of water that will be occasioned by needed drainage by proper artificial means, and then insist on the upper landowners paying for removing obstructions to such drainage and increasing the amount of its bridging. Appellant took its right of way across Cahokia creek with the implied understanding that it was to so conduct its business as to meet all changing conditions required by the public welfare of society. *East Side Levee District v. East St. Louis & Carondelet Railway*, 279 Ill. 123, 116 N. E. 720. The fact that an artificial drain is to be constructed, enlarging the channel of the creek and making it necessary to remove appellant's embankment at the channel, would not constitute such a taking of its property as invades or violates the provisions of the state or federal Constitution, as contended by appellant. *Cache River Drainage District v. Chicago & Eastern Illinois Railroad Co.*, 255 Ill. 398, 99 N. E. 635; *Sanitary District v. Chicago & Alton Railroad Co.*, 267 Ill. 252, 108 N. E. 312; *Chicago, Burlington & Quincy Railway Co. v. People*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175.

[5] As the railroad company was insisting in this case that the artificial channel under its bridge is to be considered as the true channel of the creek because made entirely on its own property in accordance with its legal rights, if it is right in its contention, the law will compel it to remove all of the obstructions placed there by it if the same is required in order to give appellees an efficient drainage system, and to construct any further bridging necessary at its own expense. After those obstructions are removed, the appellees would be required to do all further work in the channel, if their plans should contemplate or provide for a further deepening of the channel there. The court by its order stated the law correctly in this regard if the drainage ditch is to be constructed through

the appellant's artificial channel and the channel enlarged. It is in accordance with section 56 of the Levee Act, which provides:

"When any ditch or drain or other work of enlarging any channel or water course is located by the commissioners on the line of any natural depression or water course, crossing the road of any railroad company where no bridge or culvert or opening of sufficient capacity to allow the natural flow of water of such ditch or water course, is constructed, it shall be the duty of the commissioners to give notice to such railroad company to construct or enlarge such bridge or culvert or opening in the grade of such road, for such ditch or ditches or other work, of the dimensions named in such notice, within twenty days from the service thereof."

This section also imposes a penalty on the railroad company if it fails to comply with the directions in such notice. Section 55 of the Levee Act provides that the corporate authorities of a railroad are required, at their own expense, to construct such bridge, culvert, or other work, or to replace any bridge or culvert temporarily removed by such commissioners in doing their work, when constructed on the line of any natural depression, channel or water course. While the court might have omitted this order and have entered it with the usual findings, as provided in section 16 of the Levee Act, still we are unable to see in what way appellant was prejudiced by this order. Appellant is only required to comply with the order when notified by the commissioners, and under the statute it is not contemplated that they shall give such notice until the right of way is acquired, the assessment of benefits and damages has been heard and confirmed, and it is definitely determined that the ditch will be constructed across the right of way of appellant and that appellees are ready to begin the construction of the ditch at or near the railroad.

[6, 7] As the railroad company must be conceded, under the law, to have the right to change the channel of the stream when it is done entirely on its own land and without prejudice to the legal rights of upper or lower landowners, appellees will be required to construct their ditch through the appellant's artificial channel under its bridge if they can obtain an efficient system of drainage for their district by so doing. If such is not possible, then their lawful right is to construct their ditch through the old channel of the creek, as provided in their report, in which case the railroad company would have to remove its obstructions there and put in a new bridge at its cost. The fact that it may cost the drainage district a trifle more to go through the artificial channel of appellant should not be considered under the evidence in this record. The proof in this case is that it will cost appellant more than \$125,000 to remove its embankment and build a new bridge over

the opening required by appellees where appellant filled up the old channel of the creek, while it will cost only about \$55,000, under the evidence, to remove the embankment and extend the bridge in accordance with the court's order. The evidence in this record should have been, but was not, specifically directed to the question whether or not an efficient drainage district could have been established by appellees by driving their ditch through appellant's artificial channel. It should be further shown that such a ditch would be practicable and feasible as well as efficient. The difference in cost of the two ditches in question would only be material in case it was shown that an efficient ditch through the artificial channel would be at a cost prohibitive—i. e., at a cost which would exceed the benefits to the lands drained. If no such efficient and feasible ditch can be constructed through the artificial channel, then appellees would be entitled to construct the same in the old channel and through appellant's embankment, if it is shown that an efficient and feasible drainage system, within the meaning of the statute, can be thus established. Under the evidence in this case we are not enabled to definitely and satisfactorily determine these questions. The evidence was mainly directed to the question whether or not the present opening under appellant's bridge and the opening under its bridge where it is crossed by the Wabash Railroad were sufficient to care for the waters passing down the valley without causing unusual and unnecessary overflows during customary heavy rains that fall in that neighborhood. According to the expert testimony of appellant's witnesses, those openings are amply sufficient to properly care for such waters; but, according to appellees' witnesses, they are entirely insufficient and will cause much overflow and damage in the valley above appellant's railroad and prevent appellees from establishing a proper and feasible drainage district.

As this judgment will have to be reversed for error, we do not deem it proper for us to discuss the weight of the evidence. We may further say, however, after considering all the evidence together and the plat of the valley and creek channel, we are rather impressed with the idea that an efficient and feasible ditch might be obtained by constructing appellees' ditch on their present plans up to the Alton public road and through the 60-foot bridge there crossing Cahokia creek; then extending the ditch in a straight line to appellant's present bridge or extending it into the creek channel a part of the way and widening the channel; then by a straight line to the artificial channel; then in a straight line, if that is desirable, northwesterly to the beginning of the final approach of their ditch and in a straight line to its terminus. This proposed ditch would come much nearer following the old creek

channel than appellees' ditch, and, while it would make a curve at the Alton public road, it would secure, according to the plats before us, a much straighter ditch after it passes west of appellant's railroad and one much more in line with the general flow of the creek at that point. There may be much in the actual conditions against our suggestion, and we only make this suggestion because there appears to be nothing in the record against it, and for that reason we are not satisfied to merely reverse this judgment with directions.

[8, 9] Before leaving this proposition, we will further say that, in discussing the sufficiency of appellant's opening at its present bridge, its counsel frequently make the declaration that said opening is clearly and conclusively shown to be sufficient to care for all the water that would be brought to it within the proposed ditch. For such opening to be sufficient under the law it must not only be sufficient to care for the waters that are brought to it within the banks of the new ditch, but it must be also sufficient to care for and properly move the flood waters that will come to it. Parties changing or restraining the flow of water must provide against the consequences of unusually heavy rainfalls which may be reasonably expected to occasionally occur, and they must also care for overflow waters that must pass through the natural waterways obstructed or lessened. *Chicago, Peoria & St. Louis Railway Co. v. Reuter*, 223 Ill. 387, 79 N. E. 166. But such parties or a railroad company cannot be legally required to construct a larger opening or more bridging than is necessary or proper for carrying the waters of a drainage system through a natural outlet or an artificial outlet substituted for the natural one. *East Side Levee District v. East St. Louis, Columbia & Waterloo Railway Co.*, 279 Ill. 362, 116 N. E. 726.

There was no evidence in the record to sustain the court's finding that there was a natural depression under appellant's embankment and that such embankment was required to be removed by appellant so as to accommodate the ditch as located by the court. But this is of no material consequence in the decision of this case. If the ditch is constructed there and it becomes necessary for the proper drainage to enlarge the opening, the embankment will have to be removed at the appellant's cost, as aforesaid, for the reasons already given, as the removal of the embankment will simply effect the necessary widening of the artificial channel, which must then be treated as the natural channel. We are not to be understood, however, as holding that this opening will be sufficiently wide to accommodate all the waters that will be carried there by the ditch or that it will not be wider than is necessary for such purpose.

[10] The court committed serious error in

changing appellees' ditch so as to run south of the 60-foot bridge over the creek on the Alton road and to run across the road at a point where there was no natural depression or natural water course. Appellees had the right to have their ditch cross this road in the natural channel under the Alton road bridge, under the evidence in this record. It has already been shown that they will be required to build a new bridge at a cost of \$9,000, and we are unable to find any reason or evidence to sustain the court in this change. It is mainly for this reason that we reverse the judgment in this case.

[11] Complaint is made by appellant that the court ruled out certain evidence tending to show that the ditch proposed by appellees and the drainage system contemplated by them would not be feasible because of the fact that the channel of the creek from the Bohm road to the Diversion canal would not be sufficient to carry off the increased amount of water that would be thrown into it in a given time, and that for that reason it would cause a backing up of the water in the ditch above appellant's bridge. It is sufficient here to state that appellant is entitled to prove by any competent evidence that the drainage system of appellees will not have a sufficient outlet, as this goes to the question whether or not appellees' drainage system is feasible. There is no positive provision in the Levee Act, as in the Farm Drainage Act (Hurd's Rev. St. 1917, c. 42, § 91), that the commissioners must provide a main outlet of ample capacity and proper construction; nevertheless it is the duty of the drainage commissioners to provide and construct such main outlet when the same is required to give efficient drainage. *Binder v. Langhorst*, 234 Ill. 583, 85 N. E. 400. No particular evidence is pointed out to us that the court excluded and which would be competent evidence for that purpose. Merely introducing plats of plans and construction of the Chicago & Alton bridge across Diversion canal would not be competent for such a purpose, particularly without showing all the conditions surrounding such bridge. The apparent purpose of the introduction of such evidence was to show that the Alton bridge had no more capacity or opening for the passage of water than the opening of appellant's bridge. Appellant's embankment and bridge were shown to be 40 feet high above the surface and 50 feet above the bottom of the channel of the creek. No attempt was made to show the conditions surrounding the Alton bridge, and such proof was not admissible merely for the purpose of comparing the size and capacity of the openings.

[12] It is finally contended by appellant that the court erred in not reopening the case after all the evidence had been taken and the cause decided by the court and per-

mitting appellant to show that the United States was at war with Germany, that the price of steel was higher by reason thereof, and that appellant had been advised by the government to avoid the expenditure of any funds other than those necessary to properly maintain its roadbed and not to attempt any work of magnitude, and that the government had or would take control of its road. No sufficient reason was shown why this evidence might not have been introduced earlier, even if it would in any way affect the issues in this case. Besides, appellant could not complain of any matter that would be prejudicial to the government or to the Director General but only of matters that would be prejudicial to it. There were no matters disclosed in appellant's affidavit showing that it would have to violate any positive order of the government to its prejudice. If it thought that the Director General would be prejudiced by the decision, it would have been more proper to have made application to have him made a party to this proceeding. We do not think the court committed error in refusing to reopen the case.

For the reasons already given, the judgment of the court is reversed, and the cause is remanded.

Reversed and remanded.

(287 Ill. 612)

PEOPLE ex rel. McCORMICK et al. v. WESTERN COLD STORAGE CO. et al.
(No. 12618.)

(Supreme Court of Illinois. April 15, 1919.)

1. MUNICIPAL CORPORATIONS \S 680, 681(8)—ORDINANCES—LICENSE TO BUILD PLATFORM OVER SIDEWALK—COLD STORAGE COMPANY—PUBLIC BENEFIT.

A city ordinance, permitting cold storage company to build a permanent elevated platform over the sidewalk in front of its premises 106 feet long and 18 feet wide, compelling pedestrians to climb four steps on one end and go down an incline 15 feet long on the other for the purpose of enabling the company to load and unload goods, is not for the benefit of the public generally.

2. MUNICIPAL CORPORATIONS \S 693—STREETS—SIDEWALK—OBSTRUCTION—PLATFORMS—PURPRESTURE—NUISANCE.

A platform erected by a cold storage company over a sidewalk, requiring pedestrians to walk up four steps and down a 15-foot incline, is a permanent and material obstruction to the sidewalk constituting a purpresture inconveniencing the public, and is a nuisance.

3. MUNICIPAL CORPORATIONS \S 680, 681(8)—STREETS—SIDEWALKS—PLATFORMS—POWER TO LICENSE OBSTRUCTION.

The city council is without authority to grant a private corporation the right to con-

struct a sidewalk $3\frac{1}{2}$ feet above grade on a public street.

4. MANDAMUS \S 7—DISCRETION AS TO GRANT—EXCUSE FOR DENYING WRIT—VIOLATION OF LAW BY OTHERS.

The court's discretion in granting a writ of mandamus is not arbitrary, and where a clear legal right is shown by the petitioning citizens for removal of a platform obstructing a sidewalk, built under authority of a city ordinance, the fact that other storage companies and the city unlawfully maintained platforms on sidewalks for many years is no reason for refusing the writ.

5. ESTOPPEL \S 62(6)—REMOVAL OF OBSTRUCTION OF SIDEWALK—ESTOPPEL IN PARS.

Where the city assumed to grant the right to a cold storage company to maintain a platform over a sidewalk and collected compensation for it, and the company expended money in building the platform under an ordinance providing for revocation at any time by mayor and council, there can be no estoppel in pais by such contract from ordering the removal of the platform by mandamus.

Appeal from Circuit Court, Cook County;
Frank Johnston, Jr., Judge.

Proceedings in mandamus by the People, on the relation of James W. McCormick and others, against the Western Cold Storage Company and others. From judgment denying the writ and dismissing the petition, the petitioners appeal. Reversed and remanded, with directions.

Ogren & Wermuth, of Chicago (W. C. Wermuth, of Chicago, of counsel), for appellants.
Burry, Johnstone & Peters, of Chicago, for appellees.

DUNN, J. Certain persons describing themselves as citizens and residents of the city of Chicago filed a petition in the circuit court of Cook county against the Western Cold Storage Company, the city of Chicago, and its commissioner of public works and superintendent of streets, for a writ of mandamus, requiring the removal of a permanent elevated platform built by the Western Cold Storage Company over the sidewalk in front of its premises on the south side of East Austin avenue. The petition alleges that the Western Cold Storage Company occupies a building at the southeast corner of North State street and East Austin avenue; that the sidewalk space on the south side of East Austin avenue is 14 feet wide, and beginning at the east line of its building and extending west the Western Cold Storage Company has built and is maintaining upon the sidewalk space a permanent elevated platform 13 feet wide, 106 feet and 1 inch long and 2 feet above the level of the sidewalk, made of heavy timbers and braces, which unlawfully obstructs the use of the public sidewalk and requires pedestrians to climb four steps from

the sidewalk level at its east end and to go down an incline 15 feet long at the west end; that the statutes of this state forbid obstructions to public highways, and a city ordinance forbids loading platforms on public sidewalk spaces; that the platform is being used by the storage company for its own convenience, in defiance of the rights of the public, and it is the duty of the defendants to remove it and restore the use of the sidewalk proper to the public.

Demurrers to the petition were overruled, and all the defendants answered. The Western Cold Storage Company in its answer alleges that it conducts a public warehouse and furnishes facilities to the public for storing food products under refrigeration, and its business is essential to the health and welfare of the public; that food products of the character housed by it are handled and sold in West South Water street, one block south of the Chicago river, and its place of business is two blocks north of that river, and it is essential that it be located in close proximity to West South Water street; that Austin avenue is largely devoted to general and cold storage warehouses, freight depots, wharves, small factories, and machine shops; that other raised sidewalks are being maintained on Austin avenue by other plants under separate licenses, and the defendant acquired its site under encouragement of the city authorities. The answer alleges that the Western News Company is located in the same block as defendant; that the defendant caused a count to be made of the persons passing over its platform, and that the average number of pedestrians passing over the platform between 7 a. m. and 6 p. m., excepting those who go to or from the plant of the Western News Company, was 36 an hour; that a greater number went to or came from the Western News Company, and that the street was practically deserted from 6 p. m. to 7 a. m. The platform was built in 1904 under a license from the city granted by ordinance, which was extended from time to time by the city council, the last extension having been passed on July 17, 1918, after this suit was begun. The license expires April 30, 1923, is subject to revocation at any time at the option of the mayor, and is subject to repeal or modification at any time by the city council. The ordinance requires the platform and the sidewalk surrounding it to be kept in repair, safe for travel, and free from snow and ice, to the satisfaction of the commissioner of public works, who also is required to approve the plans for the structure before any work on it shall be done, and shall have supervision over the completed structure. It also requires the removal of the structure at the termination of the license, either by lapse of time or the revocation of the mayor or city council, and requires a bond in the sum of \$10,000, with sureties approved by the mayor,

for the observance of the terms of the license. The license fee is fixed by the ordinance at \$213.20 a year. The answer further alleges that 18,000 teams a year receive and discharge goods at the defendant's warehouse, and the total tonnage so handled exceeds 15,000 tons a year; that many of the packages so handled are of great weight, requiring mechanical means to handle; that the receiving floor is 2 feet four inches above the street level, and by means of the platform goods are loaded on trucks and wheeled directly from wagons into the warehouse and from the warehouse to wagons; that the only other method would be the use of skids, trucks, and other devices, which would take longer and cause vastly more obstruction and inconvenience to the public than the use of the raised platform, would be slower and cause delay of teams and congestion of the street, and would make it expensive and difficult to conduct the defendant's business.

Demurrers to the answers were overruled, and judgment was entered, denying the writ and dismissing the petition. The court having certified that the validity of an ordinance was involved and the public interest so required, an appeal was taken by the petitioners directly to this court.

[1-3] This case does not differ materially from that of *Chicago Cold Storage Co. v. People*, 224 Ill. 287, 79 N. E. 692. We said there that it could not be successfully contended that—

"The purpose of the ordinance was for the benefit of the public generally. It was for the convenience of the storage company and those doing business with it at its warehouse. Nor can it be successfully contended that the platform as erected is not a material obstruction to the sidewalk, and does not place the general public to great inconvenience in the use of the same. While the ordinance provides that the sidewalk may be used for public purposes, yet in order to use it those passing over it must go up and down five or six steps at either end. If it is not a nuisance and an obstruction, then the city might authorize private parties to erect and maintain bulkheads on every street in the city, of any height. Public streets and sidewalks cannot be lawfully used for any such purpose. We are of the opinion that the platform in question was a nuisance, and such an obstruction to public travel as entitled appellees to have it removed."

Counsel for the appellees say in reference to this case that the bare legal question is discussed of the right of the city to grant a private corporation the right to construct a sidewalk 3½ feet above grade on a public street, and that the reasons for granting permission, the character of the neighborhood, the previous conduct of the parties, the necessity for the elevated sidewalk, and the circumstances surrounding the case are not shown. The case of *Tolman & Co. v. City of Chicago*, 240 Ill. 268, 88 N. E. 488, 24 L. R. A. (N. S.) 97, 16 Ann. Cas. 142, is referred

to as indicating facts which would justify granting a license to an individual to take possession of a sidewalk by building a permanent structure on it for the benefit of a private business. This was what the *Chicago Cold Storage Co. Case* held could not be done, when it was said that public streets and sidewalks cannot be used for any such purpose. It is a mistake to suppose that the *Tolman & Co. Case* modified this statement of the law. That case was a bill for an injunction to restrain the city from preventing the complainant from using skids in receiving and shipping merchandise across the sidewalk, and the opinion recognizes the correlative rights in the streets of the public and abutting owners. Neither has the right to exclude the other, any more than the traffic along one street at an intersection has the right to exclude the transverse traffic. Each has the right to the use of the street, and each must permit its use by the other. The decree directed to be entered was not one restraining any interference with the use of skids, but was one restraining an interference with the reasonable and necessary use of skids in the delivery of merchandise across the sidewalk. The platform in question is a permanent obstruction of the sidewalk, constituting a purpresture. The distinction between the temporary use of skids and the permanent obstruction by the platform is alluded to in the *Tolman & Co. Case*, where, referring to the claim of the appellees, it is said:

"It is their position that whatever interferes with the uninterrupted, unimpeded, and unobstructed use by the public of any part of the highway is a nuisance. We have seen that this position is unfounded, and that there are numerous obstructions of the public use which are lawful. The cases cited by appellees in support of this proposition are all cases of permanent obstructions in the street, constituting purprestures therein. If the action of the superintendent of streets and commissioner of public works had been directed against the permanent platforms projecting in front of the shipping doors, these decisions would apply, but they do not apply to the skids."

[4] The appellees argue that the granting or refusing of a writ of mandamus is discretionary, and that the court was justified in exercising its discretion to deny the writ. There may be circumstances under which the writ will not operate fairly, will occasion confusion or disorder, or will not promote substantial justice, and under which the court may therefore deny the writ, though the petitioner has a clear legal right. This discretion, however, is not arbitrary, but must be exercised according to legal principles, and ordinarily, where a clear legal right is shown, petitioner is entitled to the writ. The fact that all the other warehouses in the vicinity had maintained loading platforms on the sidewalk for many years is not a reason for

refusing the writ. The case of *Chicago Cold Storage Co. v. City of Chicago*, supra, was decided in 1906. The storage companies and the city were then informed that the sidewalk could not be lawfully used in this manner. The fact that both the city and the storage companies deliberately ignored the law for many years is not a reason why it should not be enforced.

[5] The appellee the Western Cold Storage Company also insists upon an estoppel in pais from the fact that the city assumed to grant the right to maintain the platform and collected compensation for it and the company expended money in building the platform. The ordinance expressly provides that the authority granted by it may be revoked at any time by the mayor or council. There can be no estoppel by such a contract.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer to the answer.

Reversed and remanded, with directions.

(287 Ill. 532)

HOWE v. BROWN et al. (No. 12591.)

(Supreme Court of Illinois. April 15, 1919.)

1. COURTS ⇨219(15)—APPEAL DIRECT TO SUPREME COURT—GROUNDS—FREEHOLD INTEREST.

Upon petition by administratrix to sell homestead real estate of deceased to pay debts, where heirs denied by answer that deceased owned land at the time of his death, the record shows that a freehold was involved, making proper ground for appeal direct to the Supreme Court.

2. EXECUTORS AND ADMINISTRATORS ⇨344—PROCEEDINGS TO SELL REAL ESTATE—TITLE—BURDEN OF PROOF.

Upon petition by administratrix to sell deceased's land to pay debts, where the answer denies deceased's ownership of the land, the burden of proving deceased's title at time of his death, and that there was a deficiency of personal property to pay debts, rests upon the administratrix.

3. EQUITY ⇨346—STALE CLAIMS—PRESUMPTION—STRICT PROOF.

Equity does not favor stale claims, and the presumption should not be indulged in their favor, but strict proof should be required.

4. EXECUTORS AND ADMINISTRATORS ⇨227(3)—CLAIMS AGAINST ESTATE—CLAIM ON JUDGMENT—VERIFICATION.

Under Hurd's Rev. St. 1917, c. 8, § 65, a judgment regularly obtained will be taken as duly proved and held valid, even though it was not originally sworn to when filed as a claim against an estate.

5. EXECUTORS AND ADMINISTRATORS ⇨340—SALE OF LAND—CLAIMS ALLOWED—APPROVAL OF ADMINISTRATOR.

Judgments on claims against an estate as shown by a record and objected to as not prop-

erly showing the consent of the administrators for their allowance *held* sufficient, if they were still due and unpaid, to justify the court in including them as a basis for the deficiency in a proceeding to sell the land to pay debts.

6. PAYMENT ⇨68(2)—CLAIMS AGAINST ESTATE—PRESUMPTION—REBUTTAL.

Where claims have been allowed against an estate for more than 20 years, the presumption that they have been satisfied will defeat a recovery on them unless rebutted by proof.

7. EXECUTORS AND ADMINISTRATORS ⇨190—WIDOW'S RIGHT TO AWARD—LACHES AND ESTOPPEL.

A widow may waive her right to an award in her husband's estate, and the doctrine of laches and estoppel applies to her claim.

8. EXECUTORS AND ADMINISTRATORS ⇨340, 341—PROCEEDINGS TO SELL LANDS—PROOF OF CLAIMS.

In a proceeding by a administratrix for an order to sell land, it is the duty of the administratrix to make proof that the claims upon which the petition was based were still unpaid and that there was an actual deficiency of personality.

9. EXECUTORS AND ADMINISTRATORS ⇨341—PROCEEDINGS FOR SALE OF LAND TO PAY DEBTS.

In proceedings to sell land to pay debts, the objection that administratrix had filed a citation against an heir alleging that he had personal property belonging to the estate, which citation is not by this record shown dismissed, and that this proceeding should not be heard before disposal of the citation, *held* without merit, where such heir, although not allowed to be examined at length on the citation, answered that he had no personal assets belonging to the estate.

10. EXECUTORS AND ADMINISTRATORS ⇨347—SALE OF LAND—DECREE—DESCRIPTION OF LAND.

An objection that petition and decree ordering sale of land to pay debts of an estate do not sufficiently identify the land is without merit, where the description is such that the land could be located and ascertained by one familiar with surveying and locating property by description.

11. DOWER ⇨69—HOMESTEAD ⇨150(1)—ASSIGNMENT OF DOWER AND HOMESTEAD INTEREST—TIME OF APPLICATION.

If intestate had a homestead estate in land, the fee in said interest descended to his heirs, subject to the widow's dower and estate of homestead, and, if not assigned before, it can be assigned more than 20 years later in proceedings to sell lands to pay debts (Hurd's Rev. St. 1917, c. 41, § 44), and, if the petitioner wishes to have the homestead interest set off and assigned, the petition should so state.

12. EXECUTORS AND ADMINISTRATORS ⇨334—VENDOR AND PURCHASER ⇨242—SALE OF LAND TO PAY DEBTS—LACHES.

Where the widow made a deed to a son in 1901 which was not recorded until 1915, it must be assumed that he purchased knowing that

the homestead estate of his father would be liable to sale for payment of debts after termination of the homestead right, and the administratrix was not guilty of laches.

Appeal from Circuit Court, Fulton County; G. W. Thompson, Judge.

Petition by Nannie E. Howe, as administratrix, against Calvin J. Brown and others. From decree for petitioner, defendants appeal. Reversed and remanded.

Harvey H. Atherton, of Lewistown, for appellants.

W. Scott Edwards and Marvin T. Robison, both of Lewistown, for appellee.

CARTER, J. This was a petition filed at the September term, 1917, of the circuit court of Fulton county by appellee, Nannie E. Howe, as administratrix de bonis non of the estate of Jacob Brown, deceased, to sell real estate to pay debts. After a hearing a decree was entered in said court in accordance with the prayer of the petition, ordering the sale of about three acres of land alleged to belong to said estate. From that decree this appeal was brought to this court.

Jacob Brown died intestate in Fulton county on July 1, 1894, leaving Priscilla A. Brown, his widow, and a number of children, including Nannie E. Howe and the appellants, as his heirs. A short time prior to his death he owned considerable real estate in said county—680 acres or more—upon which he resided with his family, and was extensively engaged in farming. He was also a member of the firm of Turner, Phelps & Co., a partnership engaged in the banking business in Lewistown, in said county. In December, 1893, this banking firm failed, and a voluntary assignment was made of the firm's assets to James M. Stewart and George K. Linton, as assignees, for the benefit of creditors, of whom there appear to have been a large number. Suits were instituted by various creditors against Brown and other members of the banking firm. In order to settle with these creditors, Brown made a conveyance of his real estate to Stewart and Linton, as assignees of Turner, Phelps & Co., reserving in said conveyance a homestead in the southeast quarter of section 20, township 4, range 3, east of the Fourth principal meridian. A short time after Brown's death, letters of administration were issued to Harvey R. Brown, one of his sons, who is an appellant here. An inventory and appraisal bill were filed, listing personal property to the amount of \$318.50, and the widow's award was thereafter fixed at \$1,710. The widow took the appraised personal property on her award, claiming the balance in cash. A number of claims were filed against the estate of Jacob Brown, most of them apparently being obligations incurred by Tur-

ner, Phelps & Co., and the record in the county court of Fulton county shows a memorandum by the court of an allowance of these claims. On September 2, 1896, Harvey R. Brown, as administrator, filed a final report, reciting that he had turned over all the property coming to his hands to the widow on her award and that there was nothing with which to pay claims. This report was approved September 21, 1896. On October 29, 1915, Nannie E. Howe, the appellee herein, filed a petition in the county court of Fulton county to have Harvey R. Brown removed as administrator on the ground that he had moved from Illinois and was a non-resident, and he was removed and appellee was appointed administratrix de bonis non of said estate June 9, 1916. No report, account, or statement showing the condition of the estate was filed by her, although she testified that she had filed an inventory; but at the time of this hearing it could not be found and no one knew where it was. At the September term, 1917, of the circuit court of said county, she filed her original petition in this case. Her second amended petition was filed in the circuit court January 23, 1918, alleging the facts above set out, including the death of Jacob Brown and the appointment of Harvey R. Brown as administrator, the allowance of the claims and widow's award; also setting out the items of claims allowed in the county court against the estate of Jacob Brown and the balance of the widow's award remaining due and unpaid; also setting up the removal of Harvey R. Brown as administrator and the appointment of appellee as administratrix de bonis non, and alleging that certain real estate belonging to Jacob Brown had not been inventoried by Harvey R. Brown; that no personal property of any kind had come into the hands of petitioner and there was none, and because of that fact she had made no report as to the personal assets to the county court; that there was a deficiency in the personal assets to pay the just claims of the estate; that at the time of his death Jacob Brown was the owner in fee of a described part of the southeast quarter of section 20, containing three acres, more or less, being that portion of the quarter section upon which his dwelling house then stood; that said homestead premises were worth not to exceed \$1,000 in value; wherefore she prayed for the sale of said real estate to pay debts. Harvey R. Brown demurred to this second amended petition, and the demurrer was overruled, and he elected to stand by his demurrer. Appellant Calvin J. Brown answered the second amended petition, denying the material allegations thereof, including the allegation that the homestead interest belonged to Jacob Brown at his death, and alleging the homestead property belonged to Calvin J. Brown, he and a brother having

purchased the same through mesne conveyances from the assignees of Turner, Phelps & Co.; that Calvin's brother had deeded his interest in said land to him; and that his mother, Priscilla A. Brown, had thereafter deeded her homestead rights to him, so that at the time of this proceeding he was the owner in fee of all said quarter section, including the homestead interest.

After the pleadings were settled, the cause was referred to a master in chancery to take and report the evidence together with his conclusions, and afterwards was re-referred. The master reported on the re-reference that Jacob Brown left him surviving a widow, Priscilla A. Brown, and seven sons, two daughters, and a grandson, the child of a predeceased daughter; that Brown a short time prior to his death was the owner in fee simple of considerable land, including the southeast quarter of section 20 heretofore described; that on January 8, 1894, he quitclaimed his interest in all said real estate to the assignees of Turner, Phelps & Co., but that his wife did not join in the deed, and that therefore the grantor's interest in the homestead right in the southeast quarter of section 20 was not conveyed by said deed, but that he died seised of said homestead interest of the value of \$1,000, and that by reason of his death his heirs became the owners in fee simple as tenants in common in said homestead, subject to the dower and homestead rights of the widow, Priscilla A. Brown; that one of the sons died intestate after the death of Jacob Brown, leaving his mother, brothers, and sisters as his only heirs at law; that at the December term, 1894, of the circuit court of Fulton county the assignees of Turner, Phelps & Co. filed a bill in the circuit court of said county asking to have the homestead and dower interests of the widow set off in said land, and a decree was entered accordingly, apparently by agreement, the heirs at law of Jacob Brown not being made parties thereto, the decree finding that Priscilla A. Brown had a homestead interest in the portion on which the dwelling house was standing on the southeast quarter of section 20 (describing it) amounting to about three acres, and that the remaining part of the southeast quarter of section 20 and the west three-quarters of the northwest quarter of section 28 be set off and allotted to Priscilla A. Brown as and for her dower in all the real estate which Jacob Brown conveyed to the assignees of Turner, Phelps & Co.; that thereafter the assignees of Turner, Phelps & Co. conveyed the southeast quarter of section 20 to Lucien Gray, subject to the terms of the deed from Jacob Brown to them, and that later Gray quitclaimed all his interest in the quarter section to Harvey R. Brown and Calvin J. Brown; that on November 30, 1901, Harvey

R. Brown quitclaimed all his interest in said premises to Calvin J. Brown; that all of these deeds were filed for record within a short time after they were executed; that on November 30, 1901, Priscilla A. Brown gave a quitclaim deed, duly executed and acknowledged on the same day, purporting to convey all of her interest in the quarter section to Calvin J. Brown; that said deed was not filed for record until June 2, 1915; that the widow's award was approved by the county court of Fulton county at \$1,710 and the personal property appraised at \$318.50; that the widow selected the appraised chattels as part of her award, the balance (\$1,391.50) of the award to be paid in money; that on November 9, 1894, a claim was allowed in said county court against the estate of Jacob Brown in favor of Solomon Horton, administrator of the estate of Ezra Horton, deceased, for \$1,178.27; that in January and February, 1896, claims were allowed in said court against the estate in favor of Laura J. Boyd for \$3,588.96, George N. Brown for \$4,600, and Thomas A. Brown for \$335.95, all as of the seventh class. The master further found that more than 20 years had elapsed since the filing and allowance of these claims, and that there was no proof that the balance of the widow's award and said claims then remained due and unpaid; that the homestead interest of Jacob Brown at the time of his death, which descended in fee simple to his heirs at law, had not been determined and set off as required by law; that there was no proof in the record on which to base a decree for the sale of the real estate described in the second amended petition; that Calvin J. Brown had been in possession of the southeast quarter of section 20 from the time he received his deeds from Harvey R. Brown and Priscilla A. Brown, and had since that time claimed to be the owner thereof and looked after all the taxes and repairs; that during these years, until her death, in 1913, Priscilla A. Brown had resided with her son Calvin on the premises.

Objections were filed to the master's report and overruled and were allowed to stand as exceptions in the circuit court. The court sustained the exceptions and entered a decree finding that proof had been duly made that there was no personal property to pay the debts allowed against the estate and that there was a deficiency in the sum of \$11,094.68, besides accrued interest and costs and expenses of administration; that Jacob Brown was seised in fee, at the time of his death, of a homestead of the value of \$1,000 in the southeast quarter of section 20, describing it; that said homestead interest was not subject to sale to pay the debts of the estate of Jacob Brown during the life of his wife, Priscilla A. Brown, who continued to reside on the premises until her death, March 8,

1913, and for that reason the statute of limitations did not run as to the debts and widow's award; that the homestead interest be sold to pay the aforesaid deficiency.

[1] The appeal has been brought to this court on the ground that a freehold is involved, as appellant Calvin J. Brown denied in his answer that Jacob Brown owned any land at the time of his death—particularly denying that he owned any homestead interest in the southeast quarter of section 20—and claimed that in any event the only homestead interest he had in the land was of the value of \$1,000, and that the proof shows, without contradiction, that the land described as the homestead interest in the petition and decree was worth at least \$1,500, and that the \$1,000 homestead interest of Jacob Brown was never allotted or determined. On this state of the record we think a freehold was involved, and that therefore the appeal was properly taken direct to this court. *Lynn v. Lynn*, 160 Ill. 307, 43 N. E. 482; *Sutton v. Read*, 176 Ill. 69, 51 N. E. 801; *Ather-ton v. Hughes*, 239 Ill. 632, 88 N. E. 199.

[2, 3] The burden of proving that the title of the real estate in question was in the deceased at the time of his death and that there was a deficiency of personal property to pay debts is upon the administratrix alleging it. *Laughlin v. Heer*, 89 Ill. 119. The burden of proof is always upon the party asserting the affirmative of a proposition. *Chicago Union Traction Co. v. Mee*, 218 Ill. 9, 75 N. E. 800, 2 L. R. A. (N. S.) 725; *Abbau v. Grassie*, 262 Ill. 636, 104 N. E. 1020, Ann. Cas. 1915B, 414. Equity does not favor stale claims. The presumption should not be indulged in their favor, but strict proof should be required.

[4] Counsel for appellants claims that under the reasoning of this court in *Ather-ton v. Hughes*, 249 Ill. 317, 94 N. E. 546, the claims from which the decree found that a deficiency existed were not properly allowed in the county court; that the claim of Laura J. Boyd was not sworn to; that, even though the administrator at that time may have consented to its allowance, it was improper, under the authorities, to allow it without its first being sworn to. We do not think this objection a valid one. Under the provisions of section 65 of the act on administration of estates (*Hurd's Stat.* 1917, p. 21), a judgment regularly obtained will be taken as duly proved and held valid, even though it was not originally sworn to when the claim was filed.

[5] Counsel for appellants also argues that the claim of George N. Brown was filed more than a year after claim day, and that there is nothing of record to show that the administrator was summoned; that, even though the court entered an order on its docket that the claim was consented to by the administrator pro tem., yet the claim does not show any indorsement or that the administrator pro tem. or any one else had any authority to

consent to its allowance; that the claim of Ezra Horton was shown by the memorandum of the judge to have been consented to by the administrator, yet his consent was not signed by such administrator. Under the reasoning of this court in *Bowen v. Bond*, 80 Ill. 351, and *Cassell v. Joseph*, 184 Ill. 378, 56 N. E. 413, we think the judgments on these claims, as shown on this record, were sufficient; if they were still due and unpaid, in accordance with what is hereafter stated, to justify the court in including them as a basis for the deficiency in the proceeding to sell land to pay debts.

[6, 7] Counsel for appellants states that it is also shown that the claim of Thomas A. Brown has been paid in full. This seems to be conceded by counsel for appellee, but it is argued that the alleged amount of the deficiency does not take into consideration the interest on any of the claims, and that if such interest were allowed the amount of the deficiency would be much larger than that specified in the decree. As the decree must be reversed for other reasons, we do not deem it necessary to discuss further the question as to the total amount of the deficiency.

It is also earnestly argued by counsel for appellants that there is no proof of any kind in the record that any of these four claims, or the balance claimed to be due on the widow's award and figured as a part of the deficiency, are still due and unpaid; that, even if these claims were properly allowed, they were allowed more than 20 years before the filing of the original petition in this case, and there is no attempt to prove, and no proof of any kind, that these claims, including the widow's award, are still due and unpaid; that this court has held that, after the lapse of 20 years, debts, of whatever degree, are presumed to have been satisfied, and this presumption will defeat a recovery on them unless rebutted by proof. *McCoy v. Morrow*, 18 Ill. 519, 68 Am. Dec. 578. This court has quoted with approval, after a review of authorities, the following doctrine:

"Independently of the statute of limitations, the law raises a presumption, in the absence of explanatory evidence, that a debt which has been due and unclaimed and without recognition or payment of interest for 20 years has been paid." *Fagan v. Bach*, 253 Ill. 588, 97 N. E. 1087.

That case is also found in Ann. Cas. 1913A, 505, with a review of the authorities in a somewhat extensive note. It would seem from an examination of these authorities that this court was right in stating in the opinion in *Fagan v. Bach*, supra, that the doctrine there laid down, heretofore quoted, was a fair statement of the law and one that is supported by the great weight of authority in England and in this country. The widow may waive her right to an award, and the doctrine of laches and estoppel applies

to said claim. *Koelling v. Foster*, 254 Ill. 494, 98 N. E. 952.

[8] Counsel for appellants argues that all of these claims against the estate of Jacob Brown, including the widow's award, are barred by the statute of limitations, as more than 20 years has elapsed since the filing of the report by the former administrator; there being no attempt in the meantime by any of the claimants to realize anything on the purported claims or to collect them. Whether that be true or not, we have no question but that it was the duty of appellee to make proof that these claims, upon which the petition was based, were still due and unpaid and that there was an actual deficiency existing, in order to justify the allowance of the decree herein. There is no such evidence in the record. These matters, in our judgment, appellee was bound to prove before she was entitled to have a decree entered on her petition ordering the sale of said land.

[9] The record also shows that appellee had filed a citation proceeding in the circuit court of Fulton county claiming that appellant Calvin J. Brown had personal property belonging to the estate of Jacob Brown. It appears from the briefs that appellee had agreed to dismiss that petition in the circuit court, and it is argued by counsel for appellants that, as this record does not show that the petition was dismissed, this proceeding ought not to have been heard and disposed of until such citation proceeding in the circuit court had been heard and decided as such a hearing might show that there were personal assets. While the court refused to allow Calvin J. Brown to be examined at length on this citation, he did answer that he had no personal assets belonging to the estate of Jacob Brown. We do not think there is merit in this argument of counsel for appellants.

[10] Counsel for appellants also argues that the trial court erred in finding that Jacob Brown owned the real estate described in the decree and ordering its sale; that the petition and decree do not sufficiently identify the property ordered sold. With this we do not agree. We think the description of the property ordered sold, both in the petition and in the decree, is sufficiently accurate so that the property could be located and ascertained by one familiar with surveying and locating property by descriptions. The description of the property seems to be the same as that of the homestead allotted to the widow, Priscilla A. Brown, when her homestead was set off to her.

[11] It is conceded by counsel for appellants that at his death Jacob Brown had a homestead interest in the southeast quarter of section 20, but he claims that such homestead interest has never been set off and allotted and therefore cannot be sold in this proceeding. If Brown had an estate of home-

stead in this property at the time of his death, there can be no question, under the authorities, that the fee in said interest descended to and vested in his heirs, subject to the widow's right of dower and estate of homestead. *Garwood v. Garwood*, 244 Ill. 580, 91 N. E. 672, and cases there cited; *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306. Brown's homestead estate, if not assigned before, can be assigned in the proceedings in the county court or probate court under petition to sell land to pay debts against the estate. *Oettinger v. Specht*, 162 Ill. 179, 44 N. E. 399; *Hurd's Stat.* 1917, § 44, p. 1081. There is nothing in the petition in this case stating that petitioner wished to have the homestead interest set off and assigned, and it would not seem necessary that the petition should so state, under the reasoning in *Oettinger v. Specht*, supra. We think, however, it is better practice to have the petition so state and pray that the homestead interest be set off when it has not been set off theretofore. There will be nothing to prevent, when this case is remanded to the county court, that court authorizing an amendment, under the statute, so stating.

[12] We do not think, on this record, that such laches has been shown against appellee as to prevent the filing of this petition to sell the homestead interest to apply on the payment of debts or claims properly owed by the estate of Jacob Brown. The deed from Priscilla A. Brown to Calvin J. Brown, while it was executed in 1901, was not recorded until June, 1915. At the time Calvin J. Brown received this deed from his mother, in 1901, it must be assumed that he knew the homestead estate of his father was liable to be proceeded against for its sale for the payment of debts after the termination of the homestead right, and that he purchased with a knowledge of that fact. *Frier v. Lowe*, 232 Ill. 622, 83 N. E. 1083. See, also, *Judd v. Ross*, 146 Ill. 40, 34 N. E. 631; *Bursen v. Goodspeed*, 60 Ill. 277. If the property described in this petition is worth more than \$1,000, then the county court, after this case is remanded, can have enough of the property allotted to equal in value \$1,000, and such part of said land can be ordered sold for the purpose of paying the debts of the estate of Jacob Brown if it is proven that any are still due and unpaid.

Several other questions have been raised in the briefs by appellants which doubtless will not arise in the same form on another hearing of this case, and we do not deem it necessary to consider or pass upon them.

For the reasons heretofore suggested, the decree of the circuit court must be reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

(237 Ill. 574)

FRITZ v. F. W. HOCHSPEIER CO.
(No. 12495.)

(Supreme Court of Illinois. April 15, 1919.)

1. MASTER AND SERVANT — 301(4)—INJURY TO THIRD PERSON—LIABILITY OF BAILOR.

Where a bailee for hire of an automobile, with a chauffeur employed by the bailor, sent it to a place different from that stated to bailor, the bailor is not liable to a party riding therein under contract with bailee injured by the negligence of the chauffeur.

2. TRIAL — 203(1)—INSTRUCTIONS—REFUSAL OF REQUEST—ERROR.

Refusal to give an instruction stating the correct rule of law and applicable to the evidence and the issue raised by a special plea is error.

Error to Appellate Court, First District, on Appeal from Superior Court, Cook County; Marcus Kavanagh, Judge.

Action by Charles Fritz against F. W. Hochspeier Company and others. From an order of the Appellate Court affirming a judgment of the superior court against the Hochspeier Company, the Hochspeier Company brings writ of error. Reversed and remanded.

Bates, Hicks & Folonie, of Chicago (W. J. Weldon and Robert J. Folonie, both of Chicago, of counsel), for plaintiff in error.

Oscar O. Miller, of Chicago (Munson T. Case, of Chicago, of counsel), for defendant in error.

CARTWRIGHT, J. The defendant in error, Charles Fritz, sued the plaintiff in error, the F. W. Hochspeier Company, together with the Chicago Railways Company, the Chicago City Railway Company, the Chicago Surface Lines, and August Hinze, in an action of trespass on the case for damages resulting from a personal injury sustained by a collision of a street car with an automobile in which the defendant in error was riding. The automobile had been hired by a society, the Schwaben Verein, from Hinze to carry a party, of which the defendant in error was a member, to a funeral at Montrose Cemetery, and Hinze had hired the automobile from the Hochspeier Company to fill the contract. The automobile was under the charge and control of Louis Neuman, a chauffeur in the employ of the Hochspeier Company, and that company and Hinze were charged with liability for the damages suffered by the defendant in error upon the ground of negligence of the chauffeur, Neuman, and the railroad companies were charged with joint liability by reason of the alleged negligence of their employes in the operation of the street car. The Hochspeier Company filed a plea of not guilty and a special plea denying

possession or control of the automobile at the time of the accident, or that Neuman was then the servant of that company. There was a trial, resulting in a verdict of not guilty as to all the defendants except the Hochspeier Company and a verdict of guilty against it. The damages were assessed at \$2,500, and judgment was entered on the verdict. The Hochspeier Company prosecuted an appeal to the Appellate Court for the First District, which affirmed the judgment, and this court granted a writ of certiorari, and the record is in this court as a return to a writ of error.

In May, 1915, August Hinze owned and operated a garage in Chicago, where he conducted a general garage and livery business, storing and hiring out automobiles. His sons, Frank Hinze, William Hinze, and August Hinze, Jr., were employed at the garage, and Frank was the manager. The plaintiff in error, the Hochspeier Company, conducted an undertaking business at another locality and also rented automobiles for funerals and other purposes. Two large automobiles of the plaintiff in error, used principally for funerals, were kept at the Hinze garage, where they were cared for, and employes washed and cleaned them at night. Louis Neuman was the chauffeur for plaintiff in error who drove one of the cars, and when not employed in running the car he stayed at the garage ready to answer a call. August Hinze and plaintiff in error were members of the Chicago Motor Liverymen's Association, and by a rule of that association, when a member received an order for an automobile which he was unable to fill, he was required to turn the order over to another member. There was a list of prices furnished each member, and where an order was turned over by one member to another, the member receiving the order made a bill for the charge to the customer, and the member who furnished the car rendered his bill to the member who took the order. If the bill was paid within 30 days the member taking the order retained 10 per cent. of the list price and paid the member filling the order 90 per cent. Hinze was a member of the society the Schwaben Verein, and its rule was to hire automobiles from its own members. On May 29, 1915, Hinze had several orders for automobiles for the next day, May 30th, which was Memorial Day, and one order was from the secretary of the Schwaben Verein for a limousine to Montrose Cemetery, to be sent to the North Side Turner Hall for members of the society. The order was received by Frank Hinze, who testified that he told the secretary that all their limousines were busy, but he would get him one. The secretary contradicted Frank Hinze in that particular, and testified that he had no notice that Hinze would not send his own car and never ascertained before the accident that the automobile did not belong to Hinze. By direction

of Frank Hinze, August Hinze, Jr., telephoned to the office of plaintiff in error and engaged two automobiles. The order was received by Catherine Feller, an employé in the office, and she testified that they were ordered to go to Forest Home Cemetery the following day, May 30th, for a funeral; that she had no information before the accident that the car was to be sent to Montrose Cemetery, and that she had before her a memorandum book in which she made a memorandum at the time. August Hinze, Jr., testified that he engaged the cars for a funeral, but no one in particular, and did not give any location to which they were to go. On May 30th one of the cars used was hired for the Schwaben Verein funeral, and the chauffeur, Louis Neuman, was directed to go to the North Side Turner Hall and pick up the society and then go to the house of the funeral and thence to Montrose Cemetery. Forest Home Cemetery is on the west side of Chicago, and Montrose Cemetery is in a different direction, at North Crawford avenue. Returning from the funeral there was a collision at Wilson and Crawford avenues between the automobile and a street car, and the defendant in error was injured.

[1] As between the defendant in error and the street railway companies, the rights, duties, and liabilities of the parties arose out of the concurrent use of a public street crossing, but as between the defendant in error and the other parties, such rights, duties, and liabilities were governed by the contract and arose out of it. The only question involved here is whether, in ruling upon such rights, the court committed error prejudicial to plaintiff in error. The verdict was in favor of the other defendants to the suit, and whatever may be said must not be understood as relating in any way to either of them. The contract between Hinze and plaintiff in error was a bailment for hire, and the law fixes the right of the parties to such a bailment. The bailee has the right to make use of the thing in accordance with the contract, but he has no right to make use of it in any other way or for any other purpose. If a bailee for a special purpose uses the property for another purpose he is liable as for a conversion, and if the use occasions injury or damage the owner is not liable. If a hired vehicle is used for a purpose different from that stipulated in the contract the driver is not the agent of the owner in using it at the direction of the hirer. *De Voin v. Michigan Lumber Co.*, 64 Wis. 616, 25 N. W. 552, 54 Am. Rep. 649; *Coggs v. Bernard*, 2 Lord Raym. 915; *Geren v. Hollenbeck*, 66 Or. 104, 132 Pac. 1164; *Fall & Miles v. McArthur*, 31 Ala. 26; *Cartlidge v. Sloan*, 124 Ala. 596, 26 South. 918; *Bryant v. Wardel*, 2 Exch. 479; *Malone v. Robinson*, 77 Ga. 719; *Columbus v. Howard*, 6 Ga. 213; *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340; *Welch v. Mohr*, 93 Cal. 371, 28 Pac. 1060; *Moore v.*

Hill, 62 Vt. 424, 19 Atl. 997; *Frost v. Plumb*, 40 Conn. 111, 16 Am. Rep. 18; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Johnson v. Weedman*, 4 Scam. 495; *Palmer v. Mayo*, 80 Conn. 353, 68 Atl. 369, 15 L. R. A. (N. S.) 428, 125 Am. St. Rep. 123, 12 Ann. Cas. 691, and note; 3 R. C. L. 109; 6 Corpus Juris, 1115.

The plaintiff in error claimed that the automobile was hired to go to Forest Home Cemetery, on the west side of Chicago, and that in violation of the contract it was sent in a different direction to Montrose Cemetery on the north side, and offered the testimony of the employé who took the order to prove the fact alleged. If the contract was that the automobile was to go to Forest Home Cemetery, Hinze, as bailee, had no right to make use of it in any other way or for any other purpose, and the plaintiff in error would not be liable for any damages resulting from the unauthorized use of the automobile. If the automobile had gone to Forest Home Cemetery the accident at North Crawford and Wilson avenues would not have occurred.

[2] The plaintiff in error asked the court to give the jury instruction No. 8, as follows:

"The jury are instructed that if you believe from the evidence that Louis Neuman was, at the time of injury to plaintiff herein complained of, in the general employ of F. W. Hochspeier Company, and that August Hinze had by his authorized employé hired from F. W. Hochspeier Company said Louis Neuman and automobile to attend a funeral at Forest Home Cemetery, and that August Hinze by his authorized employé diverted said automobile and driver to another funeral to Montrose Cemetery without knowledge or consent of F. W. Hochspeier Company, and if you further believe from the evidence that Louis Neuman with said automobile did go to Montrose Cemetery, and while returning therefrom with plaintiff in said automobile collided with a street car and injured plaintiff, then you must find defendant F. W. Hochspeier Company not guilty."

The instruction stated the correct rule of law, and was applicable to the evidence and the issue raised by the special plea, but it was refused. The plaintiff in error had a right to have the jury advised as to the law in case they believed the testimony of the employé of the plaintiff in error who took the order, and it was error to refuse the instruction. Neuman was in the general employment of plaintiff in error as chauffeur, and if he was in the service of his employer within the terms of the contract, plaintiff in error would be liable for any negligence on his part in the management of the automobile, but would not be responsible for wrongful assumption of direction and control by Hinze in violation of the contract.

Other instructions were refused, but the first one complained of was given in another, and the others were either incorrect or not applicable to the case.

The judgments of the Appellate Court and superior court are reversed, and the cause is remanded to the superior court.

Reversed and remanded.

(287 Ill. 468)

WRIGHT et al. v. BUCHANAN et al.
(No. 12593.)

(Supreme Court of Illinois. April 15, 1919.)

1. ATTORNEY AND CLIENT ¶32—EVIDENCE
¶590—WITNESSES ¶67—TESTIMONY OF
ATTORNEY—WEIGHT.

In a suit in equity against minors, testimony in their favor of their guardian ad litem, who had theretofore been, during the litigation, attorney for their father, but who did not appear in the case as an attorney after he testified, would be closely scanned and given little weight; it being improper for an attorney to testify in his own case, though he is not incompetent to testify.

2. VENDOR AND PURCHASER ¶246 — VEN-
DOR'S LIEN—NATURE.

A vendor's lien does not grow out of an arrangement between the parties, but is simply an equity raised by courts of chancery for benefit of vendors, which will be enforced or denied as exigencies of each particular case may require, and rests on the principle of natural justice that one obtaining possession of another's estate ought not to be allowed to keep it without paying the consideration.

3. EXECUTORS AND ADMINISTRATORS ¶135—
SPECIFIC PERFORMANCE ¶4 — ENFORCING
PAYMENT OF PURCHASE MONEY OF LAND.

When purchase money of land has not been paid, vendor may file bill for specific performance to coerce payment of money and subject land to sale for satisfaction, although action at law would lie upon note, and vendor's personal representative may proceed in same manner.

4. VENDOR AND PURCHASER ¶254(1)—VEN-
DOR'S LIEN—APPLICATION OF DOCTRINE.

As the vendor's lien is a creature of equity, to relieve a vendor who has parted with his land and has not been paid therefor, it arises and the doctrine is applicable in every sale and conveyance of land when the purchaser has not paid in whole.

5. VENDOR AND PURCHASER ¶281(1) — RE-
TENTION OF VENDOR'S LIEN—PRESUMPTION
AND BURDEN OF PROOF.

The law presumes a retention of a lien in favor of an unpaid vendor, unless the contract or circumstances show that a lien was purposely excluded, and the burden of establishing that it was excluded is upon the purchaser.

6. VENDOR AND PURCHASER ¶249 — VEN-
DOR'S LIEN—FORM OF CONTRACT.

A vendor's lien lies only for a debt which may be either for money, or the rendition of services, or any other available consideration, definite and ascertained, and stipulated as the equivalent of amount of purchase price on a sale of land against which lien is sought to be

enforced; the form of the consideration being immaterial, so long as susceptible of appraisal or reduction to a definite money value.

7. MORTGAGES ¶27 — CONVEYANCES—EQUI-
TABLE MORTGAGE.

An agreement, contained either in the conveyance or in a separate instrument, for annuity or the support of the grantor, will convert such conveyance or instrument into an equitable mortgage.

8. VENDOR AND PURCHASER ¶281(3)—VEN-
DOR'S LIEN—RECITATION OF PAYMENT—EF-
FECT.

The recitation of payment of consideration in a deed or other like document, executed at time of transaction, is not conclusive as against the vendor's lien, but is simply prima facie evidence of the payment, which the vendor may explain or disprove in seeking to enforce his lien.

9. EVIDENCE ¶419(2), 432—PAROL EVIDENCE
—EXPLAINING OF RECITATION OF PAY-
MENT.

The recitation of payment of consideration in a deed or other like document may be explained or rebutted by the vendor by parol testimony.

10. GIFTS ¶4, 16, 49(1) — REQUISITES —
PROOF.

The law requires that a gift, whether direct or in trust, shall be established by clear proof, that no uncertainty shall exist, either as to the subject or object of the gift, and that the transaction must be consummated, and not remain incomplete or rest in mere contention.

11. GIFTS ¶49(4, 6)—LAND — NOTES — EVI-
DENCE.

Evidence held to show that the grantor did not intend to make a gift of land conveyed by him to minor grantees, and to sustain the chancellor's finding that notes then taken by grantor were not given by him to the father of minor grantees.

12. INFANTS ¶52—NOTES ACCEPTED BY IN-
FANTS—VALIDITY.

Generally, promissory notes issued and accepted by infants are voidable, and not void, whether they are negotiable or not.

13. INFANTS ¶58(1) — VOIDANCE OF CON-
TRACT—PERSONAL RIGHT.

The right of an infant to avoid a contract is personal, and cannot be taken advantage of by an adult, with whom he deals, as an adult enters into a contract with an infant at his peril, since the infant may decline to perform his part of the agreement.

14. INFANTS ¶47 — CONTRACTS—PERFORM-
ANCE.

When an agreement between an adult and an infant has been fully performed, the adult is bound as fully and completely as if the other party had been of full age, and will be held liable for its breach.

15. INFANTS ¶58(1) — CONTRACTS—DISAF-
FIRMANCE.

In order to take advantage of minority in refusing to carry out a contract, the rule is that

the contract executed by infants must be repudiated, after the infants become of age, within the statute of limitations.

16. INFANTS ¶52—NOTES—ENFORCEABILITY.

Notes signed by two infant grantees were not enforceable against them at any time before they became of age, either to make them pay the notes in cash or to comply with a provision on the back of the notes that they might be boarded out by the grantor.

17. INFANTS ¶30(1) — VENDOR AND PURCHASER ¶265(1) — VENDOR'S LIEN—ENFORCEMENT AGAINST INFANT GRANTEES.

If infant grantees, who executed notes to the grantor after they became of age, ratified the notes or refused to agree to a cancellation of the deed, a vendor's lien would be enforceable against the land as to them, which would continue after a conveyance of land to a third person with notice of the existence of the lien, or to a mere volunteer.

18. INFANTS ¶58(2)—REPUDIATION OF CONTRACT—RESTORATION OF VALUE.

After infant grantees who had executed their notes to the grantor became of age, they could not repudiate payment of the notes without returning the value of the property for which the notes were given.

19. EXECUTORS AND ADMINISTRATORS ¶135 —REAL PROPERTY — VENDOR'S LIEN — ENFORCEMENT BY PERSONAL REPRESENTATIVES.

Where a grantor conveyed land to infant grantees for a consideration represented by their notes fixing the price, with a notation on the back thereof that they should be boarded out by grantor, lien for price might be enforced against land after grantees became of age, and on their failure to pay notes or reconvey land, by grantor's personal representatives.

Error to Circuit Court, Richland County; Charles H. Miller, Judge.

Bill by Samuel Berry, in which, after his death, Jennie Wright and others, his executors and heirs, were substituted as complainants, against Bryan J. Buchanan and others. Decree for complainants, and defendants bring error. Reversed and remanded, with directions.

H. G. Morris, of Olney (John A. MacNeill, of Olney, guardian ad litem, of counsel), for plaintiffs in error.

McGaughey, Tohill & McGaughey, of Lawrenceville, and Lewis & Lewis, for defendants in error.

CARTER, J. This is a writ of error sued out to reverse a decree of the circuit court of Richland county finding that the executors of the will of Samuel Berry, deceased, had a vendor's lien for \$2,500 against about 76 acres of land in that county. The bill was filed by Berry in his lifetime, and the testimony partially heard, including his own, before his death, which occurred during the pendency of the suit. His executors and

heirs were substituted as complainants in the bill, and a decree was thereafter rendered.

At the time of the hearing Samuel Berry was about 83 years of age. He had been a farmer all his life, and had acquired a good farm and some personal property. He was married twice, having by his first wife one son and two daughters. When his first wife died these children were grown, and one of the daughters, Sarah Pool, was married and kept house for him until his second marriage, in 1881. His second wife had been married before. She brought with her to Berry's home a youth about 16 years old, Thomas A. Buchanan, whom she had raised from the time he was 2 years old. The evidence tends to show the children of the first marriage did not get along well with the second wife and her foster son. Shortly after the second marriage, the daughter Jennie married, and she and her sister both left home and went to keeping house, with their respective husbands, on farms in the vicinity. The son also left home and was married, living and farming in the neighborhood. The foster son of the second wife, Thomas Buchanan, married 4 or 5 years after Berry's second marriage, and went to live on a farm several miles away. This left Berry and his wife without any one to help them on the farm, and Buchanan and his wife, at their request and apparently at the urgent insistence of the foster mother, moved back to the Berry farm and lived there for a considerable time, carrying on the farm and keeping house for the old people. Several of Buchanan's children were born there. The evidence also tends to show that, while Buchanan was living away from the farm, his two sons, Bryan and Council, the plaintiffs in error herein, lived with Berry and his wife during several winters, doing the chores and going to school. The evidence also tends to show that during these years the relations between Berry and the family of Buchanan were friendly.

In 1913 Berry conveyed 33 acres of his farm land, upon which his house and barn were located, to his wife, reserving a life estate in himself, and his wife on the same day conveyed this 33 acres to her foster son, Buchanan. Before that time it appears that Berry had conveyed some of his land to his daughters, retaining only in his own name the tract of 76 acres here in question. During the early part of 1915, and for some time theretofore, Buchanan had been living on the 33-acre tract and farming it, together with the 76 acres. The evidence tends to show, also, that in February, 1915, Berry decided to deed this 76-acre tract to Buchanan's two sons, Bryan and Council. These two boys were at that time 17 and 15 years of age, respectively, and were living on the farm with their parents, helping with the

farm work. Shortly before that time Berry's stock had been troubled by a dog belonging to Pool, one of his sons-in-law, and Berry told Buchanan's two sons that, in order to stop that dog interfering with the stock, they should kill it, if necessary, and he would stand by them in any trouble that arose. The young men shot the dog, and Berry sided with them in the trouble that followed with his son-in-law over such shooting.

On February 28, 1915, Berry sent word to a neighbor, who was a justice of the peace, Adam Griesemer, to come and draw some deeds for him. The justice came to the Berry home and talked matters over, but as it was late Saturday night, and the discussion had lasted until after midnight, and for fear a deed made on Sunday might not be valid, they agreed to put the matter off until Monday. On Monday, March 2, Griesemer again went to the Berry farm and drew up a deed for the 76 acres, running from Berry and his wife to Bryan and Council Buchanan. Mrs. Berry was at that time very ill and was unable to sign, so the justice signed her name to the deed and she made her mark, and the acknowledgment of both Berry and his wife was taken by the justice. Mrs. Berry died the same day. While the justice was drawing up this deed, Thomas Buchanan drew up a series of nine notes—eight for \$300 each and one for \$100. They were made payable to Berry one, two, three, four, five, six, seven, eight, and nine years, respectively, after date. On the back of each of these notes was written, "This note is to be boarded out by Samuel and Sarah Berry"; Sarah being the name of the second wife. The justice testified that Berry asked him, on the day he drew the deed, how he could draw the notes and have them secured by a mortgage in such way as to make him safe for the purchase price of the land. The justice replied that, as the boys were minors, they would have to have a guardian appointed by the court to act for them, and then the notes and mortgage could be signed by the guardian. This conversation, apparently had in the presence of the boys and Buchanan, took place in the hearing of Mrs. Berry, who was lying in bed, sick. She immediately objected, and said she didn't want it that way, and Berry said, "Well, mother, you won't be with me long, and I am going to fix it any way you want."

It is not entirely clear from the evidence who suggested putting the indorsement about boarding out the debt on the back of the notes. From the testimony of the justice it is apparent that he was not the one who originally suggested it. Buchanan and his sons testified that the suggestion was made by Berry. Berry did not remember making the suggestion, and apparently was of the opinion that it was put on by Buchanan as his own idea. All the evidence

shows, however, that it was written on the notes before they were delivered to Berry. After the notes and deed were drawn, the nine notes were signed on the face by the two boys, Bryan and Council, and, either at that time or later, Berry put his name on the back under the notation as to boarding them out. The testimony tends to show that Berry said he wanted the notes and deed put in his tin box, although Buchanan testified that the deed was delivered to him to record. It was not recorded for some time thereafter, and Buchanan testified it was finally done at the suggestion of Berry, while Berry testified that he did not so request, claiming that he never intended to have it recorded. Buchanan further testified that some weeks later these nine notes were handed to him by Berry, and that Berry stated that he was giving them to him; that he could settle the question with his two boys as to who owned the land; that they could pay the notes, and thus own the land themselves, or they could let their father have it, and thus redeem the notes. Buchanan also testified that Berry signed his name on the back of each of these notes just before giving them to him. Berry denied that he ever gave or transferred these notes to Buchanan.

The evidence seems to show that a short time after these proceedings were commenced in court Buchanan had these notes in his possession, and had them with him at the time some of the testimony in this case was being taken, but they were mislaid during the progress of the trial. At the time these notes were executed Berry was in poor health. He had a disease of the feet, which made it impossible for him to walk without assistance, and he spent most of his time in a wheel chair. In April, 1915, on account of his health, he went to a sanitarium at Olney, the county seat of Richland county, to be examined and possibly operated upon. After arriving there he sent for his lawyer, R. S. Rowland, and at his request Rowland prepared a bill of sale to Buchanan of all the personal property on the farm, which Berry signed, and at the same time assigned to Buchanan a certificate of deposit for about \$1,000.

[1] While this litigation was in progress, the trial court appointed Rowland as guardian ad litem for the two minors, Bryan and Council Buchanan. During the trial, at the guardian ad litem's suggestion and insistence, Rowland, over his own objection, was called to testify. Counsel for defendants in error also objected to his testifying, and insisted that his testimony was incompetent; that Rowland had theretofore been, during the litigation, the attorney for Thomas Buchanan. The evidence tends to show that Rowland has not appeared in the case as an attorney since he gave his testimony. This court has repeatedly said that, when an at-

torney himself furnishes, by his own testimony, evidence to help himself succeed on the trial, such evidence will be closely scanned; that while it is not proper for an attorney, in a case he is conducting, to testify on his own behalf, he is not for that reason incompetent, and if he chooses to testify he may do so, but his testimony should be given little weight. *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *Grindle v. Grindle*, 240 Ill. 143, 88 N. E. 473; *Wetzel v. Firebaugh*, 251 Ill. 190, 95 N. E. 1085; *Rice v. Winchell*, 285 Ill. 36, 120 N. E. 572. From Rowland's statement at the time he was called upon to testify it was apparent that he understood the rulings of this court with reference to an attorney testifying. In view of the circumstances under which he gave his testimony in this case, we do not think he is subject to criticism for testifying.

After treatment at the sanitarium, Berry went back to Buchanan's home, and remained there until the latter part of September of that year, when he accepted an invitation from his daughter Mrs. Wright to visit her. It seems to have been the understanding of the Buchanans that he would return soon and live with them, but he remained with Mrs. Wright until after the beginning of this litigation, and the evidence shows that he lived with his children until his death. The original bill in this case was filed October 23, 1915, by Berry, praying that the court hold that the 76-acre tract of land was subject to a vendor's lien in his favor. Shortly after Berry went to live with his daughter, he sent his son-in-law Wright, accompanied by a grandson (Mrs. Pool's son), to Thomas Buchanan to ask him for the notes here in question, and for another note for \$300 which Buchanan had signed, with one Clodfelter as surety. Buchanan told Wright, in the presence of young Pool, that all these notes were lost. He also told them that the \$300 Clodfelter note had been signed over to him by Berry. It is not claimed that Buchanan at this time told Wright that the notes here in question, given in payment of this 76-acre tract, had been given to him by Berry. Wright and the Pool boy testified that Buchanan then only claimed that these notes had been stolen and he could not produce them.

Considerable testimony was introduced by plaintiffs in error substantially to the effect that after taking these notes and executing the deed to the 76-acre tract of land Berry had made statements to the assessor and various neighbors that would indicate that he had given the 76-acre tract of land to the Buchanan boys, and that he had fixed it so that his own children would not get any more of his property, as he claimed they had not treated him right. Berry testified during this litigation, denying that he ever made any such statements. He died on January 16, 1917, leaving a will, which was duly pro-

bated, and by which he gave \$400 to one church, \$100 to another, and the balance of his estate, "if any there be," to his two daughters and son. The testimony shows, without contradiction, that no payment had been made by Bryan and Council Buchanan on any of these notes before Berry's death.

From the evidence before us it is not absolutely clear as to whether Berry, at the time these notes were executed, expected them to be paid in cash, or that he considered the transaction a closed one so far as conveying the land was concerned. It is not claimed that any part of these notes was paid by his boarding with the boys. It is quite clear from this record that during the last years of his life Berry was in poor health physically, and quite easily influenced by those with whom he was associated. His own testimony as to his intention is not entirely consistent or in harmony; neither is the testimony on behalf of the plaintiffs in error. The claim of counsel for plaintiffs in error that these notes were understood only to be paid by Berry and his wife boarding them out with the grantees in the deed is inconsistent with the testimony of Thomas Buchanan that these notes were afterward given to him by Berry, with the statement:

"You and the boys can settle this between you; the notes are yours, and the boys can redeem them by paying them off or deeding the land back and redeeming the notes."

[2] A vendor's lien does not grow out of an agreement between the parties, but is simply an equity raised by courts of chancery for the benefit of vendors of realty, which will be enforced or denied as the exigencies of each particular case may require. 39 Cyc. 1788. See, also, *Mitchell v. Shaneberg*, 149 Ill. 420, 37 N. E. 576.

"It is a general rule in equity, and it requires a very strong case to make an exception, that no man shall be compelled to part with his title till he receives the consideration; and so vigilant are the courts of equity to protect the seller, that although an absolute conveyance be made, and no mortgage or other security taken, still in the hands of the vendee, or a subsequent purchaser with notice, the vendor has a lien on the land for his money." *Dyer v. Martin*, 4 Scam. 146; *Croft v. Perkins*, 174 Ill. 627, 51 N. E. 816.

[3] The principle on which a vendor's lien is generally regarded as resting is one of natural justice—that one who gets possession of the estate of another ought not in conscience to be allowed to keep it without paying the consideration, although other grounds, such as the presumed intention of the parties or the existence of a trust between them, have been assigned. 39 Cyc. 1789. It has been held that, when the purchase money of land has not been paid, "the vendor may file his bill for a specific per-

formance to coerce the payment of the money, and to subject the land to sale for satisfaction, although an action at law would lie upon the note. *Andrews v. Sullivan*, 2 Gilman, 332 [43 Am. Dec. 53]. This being so, we can perceive no reason why his personal representatives may not proceed in the same manner." *Burger v. Potter*, 32 Ill. 66.

[4, 5] As the vendor's lien is a creature of equity, to relieve the vendor, when he has parted with his land and has not been paid therefor, it arises, and the doctrine is applicable, in every sale and conveyance of land when the purchaser has not paid in whole. The law presumes the retention of the lien in favor of the unpaid vendor, unless the terms of the contract of sale or the concomitant circumstances of the transaction satisfactorily show that the lien was purposely excluded and that the vendor relied on the personal credit of the vendee or other security. The burden of establishing this is on the vendee. 29 Am. & Eng. Ency. of Law (2d Ed.) 742, and cases cited.

[6] It is not absolutely essential that the purchase price of the land was to be paid in money. If the land be sold at a specific figure, and it is agreed mutually that certain personal services to be rendered the vendor shall equal that figure, the lien exists. The form of the consideration within these limitations is immaterial, so long as the consideration is susceptible of appraisalment at or reduction to a definite money value, as the consideration will be deemed a mere agreement as to the method in which the purchase price is to be paid, and will not divest the transaction of its intrinsic nature. The cardinal rule deduced from all the cases seems to be that the lien lies only for a debt, which may be either for money, or the rendition of services, or any other valuable consideration, definite and ascertained, and stipulated as the equivalent of the amount of the purchase price and arising out of the sale of land against which the lien is sought to be enforced. 29 Am. & Eng. Ency. of Law (2d Ed.) 743-745, inclusive, and cases cited.

[7] It has been held that an agreement, contained either in the conveyance or in a separate instrument, for annuity or the support of the grantor, will convert such conveyance or instrument into a equitable mortgage. 39 Cyc. 1792, and cases cited. The vendor's lien does not attach where land is conveyed as a gift. *Mitchell v. Shaneberg*, supra.

[8-11] It is clear, from the evidence as to what took place at the time the deed and notes here in question were executed, that Samuel Berry did not originally intend to make a gift of the land in question to Bryan and Council Buchanan, and it is quite apparent that he did not so intend in the end, because, if he had, he would not have taken their notes for any of the consideration. The

recitation of payment of consideration in a deed or other like document executed at the time of the transaction is not conclusive as against the vendor's lien, but is simply prima facie evidence of the payment, which the vendor may explain or disprove in seeking to enforce his vendor's lien, and which he can explain or rebut by parol testimony. 29 Am. & Eng. Ency. of Law (2d Ed.) 742; 39 Cyc. 1791. This court has held that the law requires that a gift, whether direct or in trust, shall be established by clear proof, and that no uncertainty shall exist, either as to the subject or object of the gift; that the act or acts constituting the transaction must be consummated, and not remain incomplete, or rest in mere contention. *Barnum v. Reed*, 136 Ill. 388, 26 N. E. 572. See, also, *Boudreau v. Boudreau*, 45 Ill. 480; *Williams v. Chamberlain*, 165 Ill. 210, 46 N. E. 250. While Thomas Buchanan testified that these notes were given to him by Berry a few weeks after they were executed, Berry positively denied that he ever gave them to Buchanan, or ever intended to give them to him. The chancellor heard this testimony, and was in better position to pass on its weight and bearing than we are. We cannot say from the record that the gift to Buchanan was so clearly established by proof that the finding of the chancellor on this question is not justified by the evidence. Indeed, the weight of the evidence and circumstances proven tend to show that these notes were not given to Buchanan by Berry.

Counsel for plaintiffs in error suggest that, as defendants in error had an adequate remedy at law to recover on these notes, equity would not have jurisdiction to give the relief prayed for in this bill. It is the settled law in this state that, when the purchase money of land has not been paid, the vendor may file his bill for specific performance and subject the land to sale and satisfaction, even though an action at law would lie upon the note. *Andrews v. Sullivan*, supra. See, also, *Burger v. Potter*, supra; *Robinson v. Appleton*, 124 Ill. 276, 15 N. E. 761; *Winter v. Trainor*, 151 Ill. 191, 37 N. E. 869.

[12-15] Counsel for plaintiffs in error also argue that the decree in this case is wrong, because it is entered against minor defendants. The record shows that Bryan Buchanan was 19 years of age at the time the bill was filed, but became of age during the litigation; that Council Buchanan will not be of age until some time during 1919. They also argue that the decree was wrong in holding these notes void and not voidable. The general rule is that promissory notes issued and accepted by infants are voidable, and not void; and this is so, whether they are negotiable or not. 16 Am. & Eng. Ency. of Law (2d Ed.) 284, and cases cited. The right of an infant to avoid a contract is personal, and cannot be taken advantage of by an adult with whom he deals. The adult enters into a

contract with an infant at his peril, for the infant may decline to perform his part of the agreement. When an agreement has been fully performed, the adult is bound by the contract as fully and completely as if the other party had been of full age, and the adult will be held liable for its breach. In order to take advantage of minority in refusing to carry out a contract, the weight of authority is that the contract executed by infants must be repudiated, after the infants become of age, within the statute of limitations. 16 Am. & Eng. Ency. of Law (2d Ed.) 296-299, inclusive.

[16-18] It is clear under these authorities that these notes signed by the two Buchanan boys during their minority could not be enforceable against them any time before they were of age, either for the purpose of making them pay the notes in cash or to comply with the provision on the back of the notes that they might be boarded out. If, however, after they became of age, the notes were ratified by them, or they refused to agree to a cancellation of the deed to the land here in question, then a vendor's lien would be enforceable against the 76-acre tract of land as to them. 39 Cyc. 1800; *Weed v. Beebe*, 21 Vt. 495; *Grace v. Whitehead*, 7 Grant's Ch. (Upper Can.) 591; 16 Am. & Eng. Ency. of Law (2d Ed.) 290. And the lien would continue after the conveyance of the land to a third person with notice of the existence of the lien, or to a mere volunteer. 39 Cyc. 1800. After the boys became of age they could not, under the authorities, repudiate the payment of these notes without returning the value of the property for which the notes were given. *Grace v. Whitehead*, supra.

[19] It is clear from, what took place at the time the deed for this tract of land was executed and the notes signed by the Buchanan boys, that Berry did not intend to give the land to the boys outright, without any money consideration or its equivalent being paid by them. The evidence, in our judgment, shows beyond question that he intended to deed it to them for a consideration of \$2,500, and planned to take notes and a mortgage back for that consideration. Possibly, in view of the testimony in this record, he thus planned for the purpose of putting the title of the land in such condition that his own children could not obtain it after his death. When he found from the justice of the peace that there would have to be a guardian appointed by the court for the minors, in order to make the mortgage and notes valid, and his wife objected, he de-

cided, because of her extreme illness and his desire to please her, not to follow that plan, but to take the notes, signed by the boys only, without appointing a guardian, whether the notes thus executed were legal and valid or not, and the amount of these notes was a definite fixing of the amount of the purchase price; and this was so, even though Berry finally agreed to accept the condition on the back that they should be boarded out. We think, under the authorities, the lien for the amount called for by the notes can be enforced against the 76-acre tract of land.

As the payment of these notes could not be legally enforced personally against the Buchanan boys until after they became of age, it would seem, under the liberal rules laid down by the authorities as to the enforcement of a vendor's lien, that the personal representatives of the deceased vendor should have this lien on the land until the notes are enforceable. The whole question of the vendor's lien and the rights of these minors is here in a court of equity, and the two Buchanan boys cannot legally convey the land until they become of age, and if they attempt to convey it thereafter, the lien should follow the land in the hands of the grantee. If they do not dispose of it, but retain the land until after they become of age, they should be compelled to reconvey the land or to pay the notes, or the lien should be enforced for the value of the notes against the land. In accordance with these principles of equity, the lien, although it will continue to exist against the land until both the Buchanan boys become of age, should not be enforced by sale of the land until they become of age and thereafter refuse or neglect to reconvey said land or pay the amount due on these notes. The decree of the circuit court should so provide, and should also provide, and in terms state, that the vendor's lien shall exist against this land until these notes are paid, and should also provide that if the land is not reconveyed, or these notes are not paid, before or within a reasonable time after the Buchanan boys both become of age, then that the circuit court, on the filing of a supplemental bill and a hearing thereon after due notice to all parties hereto, may enter an appropriate order or decree for the enforcement of the lien by the sale of the land in question.

The decree of the circuit court is reversed, and the cause remanded to that court, with directions to modify the decree as herein provided.

Reversed and remanded, with directions.

(287 III. 401)

PEOPLE v. PORTER. (No. 12560.)

(Supreme Court of Illinois. April 15, 1919.)

1. TAXATION \S 879(1) — INHERITANCE TAX
—CONVEYANCE INTENDED TO TAKE EFFECT
AFTER DEATH.

Generally conveyance intended to take effect in possession or enjoyment after donor's death is subject to inheritance tax, under Hurd's Rev. St. 1917, c. 120, § 1, though such intention is not evidenced in writing.

2. TAXATION \S 879(1) — INHERITANCE TAX
—“CONTEMPLATION OF DEATH.”

A gift made when donor is looking forward to his death as impending, and in view of the impending death, is made in contemplation of death, within Hurd's Rev. St. 1917, c. 120, § 1, imposing inheritance tax upon property transferred in contemplation of death.

3. TAXATION \S 879(1) — INHERITANCE TAX
— CONVEYANCE IN “CONTEMPLATION OF
DEATH.”

Where grantor's contemplation of death was the impelling motive causing him to make conveyance, the transfer is subject to an inheritance tax, under Hurd's Rev. St. 1917, c. 120, § 1, although no evidence of that motive appears in the deed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contemplation of Death.]

4. WORK AND LABOR \S 7(1) — COMPENSA-
TION FOR SERVICES—FAMILY RELATIONSHIP.

Where parties live together as members of one family, the law does not imply a contract on the part of one to pay for the services rendered by another, the presumption being that such services are rendered gratuitously.

5. WORK AND LABOR \S 7(1) — COMPENSA-
TION FOR SERVICES—BURDEN OF PROOF.

A member of a family can recover for services rendered another member of a family only by proving the making of an express contract, or circumstances from which a reasonable inference would arise that such contract was in fact made.

6. CONTRACTS \S 76 — CONSIDERATION —
MORAL OBLIGATION.

A moral obligation does not suffice for a consideration unless it was once a legal obligation.

7. DEEDS \S 17(5) — CONVEYANCES — PAST
CONSIDERATION.

A father's conveyance of land to son who had, without compensation, performed services for father, was without a consideration based upon a legal obligation, where there was no contract that son should receive such property or other remuneration for such services.

8. TAXATION \S 879(1) — INHERITANCE TAX
—“CONTEMPLATION OF DEATH.”

Conveyance by father 75 years of age and in feeble health to son, where father remained in possession until his death, about a year thereafter, and continued to receive the profits and pay the taxes during such time, was made

in contemplation of death, with intent to have it take effect in possession or enjoyment at death, within Hurd's Rev. St. 1917, c. 120, § 1, imposing an inheritance tax upon such a transfer of property.

Appeal from County Court of Warren County; L. E. Murphy, Judge, presiding.

From an order of county court fixing inheritance tax upon the estate of J. Thatcher Porter, deceased, the People of the State of Illinois appeal. Reversed and remanded, with directions.

Edward J. Brundage, Atty. Gen., Floyd E. Britton, of Springfield, and George O. Hillier, of Bushnell, for the People.

J. N. Thomas, of Monmouth (E. P. Field, of Monmouth, of counsel), for appellees.

STONE, J. This is an appeal by the people from the order of the county court of Warren county fixing the inheritance tax on the estate of J. Thatcher Porter, deceased. The principal question involved is whether the conveyance in the lifetime of the deceased of 200 acres of real estate to Alvin Porter, his son, is subject to an inheritance tax under the laws of the state.

J. Thatcher Porter died intestate on September 13, 1917. At the time of his death he was seised and possessed of real estate and personalty, over and above indebtedness, amounting to about \$97,000, on which the county court assessed an inheritance tax as provided by law. The court held the 200 acres deeded to Alvin Porter were transferred as compensation for services rendered by him to the deceased, and that the conveyance was based upon a full and valuable consideration, and that the property, and the conveyance thereof, are not subject to the assessment of an inheritance tax. The transfer of the 200 acres to Alvin Porter is dated April 6, 1916.

Appellant contends, first, that the conveyance was made in contemplation of death, and that this was the impelling motive causing the grantor to make the conveyance in spite of the fact that it may have been made to compensate the grantee for services rendered, and that while the sense of obligation contributed to the gift such was not the impelling motive; second, that the conveyance was intended to, and did, take effect after the death, and that such consideration as was present was but a moral obligation, and not a legal one, and did not take the transfer out of the terms, spirit, or meaning of the statute.

It appears from the evidence that the grantor at the time of this conveyance was about 75 years of age, feeble, afflicted with disease, and subject to sinking spells, pre-

sumed to be the result of heart trouble. The testimony tends to show that for two years previous to his death his health was such that death might be expected to occur at any time; that at the time of the conveyance in question, and for some time previous thereto, he was under the care and treatment of a physician; that his health gradually failed until his death, on September 13, 1917. The evidence further tends to show that Alvin Porter, who was 47 years of age, had remained at home with his parents and managed the farm of some 480 acres, including the land in question, for his father up to the time of his father's death. There was no change in possession of the 200 acres in question until after the death of the grantor. The grantee stated that in his opinion this conveyance was made in contemplation of death, and not to take effect in possession until after the death of the grantor, but that the conveyance was made for the purpose of compensating him for services rendered to the grantor in his lifetime. Alvin received none of the proceeds from this land until after the death of his father, although the management of the land was under his control and direction, with the other lands then owned by his father. The father received the profits and paid the taxes and operating expenses from the proceeds. The testimony further tends to show that it was the understanding between Alvin and his father that the business should be conducted just the same as it had been prior to the conveyance, until the death of the grantor. The evidence fails to show any specific agreement or understanding between Alvin and his father concerning any compensation to be paid to Alvin for his services, he testifying that at the time he performed the services he believed his father would do the right thing under the circumstances. The evidence shows the value of the land to be \$38,000. There is evidence showing, or tending to show at least, that the fair value of services rendered by Alvin to his father since his majority to the date of the conveyance approximates the fair cash market value of the land in question at the time of the conveyance.

That portion of section 1 of the statute concerning tax on gifts, legacies, inheritances, transfers, etc., is as follows:

"A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom, in trust or otherwise. * * * 3. When the transfer is of property made by a resident * * * by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death." Hurd's Stat. 1917, p. 2500.

[1] The general rule with relation to the assessment of an inheritance tax is that

where the conveyance is intended to take effect in possession or enjoyment after the death of the donor it is subject to an inheritance tax, and this even though the intention of the parties is not evidenced in writing. *People v. Estate of Moir*, 207 Ill. 180, 69 N. E. 906, 99 Am. St. Rep. 206.

[2] "A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking forward to his death as impending, and in view of that event, is within the language of the statute." *Rosenthal v. People*, 211 Ill. 306, 71 N. E. 1121. So, also, it was held in *Estate of Merrifield v. People*, 212 Ill. 400, 72 N. E. 446, that where property is conveyed without consideration though by an absolute deed, followed by enjoyment and possession by the grantee during the grantor's life, such transfer is taxable under section 1 of the inheritance tax law, if the transfer was made in the contemplation of the death of the grantor. It was held in *In re Estate of Benton*, 234 Ill. 366, 84 N. E. 1026, 18 L. R. A. (N. S.) 458, 14 Ann. Cas. 107, that a gift made in contemplation of death, as expressed in the inheritance tax law, is not restricted to a gift causa mortis, but includes gifts inter vivos if they are made when the donor is looking forward to his death as impending, and made in view of that event, for the purpose of placing his estate, or some part thereof in the hands of the person whom he desires to enjoy it after his death. In the case of *People v. Carpenter*, 264 Ill. 400, 106 N. E. 302, the words, "in contemplation of death," used in the inheritance tax statute, are held to mean, not the general expectation of all rational mortals that they will die some time, but an apprehension of death arising from some existing infirmity or impending peril. In *People v. Burkhalter*, 247 Ill. 600, 93 N. E. 379, 139 Am. St. Rep. 351, the rule is laid down that where transfers of property take effect in possession and enjoyment during the lifetime of the grantor they are not subject to an inheritance tax unless the grantor's contemplation of death was the impelling motive which caused him to make such transfer.

[3] If such was the impelling motive the transfers are subject to the tax, and this though no evidence of that motive appears in the deed. In the case at bar the county court found that there was a full and adequate consideration for the transfer in question, and held that by reason of such full and adequate consideration the inheritance tax statute is not applicable. In *People v. Grendorff*, 262 Ill. 246, 104 N. E. 656, the rule is laid down that only the beneficiary's interest passing from the decedent to the heir as a result of the death is taxable, and that an absolute transfer of property made in good faith for a valuable consideration, and

not made in contemplation of death, is not subject to the inheritance tax.

It is contended on the part of the appellee that the transfer in question was for a valuable consideration, and that, even though made in contemplation of death and the enjoyment and possession thereof postponed until the death of the grantor, such transfer is, nevertheless, not subject to an inheritance tax. Were such to be held to be the rule we can see no application of it where there does not appear to have been a valuable consideration moving from the grantee to the grantor.

[4] The rule is that where parties live together as members of one family the law does not imply a contract on the part of one to pay for the services rendered by another, but the presumption arising from the relation is that such services are rendered gratuitously.

[5] In such a case there can be a recovery only by proving the making of an express contract, or circumstances from which a reasonable inference would arise that such a contract was in fact made.

[6] A moral obligation does not suffice for a consideration unless the moral obligation was once a legal one. *Finch v. Green*, 225 Ill. 304, 80 N. E. 818.

Appellee relies on the case of *Legate v. Legate*, 249 Ill. 359, 94 N. E. 498. That case was a bill in chancery reforming a deed executed by Israel Legate to Sarah Legate, his sister. The opinion in that case is based on the finding of the court that Israel intended to convey certain property, and that the property was left out of the deed through a mistake of the scrivener, and that there was a valuable consideration for the conveyance. The rule is, however, laid down in that case that where members of a family reside together, and some of them render services for others, the presumption of law arising from the relation is that such services are rendered gratuitously, and that no recovery can be had for such services without proving an express contract, or circumstances from which the law would imply a contract.

[7] In this case the evidence of the appellee shows that there was no contract that he should receive either the property in question or any other financial gain for his services, and we are of the opinion that no consideration based upon a legal obligation existed.

[8] This being true, and it appearing from the statements of the appellee himself as well as from other evidence in the record that the transfer was made in contemplation of death, and the enjoyment and possession thereof postponed until the death of the grantor, such transfer and the property therein involved are subject to an inheritance tax.

The county court found the fair cash market value of the 200 acres of land to be, at

the time of the transfer, \$36,000. Upon a review of the evidence we are of the opinion that said finding was justified.

The cause will therefore be remanded to the county court, with directions to enter an order assessing an inheritance tax against the property on the basis of the value of the same found by the court and in accordance with the statute in such case made and provided.

Reversed and remanded, with directions.

(238 Ill. 16)
CHICAGO & A. R. CO. v. LANGER.
(No. 12582.)

(Supreme Court of Illinois. April 15, 1919.)

1. RAILROADS §68—GRANT OF RIGHT OF WAY—UNCERTAINTY OF DESCRIPTION—POSSESSION.

When railroad to which landowner had granted right of way 100 feet in width, described too indefinitely to be located, constructed its track through the land, objection of uncertainty of description was removed by action of parties to extent alone that actual possession was taken under deed.

2. DEEDS §38(1)—UNCERTAINTY OF DESCRIPTION.

Where the premises in a deed are so described that they cannot be identified, the conveyance is void.

3. ESTOPPEL §93(5)—INSUFFICIENCY OF DESCRIPTION—POSSESSION—EXECUTION OF PROPER DEED.

Where grantee, in deed insufficiently describing the lands, by the consent of the grantor is permitted to take possession of premises within general terms of description, and occupy and make permanent improvements upon them, grantor will be estopped to urge uncertainty of description, and equity will compel execution of deed properly describing lands intended.

4. ADVERSE POSSESSION §100(4)—COLOR OF TITLE—EXTENT OF POSSESSION.

Where one enters upon realty under color of title, his possession is not regarded as limited to portion of premises which he actually occupies, but extends to all lands included in instrument under which he claims, a rule which has no application where deed of possessor does not definitely describe any property.

5. RAILROADS §68—CONVEYANCE OF RIGHT OF WAY—DESCRIPTION—OCCUPATION.

Where railroad, granted right of way for its track 100 feet in width by description too indefinite to locate land, laid its tracks through the land, its right of way must be held to include space occupied by rails, ties, switches, side tracks, ditches, etc., with means of ingress and egress on both sides, such as are reasonably necessary for operation and maintenance of road in customary way.

6. DEEDS @38(4)—DEFECTIVE DESCRIPTION—CONVEYANCE OF NUMBER OF ACRES.

Conveyance of certain number of acres out of a larger tract is wholly insufficient to designate any tract of land that can be located, and the description is so defective that no title passes.

7. RAILROADS @68 — GRANT OF RIGHT OF WAY—DESCRIPTION.

Deed conveying to railroad strip of land through tract for right of way, without definitely describing location, but calling for 100 feet in width, did not give road right to choose exact location of way, and is not presumed to extend an equal distance on either side of center line of tracks as located, but only to include space actually occupied.

Error to Circuit Court, Greene County; Frank W. Burton, Judge.

Action of ejectment by the Chicago & Alton Railroad Company against John Langer. To review a judgment for defendant, plaintiff brings error. Affirmed.

T. I. McKnight, of Carrollton, and Chapman & Du Hadway, of Jerseyville (Silas H. Strawn, of Chicago, of counsel), for plaintiff in error.

F. A. Whiteside, of Carrollton, for defendant in error.

DUNN, J. The Chicago & Alton Railroad Company brought an action of ejectment in the circuit court of Greene county against John Langer to recover the possession of a parcel of land 19 feet wide north and south and 67.8 feet long east and west, lying on the north side of the plaintiff's railroad. The cause was tried by a jury, and at the close of the evidence the court instructed the jury to find the issues for the defendant, and entered judgment against the plaintiff, which has sued out a writ of error.

Several questions have been argued, but the only one necessary to be decided is whether the plaintiff in error showed any title to the land. The land in question is a part of the northwest quarter of section 28, in town 10, range 13, in Greene county. On October 12, 1883, William B. Farrow owned this quarter section, except a strip off the east side of it, and on that day he executed a quitclaim deed conveying to the Litchfield, Carrollton & Western Railroad Company:

"A right of way of 100 feet in width for so much of said railroad as may pass over or through the following described real estate: Near the southeast corner of the northwest quarter of section 28, thence due west three-fourths of a mile, thence to the northwest corner of section 29, suitable ground for depot of two acres, * * * situate in the county of Greene and state of Illinois."

Afterward, in the same year, the grantee built its railroad across the northwest quar-

ter of section 28, and the track has ever since been where it now is. The property of the Litchfield, Carrollton & Western Railroad Company was afterward acquired by the plaintiff in error. Farrow continued to own the adjoining land in the northwest quarter of section 28 until his death, in 1891, and his interest in the quarter section was sold by his administratrix, under an order of the county court, to his son, Dellis Farrow, through whom the defendant in error derives his title.

The description in William B. Farrow's deed to the railroad company did not describe any specific tract of land. There were no words indicating on what part of the quarter section the right of way was to be located, except that it was to begin near the southeast corner and run due west three-fourths of a mile. This would locate it near the south side of the quarter section, but the description was still so indefinite that the precise boundaries cannot be located.

In Illinois Central Railroad Co. v. O'Connor, 154 Ill. 550, 39 N. E. 563, the owner of a tract of land in a certain quarter section conveyed to the railroad company "the right of way over and through said tract, said right of way to comprise land of the width of 200 feet." The railroad company soon after inclosed with a fence 50 feet on either side of its main track. Some years later the railroad company took down the west fence and erected a new one 50 feet further from the track. Afterward the grantee of the original owner brought an ejectment suit against the railroad company for the 50-foot strip thus taken possession of by the railroad company, which claimed an easement in it for the right of way for its railroad. The court said:

"The first question suggested upon a consideration of the facts agreed upon by the parties is: Has the defendant shown any title whatever to such an easement over this land? Its deed from Harbord did not, by its description, state out of what part of the tract the 200 feet for right of way should be taken, nor did it convey, as is sometimes done, a certain number of feet on either side of the center of the track. Therefore, until the grantee, by some act on its part other than the mere location of its track, designated the land claimed by it under the deed, no easement was acquired over any particular land. But when the company came to assert its rights under its deed it took no possession of this piece of land, nor, so far as the agreed facts show, did it in any way indicate that it claimed an easement over it. The deed itself did not specifically convey this 50 feet, nor did the grantee, in exercising its rights under it, assert any title whatever thereto, but, on the contrary, in taking possession under its deed excluded it—fenced it out of its right of way. There is nothing in the facts of the case tending to show that it by act or declaration construed its deed to include this land for more than 30 years after its date and taking possession under it."

[1-4] When the plaintiff in error, with the consent of William B. Farrow, its grantor, constructed its track through the quarter section, the objection of uncertainty was removed by the action of the parties to the extent that actual possession was taken under the deed, but only to the extent of such actual possession. Where the premises in a deed are so described that they cannot be identified, the conveyance is void. Where the grantee, by the consent of the grantor, is permitted to take possession of premises within the general terms of the description, and occupy and make permanent improvements upon them, the grantor will be estopped to urge the uncertainty of the description, and a court of equity will compel the execution of a deed properly describing the lands intended. *Purinton v. Northern Illinois Railroad Co.*, 46 Ill. 297. The plaintiff in error cannot claim to have taken possession of any part of the premises which it did not actually occupy. Where one enters upon real estate under color of title, his possession is not regarded as limited to the portion of the premises which he actually occupies, but extends to all the lands included in the instrument under which he claims. The plaintiff in error, however, can derive no benefit from this rule, because the instrument under which it claims includes no lands, for the reason that it does not definitely describe any property. The location of the 100 feet in width was not given with sufficient certainty to identify any land.

[5] There is no evidence tending to show that the plaintiff in error ever took actual possession of the land in controversy. It was never inclosed in the right of way by a fence, it was never used by the railroad company in any way, and its nearest point was over 30 feet from the center of the railroad track. While the evidence shows that the railroad company was permitted to construct its track over the quarter section, there are no circumstances which tend to show that the location of the right of way was more definitely agreed upon than it is described in the deed. The construction of the track established the line, and the right of way 100 feet wide must be held to include the space occupied by the rails, ties, switches, side tracks, ditches, cuts, embankments, and other construction, together with such means of ingress and egress on both sides as are reasonably necessary for the operation and maintenance of the railroad in the customary way. This much the grantor assented to when he permitted the railroad company to take possession, under its deed, of the space so occupied. The description of the right of way was not thereby extended to include land not taken possession of and not described.

[6, 7] The plaintiff in error contends that, when a deed conveys to a railroad company a strip of land through a certain tract for a right of way, without definitely describing the location, the company has a right to choose the exact location. If this be so, the evidence shows only that the railroad company located the line of the right of way and not its outside boundaries. In answer to this, counsel insist that where the right of way is described as of a certain width, and not otherwise located, it is presumed to extend an equal distance on either side of the center line of its tracks, and *Ohidester v. Springfield & Illinois Southeastern Railway Co.*, 59 Ill. 87, is cited in support of this contention. In that case no question of a right of way arose, but the contention was in regard to a tract of land which the owner had executed a bond to convey to the railroad company. The owner covenanted by the bond to convey to the railroad company, in consideration of the construction of its road, depot, and station house in a certain locality, the right of way through a certain tract of land, "and also 7 acres of land in said section, tract and orchard adjoining to said right of way on either side thereof." The court was of the opinion that the bond should be construed as requiring a conveyance of the right of way wherever the company might choose to establish its track, and that the 7 acres "adjoining to said right of way on either side thereof" meant $3\frac{1}{2}$ acres on each side of the right of way, being a strip of land of uniform width extending along the railway through the entire tract. The conveyance of a certain number of acres out of a larger tract is wholly insufficient to designate any tract of land that can be located, and such a description is so defective that no title whatever will pass by it. *Hughes v. Streeter*, 24 Ill. 648, 76 Am. Dec. 777. The description, "adjoining the right of way" on either, each, or both sides, does not help it. A grant of a certain quantity of land to be taken out of a larger tract, with no other description than that it should lie on both sides of a highway, was held void for uncertainty in *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172. The material part of the description in *Illinois Central Railroad Co. v. O'Connor*, supra, was substantially the same as that in *Farrow's* deed of the right of way here, and it was held that it was insufficient to convey the title.

The evidence fails to show that the railroad company acquired any title to the premises in question, and the instruction to find the issues for the defendant was therefore properly given.

The judgment will be affirmed.
Judgment affirmed.

(287 Ill. 580)

PEOPLE v. WRIGHT. (No. 12536.)

(Supreme Court of Illinois. April 15, 1919.)

1. CRIMINAL LAW §938(1), 939(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE AND INCONCLUSIVE EVIDENCE.

A new trial will not be granted on the ground of newly discovered evidence, where it is simply cumulative and inconclusive, or where there has been a want of proper diligence to procure the evidence on the trial.

2. CRIMINAL LAW §945(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PROBABILITY OF CHANGE OF RESULT.

Newly discovered evidence to warrant a new trial must appear to be such as would probably change the result if a new trial were granted.

3. CRIMINAL LAW §941(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CORROBORATION OF DEFENDANT'S STORY.

In a prosecution for larceny of an automobile, where the convicted defendant had testified that he was drinking with others who were driving the automobile, that they had left him in the automobile asleep and he had no knowledge of the stealing, newly discovered evidence as to the other parties being seen with the automobile earlier in the night when defendant was not with them, objected to as cumulative evidence supporting defendant's testimony, held to require a new trial.

4. CRIMINAL LAW §774—INSTRUCTIONS—INTENT—INTOXICATION.

In a prosecution for the larceny of an automobile, the refusal of an instruction that, if the defendant was so intoxicated on the night that the automobile was taken that he was incapable of forming an intent to steal, he should be acquitted held error, in view of uncontradicted testimony as to defendant's condition and other facts.

5. WITNESSES §233—EXAMINATION OF DEFENDANT AS TO HIS ACQUAINTANCE WITH MEN HE ALLEGES HAD POSSESSION OF STOLEN AUTOMOBILE.

Where defendant, in a prosecution for larceny of an automobile, testified that parties came to his residence about 3 o'clock in the morning for liquor; that he had met them in a saloon a few days before, but did not know their names; that he did not suppose that the automobile had been stolen—it was error not to permit a most liberal examination as to defendant's former association with these men.

Error to Circuit Court, Champaign County; Franklin H. Boggs, Judge.

Ralph Wright was convicted of grand larceny, and brings error. Reversed and remanded.

Frank T. Carson, of Urbana, and W. A. Perkins, of Tolona, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Louis A. Busch, State's Atty., of Urbana, Edward C. Fitch, of Chicago, Charles F. Mansfield, of

Monticello, and Harold D. Roth, of Urbana, for the People.

CARTER, J. Plaintiff in error, Ralph Wright, was indicted, tried and convicted by a jury in the circuit court of Champaign county on the charge of grand larceny. Judgment was entered on the verdict, and he was sentenced by the court to an indeterminate sentence in the state penitentiary. This writ of error has been sued out to review the judgment of the circuit court.

Plaintiff in error, a man 35 years of age, resided in Tolono, Ill., in July, 1918, with his family. On the night of July 12th a Ford automobile was stolen from a corncrib garage on the farm of Fred Stevens. The machine belonged to Ray Dye, who lived on said farm, which was located about 6 miles southwest of Sadorus. The machine was discovered by Oscar Hall the next morning about 3 miles west of Sidney, in the middle of the road in front of Hall's farmhouse, and plaintiff in error was lying asleep in the front seat. The towns of Sadorus, Tolono, Philo, and Sidney are all located on the Wabash railroad, in Champaign county, in the order named, at intervals of about 5 miles, Sadorus being the farthest west. Hall's farm is between Sidney and Philo and about 18 miles northeast of the farm from which the automobile was stolen. The automobile was placed in the corncrib garage on the night of July 12th, about 10 o'clock. Shortly after 5 o'clock in the morning the owner discovered that it was gone. He and his employer, Stevens, followed the tracks of the car from the corncrib into the public highway, and then as far as Sadorus, but were unable to follow them further. Dye testified that the car was worth \$300. About 5 o'clock on the morning of July 13th Hall heard the crash of a car upon the highway, as if hitting something. When he got up, shortly after he saw the car standing in the middle of the road, almost in front of his farmhouse, and went to see if it had been wrecked, and found plaintiff in error, whom he did not know, asleep on the front seat. He did not awaken him, but returned to his house and telephoned O. O. McElwee, at Sidney, an employé of the county, telling him of the finding of the car and the general situation. McElwee immediately came to Hall's residence, and, finding plaintiff in error still asleep, made a search of his clothes for a revolver, but found none, and then awakened him in the presence of Hall, and plaintiff in error's first question was to ask where he was. On being questioned he stated the machine was not his; that he had been with a couple of fellows in the automobile; that he became acquainted with them a few days before at Westville, but did not know their names. McElwee called up the deputy sheriff, who came and recognized plaintiff in error, and asked him whose machine it was,

and he replied that it did not belong to him; that he had been with two fellows that had the car. The deputy sheriff then got into the car and drove it to Urbana, with plaintiff in error as a passenger. The machine, when found, had one of the tires off, the license plate was gone, and the steering gear out of order. The tracks showed that the machine had been run in a crooked path for some rods back. A heavy dew had fallen in the night, making it possible to track the car both on the road from the Stevens farm and on the road where it was found. Hall and McElwee both testified that there was no indication that any one had alighted from the car at the point where it was found, before plaintiff in error was awakened.

The evidence of plaintiff in error and the witnesses sworn on his behalf was to the effect that on the night of July 12th he was at his home in Tolono; that his father, a brother, mother, and three men were there with him during the evening; that his father left between 10 and 11 o'clock, and that the visitors, Munns and Maxwell, remained until about 3 o'clock; that just before they left two men drove by in two cars, going east past the house, and then came back and stopped, and asked plaintiff in error if he had any beer; that he told them no, but that he had a little whisky, and they all drank; that he had been drinking whisky before during the evening; that they asked him to go back to Westville with them and as he was going there, the next day anyway he went along with them; that during the trip they had a good deal of tire and engine trouble with the Ford car, and that he finally got out of the other car and got in the Ford, and that was the last he remembered until he was awakened by Hall and McElwee the morning; that he did not know who his two fellow travelers were, except that he had met them a few days before in a saloon at Westville, and that they had told him they were real estate men; that they had brought him home in their car from Westville to Tolono the first part of the week; that he did not know the numbers were off the Ford car and did not know it was stolen; that he had been working all day on his father's farm, putting up hay; that he had been drinking before these men came with these cars, and drank some more whisky with the men before they left. His father testified, corroborating him as to being at his home with the three other men all the evening until about 11 o'clock. Munns testified that he lived at Decatur, and was a car inspector for the Wabash Railroad, and that he and Maxwell were with plaintiff in error at his home the night in question from about 8 o'clock until 3 the next morning; that they had something to drink that night; that he saw two automobiles come past the place, driving east, at about the time they were leaving, at 3 in the morning; that after going a little way east the cars turned and

came back to plaintiff in error's place, that plaintiff in error was not away from the place that night until after witness and Maxwell left; that the plaintiff in error was pretty drunk and rowdy and talked loud. Maxwell, a well driller, testified to the same effect. George Shipley and his wife lived a short distance east of plaintiff in error. Shipley testified that he spent part of the evening with plaintiff in error, and left about 10 or 11 o'clock; that about 3 in the morning two automobiles came up and stopped in front of his house, and the occupants asked him if the plaintiff in error lived there, and that he told them where plaintiff in error lived. Shipley's wife testified that she heard this inquiry and answer, and that the automobiles turned around and went back toward Wright's house. George Wall and his wife, other neighbors, testified that two machines stopped in front of their house about 3 in the morning, and that one of the men came to the house and wanted to know if Wright lived there, and that Wall directed them to the next house west, and the machines then went in that direction. Hall testified that plaintiff in error, when awakened in the morning, in answer to questions said that he lived on a certain street in Danville. Plaintiff in error denied so stating, but testified that he did say he was going to Westville. There is some testimony by the sheriff's deputy to the effect that plaintiff in error told him on the morning he was taken into custody that he was going to Champaign. There are perhaps some other inconsistencies testified to by some of the witnesses in the statements made by plaintiff in error as to his actions on the night in question, but we deem none of them of so material a character as to refer to them specifically.

It is most earnestly urged by counsel for plaintiff in error that the trial judge improperly overruled a motion for new trial, and that the motion, because of the showing made by affidavits of newly discovered evidence which they insist was very material as to the merits, should have been granted. The affidavits of Frank E. Holliday and John E. Meath presented in support of this motion stated, in substance, that on July 13th, when returning home from the city of Champaign at about 2 o'clock that morning, they met two machines on the Sadorus road, 2 miles west of Tolono; that one of these machines was a runabout car and the other a Ford on which there were no license numbers. The general description of these machines as given in the affidavits of Meath and Holliday was similar to the description of the machines given by plaintiff in error. The affidavits stated that these two machines were headed towards Tolono, and were stopped in the road; that the occupants seemed to be in some trouble about the operation of the Ford car, and as Holliday was an expert machinist they stopped and asked

what was the matter. They also asked why there were no numbers on the Ford car and the two men answered that they had traded for the car that day in Decatur. Affiants deposed that they did not know either of these men but that plaintiff in error was not with them. The affidavit of James Bates, also filed in support of the motion for new trial, was to the effect that he was a farmer, and that while bringing medicine for a sick horse about daylight on the morning of July 13th he observed two machines in the highway east of Tolono; that there were three men with the machines, one of them being Wright and the other two he did not know; that these machines were standing still, and one of them was a Ford without numbers on it. The affidavits of plaintiff in error and his attorneys were also filed in support of the motion, to the effect that they knew nothing about the testimony of Holliday, Meath, and Bates until after the verdict had been found in this case. It is insisted by counsel for plaintiff in error that this evidence so strongly corroborates his story that it would certainly have had great influence with the jury in deciding whether or not he had anything to do with stealing the automobile in question, while counsel for defendant in error urge that the evidence is simply cumulative, and under the rulings of this court would not justify the granting of a motion for new trial.

[1, 2] This court has said that a new trial will not be granted on the ground of newly discovered evidence where it is simply cumulative and inconclusive or where there has been a want of proper diligence to procure the evidence on the trial. *Lathrop v. People*, 197 Ill. 169, 64 N. E. 385; *Henry v. People*, 198 Ill. 162, 65 N. E. 120. We have also stated that newly discovered evidence must appear to be such as would probably change the result if a new trial were granted. *People v. Williams*, 242 Ill. 197, 89 N. E. 1090, 17 Ann. Cas. 313. This last decision stated the requirements that must be complied with in order to justify the granting of a motion for a new trial for newly discovered evidence. These requirements are substantially the same as set forth in *Wharton on Criminal Pleading and Practice* (8th Ed.) § 868, and 20 R. C. L. 290. It has also been stated that when it is shown, on motion for new trial, that there was newly discovered evidence not cumulative in regard to the particular point to which it relates and the importance of which could not have been foreseen, and such newly discovered evidence strengthens the conviction of the court that justice has not been done, a new trial will be granted for further examination of the case. *Wilder v. Greenlee*, 49 Ill. 253; *Cairo & St. Louis Railroad Co. v. Schumacker*, 77 Ill. 583.

"As a general rule, a new trial will not be granted on account of the discovery of facts and circumstances merely cumulative in their

character, the reason for which rule is that public policy, looking to the finality of trials, requires that parties be held to diligence in preparing their causes for trial, and it is not, strictly speaking, an independent rule, but a mere corollary of the requirement that the newly discovered evidence must be such as to render a different result probable on a retrial of the case. The rule must, however, be taken in its proper sense, and it is not to be understood as precluding a new trial in every case where the testimony relates to a point contested on the former trial, for if it were so a new trial could seldom, if ever, be granted in any case. The rule, when properly applied, is a salutary guide to the discretion of the court, and where the testimony is strictly cumulative and merely increases the weight of the evidence, leaving the cause still in doubt, or where it is of such a nature that its truth may be conceded without justifying acquittal in the face of other evidence, a new trial will not be granted." 20 R. C. L. 295.

There is a wide divergence in the authorities as to just what constitutes cumulative evidence. Generally it is held to be additional evidence of the same kind and to the same point.

"To render evidence subject to the objection that it is cumulative in the legal sense, it must be cumulative not with respect to the main issue between the parties, but on some collateral or subordinate fact bearing on that issue." 20 R. C. L. 298.

See, also, as to what has been held to be cumulative and not cumulative evidence. *Spencer v. State*, 69 Tex. Cr. R. 92, 153 S. W. 858, 46 L. R. A. (N. S.) 903, and cases cited in note and also note in L. R. A. 1916C, p. 1162.

"It must appear that the newly discovered evidence, if adduced at another trial, would operate to produce a different result." 8 Ency. of Evidence, 997.

The same rule applies to newly discovered evidence in criminal cases as in civil cases, except it is sometimes held that as great an amount of diligence to discover the new evidence is not required in criminal cases. 14 Ency. of Pl. & Pr. 842; 20 R. C. L. 290.

[3] It is not urged that the rules as to due diligence have not been complied with by plaintiff in error or his counsel; the only real objection made to allowing the motion for a new trial being that this evidence is merely cumulative. There can be no question that it tends strongly to support the testimony of plaintiff in error as to the two men coming to his house with two automobiles—one of them a runabout and the other a Ford with no license numbers—and that he was not with them before the machines reached Tolono, where he lived, and was with them as they traveled east from Tolono towards Sidney. In view of the nature of the evidence in this record we think that the ends of justice require that there should be a new trial for the purpose of permitting the jury to consider

this newly discovered evidence in deciding whether or not plaintiff in error was guilty of the crime with which he was charged.

[4] Counsel for the plaintiff in error further argue that the court erred in refusing to give an instruction they requested, to the effect that—

"If you believe from the evidence in this case that the defendant, Ralph Wright, was so intoxicated on the night that the automobile in question was taken, to wit, from the hours of 10 o'clock in the evening until 4 o'clock next morning, when the machine was found, that he was incapable of forming an intent to steal, it will be your duty to find the defendant not guilty."

There can be no question from this record that plaintiff in error had been drinking heavily during the night of July 12th and morning of July 13th, and all the evidence in the record is consistent with his statement that he drank intoxicating liquor with these men at his house and after they went away together in their automobiles. The testimony of those who saw him sleeping in the front seat of the automobile as to what his condition was, how he acted, and what he said after he was awakened is also entirely consistent with the theory that he had been drinking heavily during the previous night. The only instruction given on the question of drunkenness was one on behalf of the state, which instructed the jury that the statutes of Illinois provide that "drunkenness shall not be an excuse for any crime or misdemeanor." It has been stated by this court that neither at common law nor under the statute was drunkenness any excuse for crime, except as provided by the statute.

"At common law, where it required a particular intent in the doing of an act to constitute crime—as, for instance, larceny, where the intent to steal must accompany the act of taking—it is held it may be shown in defense that the party charged was intoxicated to that degree that he was incapable of entertaining the intent to steal, and that he neither then, nor afterwards, yielded it the sanction of his will." *Bartholomew v. People*, 104 Ill. 601, 44 Am.

Rep. 97; *Schwabacher v. People*, 165 Ill. 618, 46 N. E. 809; *Bruen v. People*, 206 Ill. 417, 69 N. E. 24.

While this refused instruction was not as accurately worded as it might have been, and for that reason we might not be disposed to reverse for the refusal to give it if that were the only error, we think the court erred in not giving an instruction setting out substantially the rule as stated in these decisions of this court.

[5] It is further urged in this connection that the court erred in refusing to permit plaintiff in error, while on the stand, to be examined at length as to his former acquaintance and association with the two men who he testified came to his residence in Tolono at 3 o'clock on the morning of July 13th; that while he was permitted to testify that he had met them in a saloon a few days before at Westville and had ridden over with them to Tolono in the automobile he was not permitted to testify that when they came to his house at that time they drank intoxicating liquor; that if he had been allowed to tell the jury this fact and his former association with the men it would not have appeared to the jury so unreasonable that they should come to his house at 3 in the morning for more liquor. The court seemingly refused to allow the examination on these questions because the alleged meeting with these men was several days before the automobile was stolen. The court should have permitted a most liberal examination as to plaintiff in error's former association with these men. We think the court erred in refusing to allow plaintiff in error to be examined fully on that question.

Other rulings of the court are urged as error by counsel for plaintiff in error, but we deem none of them of sufficient importance to justify a separate discussion here.

The judgment of the circuit court will be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(226 N. Y. 70)

NEW YORK MUNICIPAL RY. CORPORATION et al. v. WEBER et al.

(Court of Appeals of New York. March 18, 1919.)

1. EMINENT DOMAIN ⇐263—COMPENSATION—APPEAL—MODIFYING REPORT OF COMMISSIONERS.

If Appellate Division, on appeal from Special Term, was dissatisfied with report of commissioners, it should have directed a new appraisal, and not modified report by striking out damages awarded, leaving defendant without any compensation for the taking of his property or for his damages.

2. EMINENT DOMAIN ⇐101(1) — DAMAGES — LAWFUL CHANGE OF GRADE.

In the absence of some statute, the owner of property abutting on a street cannot claim damages for lawful change of grade in the highway.

3. EMINENT DOMAIN ⇐101(1) — CHANGE OF GRADE—DAMAGES.

Where the part of defendant's land taken is used for the purpose of erecting on it one end of a retaining wall, which extends across the street, the land was not taken for the purpose of changing the grade of the street, for which railway company obtained authority in another way, and there can be no recovery for damages for a change of grade.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the petition of the New York Municipal Railway Corporation and another, relative to acquiring title to real estate, against Charles Weber and others. From an order of the Appellate Division, Second Department (179 App. Div. 245, 166 N. Y. Supp. 542), modifying and affirming the award of commissioners, Joseph A. Walsh appeals. Order modified by remitting proceedings to Supreme Court, with instruction to provide for a new appraisal.

Louis J. Altkrug, of Brooklyn, for appellant.

O. L. Woody, of Brooklyn, for respondents.

PER CURIAM. [1] This was a condemnation proceeding instituted to acquire title to a small piece of land belonging to the defendant Joseph A. Walsh. The land to be acquired was a part of a larger tract. The commissioners of appraisal duly made their

report fixing the value of the land taken and the damage done to the remainder of the tract. This report was confirmed at the Special Term. On appeal the Appellate Division modified the report by striking out altogether the damages awarded to the defendant.

This left the defendant without any compensation at all for the taking of his property or for his damages. Clearly the determination of the court at the Appellate Division was erroneous as the respondents' counsel admitted on the argument.

If the Appellate Division was dissatisfied with the report of the commissioners, it should have directed a new appraisal.

Inasmuch as there will be a rehearing in this proceeding, it appears proper to say a word on the question of damages.

[2] The general rule in this state is that, in the absence of some statute, the owner of property abutting on a street cannot claim damages for lawful change of grade in the highway. *Conklin v. N. Y., O. & W. Ry. Co.*, 102 N. Y. 107, 6 N. E. 663.

[3] The appellant bases his demand for damages for a change of grade on the rule laid down in *South Buffalo Ry. Co. v. Kirkover*, 176 N. Y. 301, 68 N. E. 366, which is that, when land is taken by a railroad company, the owner may recover the market value of the land actually taken, also any damages resulting to the remainder of his land including the damage that will be sustained by reason of the use to which the part taken is put by the railroad company. The part of the appellant's land taken is used for the purpose of erecting on it one end of a retaining wall which extends entirely across the street. It is not correct to say that the land taken is used for the purpose of changing the grade of the street for which the railroad company obtained authority in another way. The street grade could have been changed without taking the appellant's land. Therefore he should not in this proceeding recover damages for a change of grade.

The order appealed from should be modified by remitting the proceeding to the Supreme Court, with instructions to provide for a new appraisal before new commissioners, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDERBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

Ordered accordingly.

⇐ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(226 N. Y. 153)

AMSTERDAM v. APFEL.

(Court of Appeals of New York. April 8, 1919.)

ATTORNEY AND CLIENT §129(3)—CONVERSION BY ATTORNEY—QUESTIONS FOR JURY.

On the facts, *held*, that the question whether an attorney converted funds of the client to his own use should have been submitted to the jury.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Rose Amsterdam against Ignace I. Apfel. From a judgment of the Appellate Division (178 App. Div. 71, 165 N. Y. Supp. 60), reversing a judgment entered on a verdict in favor of plaintiff, and dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

E. Walter Beebe, of New York City, for appellant.

Charles Goldzier, of New York City, for respondent.

HOGAN, J. The facts in this case are voluminous and referred to at some length in the prevailing opinion of the Appellate Division. *Amsterdam v. Apfel*, 178 App. Div. 71, 165 N. Y. Supp. 60. We do not deem it essential to recite at length the facts there enumerated. Our examination of the record leads us to the conclusion that the evidence adduced upon the trial presented a question of fact for a jury, and the determination by the Appellate Division was erroneous.

It is undisputed that the plaintiff delivered of the defendant the sum of \$1,500, and that defendant received that amount of money from plaintiff. The purpose for which said sum of money was delivered and received gave rise to a sharp conflict between the parties.

The prevailing opinion below refers in a general way to a certain transaction relating to the sale of certain real estate on Lafayette avenue, Brooklyn, of which plaintiff and seven additional members of the same family were owners, in which transaction defendant acted as attorney for plaintiff and the members of the family. The various steps connected with the transaction leading up to the question of difference at issue, viz.: The failure of defendant to insert in the deed the name of Brown Weiss Realities as grantee, the retention of the deed, failure to close the contract, personal negotiations with Brown Weiss Realities resulting in a contract on June 18th for an exchange of Lafayette avenue property for property on Cortland street which he did not own and did not acquire title to until June 23d, when he purchased same for the purpose of making the exchange, thereafter inserting in the

deed the R. S. S. Co. as grantee, and thereupon taking a lease of the premises, with the privilege of purchasing the same for \$8,000 cash or \$9,000 by payment of \$2,000 cash and \$7,000 mortgage, the taking of title under that option after the commencement of this action and the conveying of the property to the Sixty-Six Realty Company, of which he is the owner of the entire capital stock and in control of its affairs—these circumstances, in connection with the denial by plaintiff and the only other member of the family called as a witness that they had knowledge or information of any such acts relating to their property, and the admission by defendant that plaintiff, at the time she signed the deed, may have been under the impression that it went to Brown Weiss Realities, have a direct bearing upon the issue in this case, and were proper for consideration by a jury as bearing upon the credibility of the parties hereto, the purpose for which plaintiff delivered to defendant the sum of \$1,500 and the reasons, if any, prompting defendant to solicit her to deliver the same.

Passing to the transaction in dispute, plaintiff testified that on the evening of June 22, 1912, defendant asked her how she would like to invest in buying back her old property on Lafayette avenue, and said:

"We will buy back that property if you will put up \$1,500 and I will go to the Lawyers' Guarantee Trust Company and get a mortgage for \$8,000, or I will sell the property, which I expect to do within the next three or four months, and I will give you back your \$1,500 and give you half of the profits."

The date of the interview is important, when considered in connection with transactions relating to the title to which attention has been called. Defendant places the date of the conversation as June 23d, the day he had entered into further transactions related above, and claims he told plaintiff that he had the Lafayette avenue property, which stood him about \$9,500; that the plaintiff asked if she could get an interest in it; that he told her he expected to get a loan of \$8,000 on the property, and had arranged with Robert S. Smith for \$8,000, and she agreed to buy a one-half interest in it; that she said she would take a one-half interest in the property, "and I told her if she would give me \$1,500 I would give her one-half of the profits as soon as the property is sold for the \$1,500 and give her—first give her back the \$1,500 and then give her half of the profits."

Plaintiff further testified that on the evening of June 27th defendant called upon her (he admits that his deals were not closed until the 28th); that he asked her for \$100, and she gave him a check therefor, and was to draw the balance from the savings bank

on July 1st, before her departure for Europe on July 2d at 9 a. m. He also told her to leave a power of attorney with either of her sisters, as he expected to sell the property before her return the middle of August. For the \$100 check defendant gave her a receipt in the following form:

"Received from Rose Amsterdam check for one hundred dollars on account of fifteen hundred dollars to be paid by her for the purchase of 505-7 Lafayette avenue, Brooklyn, 40x200, for said sum plus one-half of any necessary expenses for mortgage closing of title, etc. Miss Amsterdam to have one-half interest in said property, I. I. Apfel to take charge of property, and profits are to be divided equally. Balance of (\$1,400.00) fourteen hundred dollars to be paid by July 2, 1912.

"June 27, 1912.

Ignace I. Apfel."

Before referring to the payment of \$1,400, the facts above stated in connection with the admission by defendant in his answer that the sum of \$1,500 paid by plaintiff to him was not used by defendant to purchase the said property, nor any part thereof, were important to be considered by a jury.

Late on the night of July 1st, defendant called on plaintiff again and asked her if she had drawn her money. She replied she had. He thereupon, as she testified, asked her for the check for \$1,400, and while she was writing her check "he read off the power of attorney. He read off a paper to me. * * * I signed something. There was no question at all of the R. S. S. Co., or any lease. I never heard of a lease"—and never discovered same until after this action was commenced, when she states she handed it to her lawyer to read, as she imagined it was her deed.

Defendant produced upon the trial the paper which is set out in the prevailing opinion below, which in effect was an assignment by him in consideration of \$1,500 of a one-half interest in a lease of the Lafayette avenue premises made between him and the R. S. S. Co. and constituting defendant her attorney to disclose of her interest in the lease, each party to have an equal one-half interest in and to said lease, together with the option to purchase the property therein contained, and in the event of a resale thereof out of the profits to be realized plaintiff

to receive \$1,500, being the amount of her investment therein; the balance remaining to be equally divided. The court below wrote that there was no inconsistency between that instrument and the receipt of June 27th, that defendant had sold plaintiff a one-half interest in the property. We think there is opportunity for argument on that question, for determination by a jury, especially in view of all the circumstances, the manner in which plaintiff may have been induced to sign the same, and the fact that defendant as a witness testified that he intended by the agreement that the \$1,500 should become his money, and if he never exercised the option to purchase the property he would not have to give the money back, that he was not required to exercise the option and buy the property, he did not have to use the \$1,500 to buy the property, and if he did not buy it the \$1,500 was his.

The opinion below also states that importance cannot be attached to the fact that title to the property was not taken in plaintiff's name. We cannot assent to that proposition. The title is now in a corporation owned and controlled by defendant under a conveyance from him. That corporation may be solvent, or may have numerous creditors. It may mortgage or sell the property. Why the transfer by defendant to that corporation? Why should it be permitted to hold the title, and the defendant retain the moneys of plaintiff, asserting ownership of the same, while admitting he did not use the \$1,500 for the purchase of the property? These are questions very well debatable, having some bearing upon the entire transaction in connection with other facts in the case, particularly as to whether or not plaintiff was misled by defendant into signing the agreement on July 1st, and the effect of any subsequent advance referred to in the opinion below. Such questions, including all the relations between the parties, were proper for consideration by a jury.

The judgment should be reversed, and a new trial granted; costs to abide the event.

CHASE, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.
HISCOCK, C. J., not sitting.

Judgment reversed, etc.

(326 N. Y. 578)

WRIGHT et al. v. WRIGHT et al.

(Court of Appeals of New York. March 18, 1919.)

1. APPEAL AND ERROR ⇨856(1)—QUESTIONS NOT RAISED BELOW.

Ordinarily respondent will not be allowed to sustain a judgment upon grounds not considered below.

2. APPEAL AND ERROR ⇨854(1)—QUESTIONS CONSIDERED.

The rule that respondent cannot sustain a favorable ruling upon a reason not considered below, when such reason could have been obviated, if presented, is inapplicable to a proposition of law appearing upon the face of the record, which could not have been avoided below.

3. APPEAL AND ERROR ⇨832(4)—REHEARING—GROUNDS—WAIVER.

Respondent, by ignoring a point specifically urged by appellant, waived the right to urge upon motion for reargument that the proposition should not have been considered, because not raised below.

On motion for reargument. Motion denied. For former opinion, see 225 N. Y. 329, 122 N. E. 213.

Ell J. Blair and Frank H. Platt, both of New York City, for the motion.

George L. Shearer, of New York City, opposed.

PER CURIAM. [1, 2] A motion for reargument is made in this case upon the ground that the appellant was defeated in this court upon a question which was not argued in the courts below. In attempted support of the motion appellant correctly states certain principles applicable to the consideration of appeals. It is accurate in asserting that as a general rule a party who has obtained a judgment will not be allowed in this court to sustain that judgment upon grounds which were not considered in the courts below. It is also true that a respondent will not be permitted to sustain a ruling in its favor upon some reason not considered in the lower courts, and which if there presented could have been met and obviated.

This case, however, is not subject to the application of these principles. The appellant has been defeated upon a proposition of law which appeared upon the face of the record, and which could not have been avoided if brought to the attention of the appellant in the courts below. *Cook v. Whipple*, 55 N. Y. 150, 157, 14 Am. Rep. 202; *People v. Bradner*, 107 N. Y. 1, 4, 13 N. E. 87; *Murdock v. Ward*, 178 U. S. 139, 20 Sup. Ct. 775, 44 L. Ed. 1009. The appellant does not contend that considerations could have been advanced there which were not available here, but only that this court has reached a wrong decision upon the question.

[3] But, aside from this, if we should assume that under ordinary circumstances the appellant would have the right to insist that the proposition upon which it has been defeated in this court should not have been considered, because not urged in the lower courts, it has waived, and has now lost the right to take, this position. The respondent, in its brief upon the argument of the appeal, expressly and specifically urged the proposition considered by this court and upon which the appellant has been defeated. The appellant neither argued that this proposition could not be considered in this court for the reason now suggested, nor that the proposition of law itself was erroneous. It absolutely and entirely ignored the point thus presented by the respondent, and made no answer whatever to it. It now says that the proposition was argued by the respondent upon its brief in a perfunctory way. This may be true. It may not have been argued in a thorough or efficient manner, but nevertheless it was presented to the court and the duty thrown upon the latter of examining and deciding the question.

Under these circumstances it is evident that no reason is presented which justifies this court in granting the motion for reargument. In addition, we do not discover in the brief upon this motion anything which leads us to believe that the decision already made was erroneous or would be changed upon reargument.

The motion should be denied, with \$10 costs and necessary printing disbursements. Motion denied.

All concur.

(226 N. Y. 84)

PEOPLE ex rel. OAKLAWN CORPORATION v. DONEGAN, County Register.

(Court of Appeals of New York. March 18, 1919.)

1. VENDOR AND PURCHASER ⇨231(15)—BONA FIDE PURCHASERS—RECORD AS NOTICE—DEFECTIVE ACKNOWLEDGMENT.

Where the acknowledgment of one of four grantors in a deed was defective, the record would not be notice to bona fide purchasers as to such grantor.

2. ACKNOWLEDGMENT ⇨6(2)—INSTRUMENTS ENTITLED TO RECORD—DEED—DEFECTIVE ACKNOWLEDGMENT BY ONE GRANTOR.

Under Real Property Law, §§ 291, 311, 312, a deed to which the acknowledgment of one of four grantors was defective should be regarded as the conveyance of those properly acknowledging it, and should be recorded.

3. RECORDS ⇨8—INDEX—DEFECTIVE ACKNOWLEDGMENT BY ONE GRANTOR.

In recording a deed to which the acknowledgment of one of the four grantors was defective, the register need not index the conveyance against such grantor.

4. MANDAMUS ~~§~~190—COSTS—APPEAL—GOOD FAITH OF OFFICER.

Where the register refusing record to a deed acted in good faith, and the cause was novel, reversal of an order refusing mandamus should be without costs.

Appeal from Supreme Court, Appellate Division, First Department.

Application for writ of mandamus by the People, on the relation of the Oaklawn Corporation, against James A. Donegan, Register of the County of New York. The Special Term denied the application (104 Misc. Rep. 223, 172 N. Y. Supp. 37), and that determination was unanimously affirmed by the Appellate Division (184 App. Div. 763, 172 N. Y. Supp. 448), which granted permission to relator to appeal to the Court of Appeals. Reversed, and writ directed without costs.

See, also, 173 N. Y. Supp. 918.

The respondent refused to record the deed upon the ground that it was not properly acknowledged. The deed purported to be made by four grantors. It was duly acknowledged within the state by three of the grantors, but the fourth had acknowledged the instrument before a notary public in the county of Berkshire, state of Massachusetts. This latter acknowledgment was not authenticated by the certificate of the clerk of Berkshire county or other proper officer as required by the Real Property Law.

Harold Swain, of New York City, for appellant.

William P. Burr, Corp. Counsel, of New York City (Terence Farley, of New York City, of counsel), for respondent.

CUDDERBACK, J. Section 291 of the Real Property Law (Consol. Laws, c. 50) provides that a conveyance may be recorded on being duly acknowledged by the person executing the same. Sections 311 and 312 provide that the acknowledgment is not sufficient where it is taken by the officer of another state, unless it is authenticated by the certificate prescribed by the statute as to the authority of the officer taking the acknowledgment, and the genuineness of his signature.

The conveyance presented by the relator was not precisely within the law, inasmuch as it lacked the authenticated acknowledgment of one of the four grantors. But I

think it came within the spirit of the statute.

[1] As to the grantor whose acknowledgment was defective, the record would not be notice to subsequent purchasers of the conveyance (Bradley v. Walker, 138 N. Y. 291, 33 N. E. 1079), and if that person had been the sole grantor, the deed could not have been lawfully recorded. Penal Law (Consol. Laws, c. 40), § 1862.

But, confessedly, three of the four grantors properly acknowledged the deed, and it was entitled to be recorded as against them. Sometimes it may happen that the vendee of land may be compelled in making the title to rely in part upon a deed in which all the vendor owners are named as grantors, but which some of them do not sign or acknowledge. May not the vendee in such case regard the names of those who do not sign or acknowledge as surplusage, and hold the deed sufficient for recording as to the others?

In the present case, according to the opinion of the court at Special Term, the register was willing to record the deed if the name and signature of the grantor whose acknowledgment was defective were erased. The relator was not obliged thus to alter or mutilate the instrument with the risk of invalidating it altogether.

One object of the Recording Act is to preserve the evidence of real estate conveyances. To that extent, the relator was entitled in this case to the benefits that accrue from the law.

[2, 3] Our attention is not called to any contrary authority, and I think the better view is that the deed in this case should be regarded as the conveyance of the grantors who properly acknowledged the same and should be recorded. The register should not, however, be compelled to index the conveyance against the grantor whose acknowledgment is not in proper form.

[4] I recommend that the orders appealed from be reversed, and the issuance of a writ of mandamus directed; but, inasmuch as the question is novel and the register acted in good faith, I think the reversal should be without costs.

HISCOCK, C. J., and CHASE, COLLIN, McLAUGHLIN, and CRANE, JJ., concur. HOGAN J., concurs in result.

Orders reversed, etc.

(236 N. Y. 154)

ELIAS v. LEHIGH VALLEY R. CO.

(Court of Appeals of New York. April 8, 1919.)

1. RAILROADS §350(16) — ACCIDENTS AT CROSSING—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

A driver, who twice looked east from points at which he had a view for considerable distance, and thereafter confined his attention to the west, in which direction his view was limited, and to the flagman's shanty across the track, and who was struck by a light engine coming from the east, was not contributorily negligent as a matter of law.

2. RAILROADS §330(2)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—PRESENCE OF FLAGMAN.

Where a railroad has stationed a flagman at a crossing, though not required to do so, that fact may be considered by the jury in determining whether one who knew that a flagman had been stationed there was contributorily negligent in approaching the crossing without warning from the flagman.

3. RAILROADS §307(6) — ACCIDENTS AT CROSSING—NEGLIGENCE—FLAGMAN.

Where a railroad has stationed a flagman at a crossing, though not required to do so, his unexplained failure to give warning of an approaching train to one who knew of his presence may be found by the jury to be negligence of the railroad company.

Collin and Cuddeback, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Edward Elias against the Lehigh Valley Railroad Company. Judgment for plaintiff was reversed by the Appellate Division (174 App. Div. 923, 159 N. Y. Supp. 996), and plaintiff appeals. Judgment of the Appellate Division reversed, and that of the Trial Term affirmed.

George S. Van Schaick, of Rochester, for appellant.

Clarence P. Moser, of Rochester, for respondent.

ANDREWS, J. About noon on January 22, 1914, the plaintiff was driving two horses attached to an empty bobsleigh north on a highway in the town of Rush, Monroe county, which is crossed by the defendant's tracks at a slight angle. As he approached, his view towards the west was cut off by buildings until he substantially reached the railroad right of way. Toward the east there was less difficulty. Five hundred feet from the intersection he could see along the tracks to a point beyond a local passenger station, some 700 feet distant. Again, when 80 or 90 feet from the rails, he could see in the same direction some 350 feet, and this distance rapidly extends as the tracks are near-

ed. At this crossing for years the defendant had stationed a flagman. His shanty was north of the tracks and west of the highway. The plaintiff lived nearby and was familiar with the situation. He knew of the flagman. Indeed, that very day, as he drove back and forth, he had seen him performing his duties.

[1] Under these circumstances, what did he do? At the 500-foot point he looked to the east and saw nothing. He then drove on slowly, listening. The day was bright and clear, and he might hope to hear the noise of an approaching train. He looked again at the 80-foot point, and again heard and saw nothing. No sign came from the flagman, although the door and a window of his shanty faced the east, and he apparently had an unobstructed view in that direction. The plaintiff may have naturally assumed, also, that at least many of the trains from the east would stop at the station. Reasonably he feared greater danger from the west. From that direction all trains would come at speed. In that direction, too, the flagman's view was interrupted by a cut. The plaintiff himself could see nothing until close to the rails. He was not walking, but had his horses to control. Not unnaturally his attention was directed to that side and to the flagman's shanty. He did not look again to the east until he was on the tracks, a moment before the accident. He was struck by a light engine, used for the inspection of the road, coming from the east at 45 miles an hour. It made, we may fairly assume, less noise than an ordinary train. We may also assume it did not run on any schedule time. Certainly it did not stop at the station. The flagman gave no warning, although he seems to have been in his shanty.

Under these circumstances it was error for the Appellate Division to hold that the plaintiff was guilty of contributory negligence as a matter of law. He did listen. He did look, although not, perhaps, at the precise point where later cool investigation shows looking would have been most effective. In the situation presented to us, it was for the jury to say whether he should have looked once more.

[2] In reaching this conclusion we lay some stress upon the absence of the flagman—not that this absence would entitle the plaintiff to discard all caution; but as bearing upon the question as to whether the caution he did use was adequate. This, it is said, we may not do. We think it, however, an element entitled to consideration. It is doubtful whether *McGrath v. N. Y. C. & H. R. R. Co.*, 59 N. Y. 468, 17 Am. Rep. 359, was ever intended to have as broad an application as is now claimed for it by the respondent. *Wilbur v. Del. & W. R. R. Co.*, 85 Hun, 158, 32 N. Y. Supp. 479. Had it, however, it would now be overruled by later

decisions of this court. *McGrath v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 522; *Dolan v. D. & H. C. Co.*, 71 N. Y. 285; *Pakalinsky v. N. Y. C. & H. R. R. Co.*, 82 N. Y. 424, 428; *McNamara v. N. Y. C. & H. R. R. Co.*, 136 N. Y. 650, 32 N. E. 765; *Avery v. N. Y. C. & W. R. Co.*, 205 N. Y. 502, 506, 99 N. E. 86, 42 L. R. A. (N. S.) 158. Where, although not required so to do, a railroad has stationed flagmen at a crossing, that fact, as to one who knows it and has come to rely upon it, may be considered by a jury in deciding whether under all the circumstances he has used reasonable care for his own protection. The absence of such a flagman may well affect the vigilance they would otherwise have required of an approaching traveler.

[3] As to the defendant's negligence, it is true that no flagman need have been stationed at this point. Having voluntarily placed one there, the defendant could later withdraw him. Its duty was done if it gave reasonable warning of the passing of its trains, and often the bell and whistle would as a matter of law be sufficient. Not always, however. Where the practice of guarding the crossing was not abandoned, where it was neglected by him whose duty it was to warn travelers, his unexplained failure might be found to be negligent towards those who knew of his habitual presence and had become accustomed to his warnings. The danger is obvious. It is like in kind to that caused by raised and untended gates. To some extent it is an assurance that the way is safe. That the railroads recognize the danger is seen by the familiar sign at country crossings giving notice that the flagman is absent after 6 p. m.

The judgment of the Appellate Division should be reversed, and that of the Trial Term affirmed, with costs to the appellant in this court and in the Appellate Division.

HISCOCK, C. J., and CARDOZO, POUND, and CRANE, JJ., concur.

COLLIN and CUDEBACK, JJ., dissent.

Judgment reversed, etc.

(226 N. Y. 180)

COLLINS et al. v. KELLY.

(Court of Appeals of New York. April 8, 1919.)

1. WITNESSES ⇨396(1) — EXPLANATION OF INCONSISTENCY.

In an action by a materialman against a subcontractor, it was error, after having admitted testimony on cross-examination that plaintiff had commenced suit against the principal contractor's surety, which had taken over the contract, and had presented a claim against its receiver to recover on the same account as

that sued on, thereby showing an inconsistent attitude, and the making of inconsistent statements, to exclude on redirect examination evidence as to why plaintiff had instituted such suit against the surety to explain the contradiction.

2. CONTRACTS ⇨329—ACTIONS—DELAY IN STARTING SUIT.

While it is proper for an attorney to comment on delay in commencing an action as bearing on the merits of plaintiff's claim, plaintiff in an action against a subcontractor to recover for materials furnished was not obliged to furnish direct evidence showing an excuse for failure to commence the action earlier.

Appeal from Supreme Court, Appellate Division, First Department.

Action by John F. Collins and others against George T. Kelly. From a judgment of the Appellate Division (174 App. Div. 917, 160 N. Y. Supp. 1126), unanimously affirming a judgment of the Trial Term for defendant, entered upon a verdict of the jury, plaintiffs appeal. Reversed, and new trial granted.

William A. Walsh, of Yonkers, for appellants.

Robert W. Bernard, of New York City, for respondent.

HOGAN, J. The Church Construction Company entered into a contract with the United States government for the construction of certain buildings at West Point, N. Y. The Metropolitan Surety Company was surety on the bond of the contractor and the latter, having failed to perform the contract, the surety company undertook to perform the same, and on April 18, 1907, entered into a contract with the United States government to complete the contract between the government and the Church Construction Company, to commence work immediately, payments to be made to the surety company in monthly installments as the work progressed to the extent of 90 per cent. of the value of the material furnished and work actually performed in the buildings, the balance of 10 per cent. to be paid within 10 days after final inspection and acceptance of the whole work. On April 18th the surety company entered into a contract with the defendant Kelly, reciting its contract with the government, whereby Kelly undertook to furnish all materials and labor necessary to complete the work on or before October 1, 1907, in accordance with the contract between the United States government and the surety company, the surety company to pay to Kelly as the work progressed the amount of the bills for material and work as the same shall become due, and 30 days after the completion and acceptance of the work by the government

to pay defendant Kelly an additional sum equal to 10 per cent. of the actual cost of such work and materials in full for his remuneration for all work, labor and materials, supervision, and other services rendered.

Plaintiffs alleged that in or about the latter part of April, 1907, they entered into an agreement with defendant Kelly to do the plumbing work, furnish the materials therefor, and to receive for services and materials 8 per cent. of the value of the same, Kelly to pay for the material and labor as the same became due.

On or about January 30, 1909, in an action brought in behalf of the people of the state of New York against the Metropolitan Surety Company, a judgment was entered dissolving the surety company because of its insolvency and appointing a permanent receiver of the same. Prior to the dissolution of the corporation, and in April, 1908, as developed upon cross-examination of plaintiff Collins by counsel for the defendant, plaintiffs had commenced an action against the Metropolitan Surety Company to recover the amount of money it sought to recover against the defendant in this action on account of labor and material furnished as alleged here by plaintiffs to Kelly. The dissolution of the Metropolitan Surety Company resulted in the abandonment of that action, and subsequently a claim was presented by plaintiffs to the receiver of the surety company for the same claim.

The trial justice charged the jury that the entire proof as adduced on the trial required the jury to determine whether the plaintiff Collins or the defendant Kelly, who denied liability to plaintiffs, was to be accredited upon the trial, as the entire issue as presented had been on the testimony of the two witnesses named—that if the jury accredited the testimony of plaintiff Collins, it would have the right to render a verdict in his favor; if, on the other hand, they were not satisfied by a fair preponderance of evidence that the plaintiffs had made out a case against the defendant Kelly, then their verdict must be for the defendant. Upon a former trial of this action the jury disagreed. Upon the second trial the verdict of the jury was in favor of the defendant, and the Appellate Division has unanimously affirmed the judgment. Our review of the case is confined to errors of law raised by exceptions.

[1] Upon the cross-examination of the plaintiff Collins, counsel for the defendant laid stress upon the fact that the plaintiffs had commenced an action against the Metropolitan Surety Company and also had presented a claim against the receiver of the surety company after the company was placed in liquidation upon the same account plaintiffs now sought to recover on against Kelly. He cross-examined plaintiff as to

the truthfulness of certain statements in the complaint in the action against the surety company, and likewise as to his evidence given before the referee on the hearing of the claim against the surety company. During the progress of such examination, the plaintiff, when confronted with apparent inconsistency of position, sought to make explanation thereof, but was not permitted to do so by counsel, and was confined strictly to answering specific questions. Upon redirect examination, counsel for plaintiffs undertook to have Collins explain to the court and jury how he came to bring the action against the surety company in the first instance. He was asked the direct question, objection was made by counsel for defendant, the objection was sustained, and exception taken to the ruling. Other questions of a like character were asked of the witness. Objections made thereto were sustained, to which rulings exceptions were duly taken.

Defendant was thereby permitted to prove acts and statements made by plaintiff Collins, and to use the same as an admission against plaintiffs tending to show an inconsistent attitude on their part, and they were denied an opportunity to explain the apparent contradiction in the acts and statements of Collins in the action and proceeding against the surety company and upon the trial of this action. The exclusion of the evidence was error. *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161. The error was also material. The trial justice in his charge to the jury referred to the evidence of Collins but not in detail in the surety company case and upon this trial, and then stated:

"There is a rule of law, gentlemen, that witnesses who willfully falsely testify to a certain fact, juries have a right to disregard their entire testimony. But did he do that? Why did he testify in the manner that he did? That is all for you. There may be a reason for it. But you cannot make a reason for him. That is not your province."

The trial justice, also, at request of counsel for defendant, instructed the jury in substance that, if Collins told the truth when he made the statements in his complaint in the action against the surety company and in his proof of claim and upon the hearing thereof, the verdict must be for defendant. Reference to the charge, to which no exception was taken, is made solely for the purpose of showing the materiality of the error of the justice.

Counsel for defendant also asked the court to charge that there was no evidence, and not a word of evidence, in this case as to any excuse for not bringing this lawsuit until 1912. The court in reply said:

"There is no direct evidence of it, no, sir; they may take the circumstances of it, however."

Exception was duly taken to the charge.

[2] This action was commenced within the statutory period of time. Delay of a party in the commencement of an action is frequently a subject of argument before a court or jury as a circumstance bearing upon the merits of the plaintiff's claim, but there is no rule of law which imposes upon a plaintiff in an action like the present one a duty to furnish direct evidence showing an excuse for failure to commence the action at an earlier day.

The judgment should be reversed, and a new trial granted; costs to abide the event.

HISCOCK, C. J., and CHASE, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Judgment reversed, etc.

(226 N. Y. 87)

CAFFERTY v. SOUTHERN TIER PUB. CO.

(Court of Appeals of New York. March 21, 1919.)

1. LIBEL AND SLANDER §86(1)—INNUEENDO—ENLARGING LIBEL.

An innuendo in a complaint for libel, based on an article charging plaintiff with incompetency as a supervisor of music in the public schools, cannot enlarge the sense of the words used by alleging that they charged her with incompetency as a teacher of music.

2. LIBEL AND SLANDER §86(2, 4)—INNUEENDO—NECESSITY—LIBEL PER SE.

When the publication complained of is libelous per se, no innuendo is necessary, and if the one alleged is not supported by the words, it may be treated as surplusage.

3. LIBEL AND SLANDER §94(4)—JUSTIFICATION—TRUTH—INCOMPETENCY—"SUPERVISOR."

Allegations in an answer in an action on a complaint for libel that plaintiff had a vexatious temper, ill-treated teachers under her, antagonized the principal, and caused dissensions among the teachers showed the truth of a printed charge that plaintiff was incompetent as supervisor of music, since a "supervisor" is one having authority over others, to superintend and direct.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Supervisor.]

4. LIBEL AND SLANDER §56(1)—JUSTIFICATION—TRUTH—"INCOMPETENCY" OF TEACHER.

A showing that a teacher had a vexatious and perverse temper, ill-treated her associates, and antagonized superiors is justification for a printed statement that she was incompetent, since incompetency is not limited to lack of mental equipment and knowledge or ability to

teach, but means a lack of fitness for the duties of the office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incompetency.]

5. LIBEL AND SLANDER §19—CONSTRUCTION OF WORDS.

Words in an article alleged to be libelous must be construed as persons generally understand them, and according to the ordinary meaning.

Chase and McLaughlin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action for libel by Florence Cafferty against the Southern Tier Publishing Company. Judgment for plaintiff for \$1,800.81 and defendant appeals directly to the Court of Appeals. Reversed.

For opinions below, see 180 App. Div. 45, 187 N. Y. Supp. 413; 181 App. Div. 913, 187 N. Y. Supp. 1091; 186 App. Div. 136, 173 N. Y. Supp. 774.

Harvey D. Hinman, of Binghamton, for appellant.

T. B. Merchant, of Binghamton, for respondent.

CRANE, J. The complaint alleges that the plaintiff is an educated and trained teacher of music and for upwards of 13 years prior to the 6th day of June, 1916, had been earning her livelihood in the profession of teaching in the public schools in the city of Binghamton, and 4½ years prior to and including 1916 was engaged as supervisor of music in all the 15 schools of said city, including the high school.

On the 6th day of June, 1916, the defendant published in the Binghamton Republican-Herald, under the head line "Public School Teachers' List is Announced" the following matter concerning the plaintiff:

"Miss Florence Cafferty, supervisor of music, charged with * * * incompetence by Superintendent Kelly is another of those not appointed."

The innuendo pleaded states that this charged the plaintiff with being "unqualified and unfitted to practice her said profession, that she lacked the ability, special education, training, and equipment necessary to enable her to perform the duties of a teacher with intelligence and efficiency, that by reason of such lack of ability, special education, training and equipment as a teacher of music, plaintiff was unqualified and unfitted to retain the position as teacher in the public schools of Binghamton, and for that reason was not reappointed to that position by the board of education in said city at its meeting on June 5th, 1916."

The defendant, after pleading denials and that the article published was privileged as a fair account of the public proceedings of the board of education of the city of Binghamton, set up a justification in its third defense which reads as follows:

"For a third and as a separate and further answer and defense said defendant alleges upon information and belief that the words set forth in the complaint and therein alleged to have been published by the defendant were and are true; that the plaintiff is a woman with a vexatious and perverse temper, and in her employment as supervisor of music in the schools of the city of Binghamton spitefully and abusively illtreated teachers who were required to work under her direction, as well as other teachers who were associated with her in the work of teaching in the schools of said city; that in her said employment she willfully antagonized the principal of the high school under whose direction she was required to work while in said high school, and willfully inconvenienced said principal and other teachers in said high school, and willfully and systematically caused and attempted to cause dissensions among the teaching force of the schools of said city of Binghamton; that the plaintiff's said acts tended to injure the schools of said city, and did injure them, and that by reason thereof, as well as by reason of her perverse temperament, she was and is incompetent to continue in her said employment, and because of such incompetence was not reappointed at the expiration of her contract with the board of education of said city of Binghamton at the close of the school year for 1915-1916."

It has been held thus far that this defense is not a justification, and therefore insufficient, as the matter pleaded is not as broad and extensive as the libel. *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102; *Collis v. Press Publishing Co.*, 68 App. Div. 38, 74 N. Y. Supp. 78; *Saunders v. Post Standard Co.*, 107 App. Div. 84, 94 N. Y. Supp. 993. It is said that the incompetency charged applies and is restricted to the plaintiff's learning, knowledge, and ability as a teacher of music, whereas the attempted justification only touches upon her temperamental disqualifications.

We think that the article has been misconstrued and the justification unduly limited.

[1] Miss Cafferty was charged with incompetency as supervisor of music, and not as a teacher of music. As these words were clear and unambiguous, their meaning cannot be extended by an innuendo. The office of an innuendo is to explain what has already been expressed, but not to enlarge or change the sense of the words used. *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; *Goodrich v. Hooper*, 97 Mass. 1, 5, 93 Am. Dec. 49; *Fleischmann v. Bennett*, 87 N. Y. 231; *McDonald v. Press Publishing Co.*, 174 App. Div. 463, 161 N. Y. Supp. 356.

[2] It is well settled that when the publication complained of is libelous per se no

innuendo is necessary, and, if the innuendo alleged is not borne out by the words, it may be treated as surplusage, and a recovery had on the words themselves. *Gustin v. Evening Press*, 172 Mich. 311, 315, 137 N. W. 674, Ann. Cas. 1914D, 95; *Arnold v. Ingram*, 151 Wis. 438, 452, 138 N. W. 111, Ann. Cas. 1914C, 976.

[3] Construed by this rule the complaint alleges that the plaintiff was charged with incompetency as supervisor of music, and that the charge meant and was intended to mean (a) that the plaintiff was unqualified and unfitted for supervisor; (b) that she lacked the ability, special education, training, and equipment necessary to enable her to perform the duties of a supervisor of music with intelligence and efficiency; (c) that the plaintiff was unfitted to retain the position as supervisor of music in the public schools of Binghamton.

The attempted justification met these charges fully and completely. It stated five things wherein the plaintiff had shown herself to be unqualified, unfitted, without training and equipment to intelligently and efficiently perform her duties as supervisor of music in the public schools.

These things were (a) that she had a vexatious and perverse temper; (b) that she spitefully and abusively illtreated teachers who were required to work under her direction; (c) that she willfully antagonized the principal of the high school whom she was to obey; (d) that she willfully inconvenienced the principal and other teachers; (e) and systematically caused dissensions among the teaching force.

A supervisor is one having authority over others, and to supervise is to superintend and direct. Incompetence, as applicable here, is a general lack of capacity or fitness for directing, controlling, and supervising the teaching of music. This is an entirely different matter from incompetence as a teacher or the lack of requisite knowledge, equipment, and ability to teach. A peculiar adaptability is frequently necessary to make one fitted for the control and direction of subordinates, and a person perfectly able to do the work himself may be wholly incapable of acting as a superintendent over others. Every business and profession is familiar with this distinction.

[4] But even if the article means that the plaintiff was incompetent to teach music to children in the public schools, we would still be of the opinion that the justification was sufficient. A teacher who had a vexatious and perverse temper, illtreated her associates, antagonized the rules, and willfully inconvenienced superiors could hardly be fitted for her place. Education in part at least consists in knowing how to behave. However this may be, the plaintiff was a supervisor of music and not merely a teacher. So reads the charge.

If the defendant were able to prove the

statements alleged, the plaintiff certainly was incompetent as a supervisor or director of music, and the published article was therefore true.

[5] Words are to be construed as persons generally understand them and according to their ordinary meaning. *Larsen v. Brooklyn Daily Eagle*, 165 App. Div. 4, 150 N. Y. Supp. 464; 214 N. Y. 713, 108 N. E. 1098. Incompetence, therefore, cannot be limited merely to a lack of mental equipment and knowledge of music or ability to teach. It must have an association with the work and position which the plaintiff was filling—a lack of fitness for the duties of the office. *Nehrling v. State*, 112 Wis. 637, 647, 88 N. W. 610; *People ex rel. Hannan v. Board of Health, City of Troy*, 153 N. Y. 513, 520, 47 N. E. 785. Teachers and principals in our public schools and professors in our colleges require something more than learning to make them efficient. Character, manners, and self-control are a part of the qualifications which fit one to be a guide to the young to whom example is as potent as precept.

The libel law is not a system of technicalities, but reasonable regulations whereby the public may be furnished news and information, but not false stories about any one. When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done. Competency, therefore, as applicable to the plaintiff's position would be accepted by the ordinary person as a synonym for fitness and ability to do the work required in the public schools as a supervisor of music, and would not be understood or taken to refer to the plaintiff's learning or culture as a musician. True, some might take her discharge to mean all this, but the law cannot take words from their setting and association; rather it must receive them for what they fairly and reasonably state.

Whoever may read this opinion, of course, must understand that we are dealing solely with a question of law and the sufficiency of the words which the parties have put on paper to make out a defense if proved. The statements must not be accepted as any intimation of the facts, for we are dealing solely with a question of pleading.

The interlocutory judgment sustaining the demurrer should be reversed, and the demurrer overruled.

The judgment appealed from should be reversed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, and HOGAN, JJ., concur. CHASE and McLAUGHLIN, JJ., dissent.

Judgment reversed, etc.

(226 N. Y. 101)
GEORGE COLON & CO. v. SMITH et al.
 (Court of Appeals of New York. March 21, 1919.)

APPEAL AND ERROR — 1094(2) — TRIAL — 384 — TRIAL BY COURT — NONSUIT — EVIDENCE.

An order dismissing, without the findings of fact required by Code Civ. Proc. § 1022, a complaint to foreclose a mechanic's lien because there was no evidence of performance of work within 90 days before the filing of the lien, as required by Lien Law, § 10, was a mere nonsuit, not a decision on the merits, and must be reversed where there was some evidence for plaintiff on that issue, though the evidence was not undisputed, and the order had been affirmed by the Appellate Division.

Appeal from Supreme Court, Appellate Division, First Department.

Action by George Colon & Co. against Sarah B. Smith and another. Judgment of the Special Term, dismissing the complaint, was affirmed by the Appellate Division (178 App. Div. 100, 165 N. Y. Supp. 165) and plaintiff appeals. Reversed.

Mortimer M. Menken, of New York City, for appellant.

Lillian Herbert Andrews, of New York City, for respondents.

POUND, J. This is an action to foreclose a mechanic's lien. The Lien Law (Consol. Laws, c. 33), § 10, provided that:

"The notice of lien may be filed * * * within ninety days after the completion of the contract, * * * dating from the last item of work performed or materials furnished."

The only question here presented is whether plaintiff performed any services under a contract for excavation preliminary to the erection of a building made between the defendants Smith as owner and Fitzgerald as contractor within 90 days prior to filing its notice of lien therefor. The contract with Fitzgerald was an oral contract which was sublet to plaintiff and substantially completed by it many more than 90 days prior to such filing. The plaintiff contends that the contract required it to put the sidewalk adjoining the premises in as good condition as the contractor found it, and that the last item of work performed consisted in remedying, at the request of the owner, defects in the work which it agreed to do on the sidewalk. If this was work done in good faith under the contract, its notice was timely filed. *Kenney v. Apgar*, 93 N. Y. 539; *Milliken Bros., Incorporated, v. City of New York*, 201 N. Y. 65, 94 N. E. 196, Ann. Cas. 1912A, 905. The time of the completion of the contract was a question of fact. The learned trial justice, after hearing all the evi-

dence, said in his opinion that he found no evidence of any work performed on the sidewalk within the period of 90 days before the lien was filed, and made a decision dismissing the complaint. No findings of fact were made, and the judgment herein is a mere nonsuit both in form and intention. Code Civ. Pro. § 1022; *Deeley v. Heintz*, 169 N. Y. 129, 135, 62 N. E. 158; *Lindenthal v. Germania Life Ins. Co.*, 174 N. Y. 76, 81, 66 N. E. 629. The Appellate Division affirmed by a divided court but made no findings.

The plaintiff unquestionably produced, if not undisputed evidence, at least evidence upon which the facts may be found in its favor. Indeed, the respondents make no stronger point in their brief than that—

"The question of the completion of this work under the excavation contract is a disputed question of fact which, having been determined by the court below adversely to the plaintiff, is not reviewable in the Court of Appeals."

There has been no determination of the disputed question of fact. The dismissal of the complaint was not on the merits, and was improper.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, McLAUGHLIN, and ANDREWS, JJ., concur.

Judgment reversed, etc.

(126 N. Y. 103)

PEOPLE ex rel. COTTE v. GILBERT, Town Clerk.

(Court of Appeals of New York. March 21, 1919.)

1. STATUTES §101(1)—LOCAL LAWS—"ELECTION OF BOARD OF SUPERVISORS."

Laws 1917, c. 126, amending Town Law, § 40, as to time of town meetings in Nassau county, the terms of office, and filling of vacancies, though a local law, does not provide for election of members of board of supervisors within Const. art. 3, § 18, prohibiting Legislature from passing any local bill as to election of board of supervisors, in view of section 26, as to board of supervisors being elected in such manner and for such period as is or may be provided by law.

2. CONSTITUTIONAL LAW §48—FAVORING CONSTITUTIONALITY OF ACT.

When the constitutionality of an act of the Legislature is questioned, every reasonable doubt must be resolved in favor of its validity.

3. STATUTES §220—LEGISLATIVE AND PRACTICAL CONSTRUCTION—DISREGARDING.

The legislative interpretation given Const. art. 3, § 18, together with the practical con-

struction given it, and acted upon without question or complaint by any one, should not be lightly disregarded.

Appeal from Supreme Court, Appellate Division, Second Department.

Mandamus by the People on the relation of Frank B. Cotte, against Franklin C. Gilbert, Clerk of the Town of Hempstead, County of Nassau. From an order of the Appellate Division (175 N. Y. Supp. 106), directing the issuance of a peremptory writ, defendant appeals. Reversed.

M. Linn Bruce, of New York City, for appellant.

Alfred A. Gardner, of New York City, for respondent.

McLAUGHLIN, J. In 1899 the board of supervisors of the county of Nassau, by resolution, duly passed, pursuant to the provisions of the Town Law (Laws 1898, c. 363) and section 40 (Consolidated Laws, c. 62) fixed the first Tuesday of April in odd-numbered years as the time for holding biennial town meetings in such county, and town meetings were accordingly held up to and including April 3, 1917.

In 1917 the Legislature passed chapter 126 (now section 588 of the Town Law) and it became a law on the 2d of April of that year. This act provided that after the 3d day of April, 1917, the next biennial town meeting and election of town officers in the towns of the county of Nassau should be held on the first Tuesday after the first Monday in November in the year 1919, and thereafter such town meetings and elections should be held on that day in every odd-numbered year. The section further provided that the town officers to be elected at that town meeting should hold office until and including December 31, 1919, excepting certain ones, and their successors should be elected at the regular biennial meetings which it provided should be held on the general election day in November in 1919.

Certificates of nomination for town officers in the town of Hempstead in the county of Nassau to be voted for on the first Tuesday of April, 1919, were presented to the town clerk of that town, who declined to receive or file the same, on the ground that the time for holding the election for town officers had, by the act of 1917, been changed from the first Tuesday in April to the first Tuesday after the first Monday in November. Application was thereupon made to the Special Term of the Supreme Court for a peremptory writ of mandamus to compel him to receive and file such certificates. The application was granted, the Special Term holding that the act of 1917 was unconstitutional. An appeal was taken to the Appellate Divi-

sion, where the order of the Special Term was, for a similar reason, affirmed by a divided court. From this order the present appeal is taken.

[1] The act of 1917 has been pronounced invalid. It is claimed it violates article 3, § 18, of the Constitution of the state. This section provides, among other things, that—

"The Legislature shall not pass a private or local bill in any of the following cases: * * * Providing for election of members of boards of supervisors."

The questions presented, therefore, are (1) whether the act is a local one; and (2) whether it provides for the election of members of the board of supervisors within the constitutional provision. That it is a local act cannot well be questioned. The answer to the remaining question necessarily turns upon the construction to be put upon section 18. In construing this provision of the Constitution, it must be read in connection with section 26 of the same article, which provides there shall be in each county, except in a county wholly included in a city, a board of supervisors to be composed of such members and elected in such manner and for such period as is or may be provided by law. When thus read, I am of the opinion that the act of 1917 is a valid legislative enactment.

[2] When an act of the Legislature is questioned as to its constitutionality, every reasonable doubt must be resolved in favor of its validity. *Matter of Seeley v. Stevens*, 190 N. Y. 158, 82 N. E. 1095; *Matter of Sugden v. Partridge*, 174 N. Y. 87, 66 N. E. 655; *People v. Petrea*, 92 N. Y. 128. Section 18 appeared first in the Constitution of 1874, and was continued, in the Constitution which took effect on the 1st of January, 1895. Since then numerous counties have been exempted by the Legislature from the provisions of section 40 of the Town Law in precisely the same manner as have the towns in the county of Nassau. Upwards of 20 years ago an act was passed, which was applicable only to the counties of Orange, Rockland, and Sullivan, changing the time of holding town elections in towns in those counties to the time of holding the general election in November. Laws 1897, c. 439. Like laws have since been passed, applicable to other counties—Suffolk (Laws 1918, c. 319), Chenango (Laws 1919, c. 3), Erie (Laws 1902, c. 10), Onondaga (Laws 1898, c. 594), Oneida (Laws 1901, c. 34), Rensselaer (Laws 1901, c. 174), Niagara (Laws 1902, c. 239), and Herkimer (Laws 1903, c. 266). Orange, Rockland, Sullivan, Suffolk, and Chenango counties were mentioned by name. It is possible that the act relating to Erie might be considered a general law; but the laws applying to Onondaga, Oneida, Rensselaer, Niagara, and Herkimer, while not mentioning them by name, identify them

by the preceding state or federal enumeration in such a way that it is claimed they are as clearly identified as if their names were used.

[3] It therefore appears that for many years there has been a legislative interpretation of this section of the Constitution, together with a practical construction given it and acted upon without question or complaint by any one, which ought to be considered, certainly not lightly disregarded. *Rathbone v. Wirth*, 150 N. Y. 459, 514, 45 N. E. 15, 34 L. R. A. 408.

Section 40 of the Town Law fixed the time when town meetings shall be held throughout the state, viz. biennially on the second Tuesday of February. The section further provides that the board of supervisors of any county may fix a different time between the 1st day of February and the 1st day of May, or the general election day in November, and section 41 confers upon any town the power to change any day so fixed to the general election day in November.

It thus appears it was not the legislative intent that town meetings in all the towns throughout the state should be held on the same day. But it is urged that, while the Legislature, under the Constitution, may delegate to the board of supervisors in any county power to change the date, it cannot itself make an exception to the time so fixed by section 40, except by a general act.

But when section 18 is read in connection with section 26, as already suggested, I do not think there is any limitation upon the power of the Legislature to fix the time of holding an election for town officers in any county of the state. Indeed, under the present law, uniformity is not required. One county may have one time and an adjoining county another. The limitation upon such power in the section is as to the manner and method of election and the composition of the board. This limitation is to prevent one town having a larger representation upon the board than another town, or to prevent one county, selecting its board of supervisors in one way and another county in another. The uniformity now existing in this respect is in no way interfered with by the act in question. The composition of the board, representation thereon, the terms of office of its members, except only in so far as is necessary to prevent a vacancy, remain the same.

Attention is called by the respondent to *People ex rel. Clancy v. Board of Supervisors, Westchester Co.*, 139 N. Y. 524, 34 N. E. 1106. The decision in that case is not in conflict with the view here expressed. All that case determined was the validity of certain provisions of the charter of the city of Yonkers as amended in 1892 (Laws 1892, c. 54, § 4), allowing a supervisor of each ward to be elected by the electors of

the ward and the court held that the act was not in conflict with section 18 of article 3 of the Constitution.

If the foregoing views be correct, then it follows that the orders of the Appellate Division and the Special Term should be reversed, and the application for mandamus denied, without costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, and CRANE, JJ., concur.

Orders reversed, etc.

(226 N. Y. 51)

MELCHER v. OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited.

(Court of Appeals of New York. March 18, 1918.)

1. APPEAL AND ERROR ⇐1091(4)—INTERMEDIATE COURT—DISMISSAL OF COMPLAINT—PRESUMPTION AS TO EVIDENCE.

Where Appellate Division not only reversed judgment for plaintiff, but also dismissed his complaint, the dismissal of the complaint required the Court of Appeals to take the view of the evidence most favorable to plaintiff.

2. INSURANCE ⇐535—ACCIDENT INSURANCE—INJURY—NOTICE TO INSURER.

Where an apparently trivial mishap occurred, the assured under an accident liability policy was not required to regard it as an accident of which notice should be given immediately to the insurer, although it afterwards resulted in serious injury.

Collin, Hogan, and Andrews, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by John S. Melcher against the Ocean Accident & Guarantee Corporation, Limited. From a judgment of the Appellate Division (175 App. Div. 77, 161 N. Y. Supp. 586), reversing a judgment of the Trial Term entered on the verdict of a jury, and dismissing the complaint, the plaintiff appeals. Judgment of the Appellate Division reversed, and judgment of the Trial Term affirmed.

Frederick B. Campbell, of New York City, for appellant.

Frederick W. Oatlin, of New York City, for respondent.

CUDEBACK, J. The defendant issued to the plaintiff a policy of insurance, whereby the defendant promised and agreed to indemnify the plaintiff against loss on account of bodily injuries received by any person while within the Chatsworth Apartments, which is owned by the plaintiff.

During the life of the policy, and on or

about November 3, 1913, one Henry Didier was injured under circumstances which created a liability on the part of the defendant under its policy. Subsequently the plaintiff made claim against the defendant, but the defendant refused to admit its liability, on the ground that the assured had failed to give immediate notice of the accident as required by the policy. The plaintiff did not give the defendant notice until on or about February 17, 1914, some three months after the accident occurred. The plaintiff was subsequently compelled to pay \$4,000 on account of Didier's injuries, and brings this suit on the policy.

The jury rendered a verdict for the plaintiff. The Appellate Division reversed the judgment, and also dismissed the plaintiff's complaint. The dismissal of the complaint requires this court, in the consideration of the case, to take the view of the evidence most favorable to the plaintiff. *Faber v. City of New York*, 213 N. Y. 411, 107 N. E. 756.

The evidence shows that there were two elevators in the plaintiff's apartment house, a passenger elevator and a freight elevator, situated side by side. Didier was engaged in making some alterations in the passenger elevator. The plaintiff had employed a firm of sheet iron workers to make the alterations in the elevator, and the firm sent Didier to do the work. To carry out his task, Didier went to the thirteenth floor of the building and took his station on an I-beam between the two elevator shafts. The superintendent of the building, one Moore, instructed the elevator operator on the freight car not to run higher than the twelfth floor.

For some reason, the freight elevator was run above the twelfth floor, and it struck Didier in the posterior, raising him up about a foot. Didier sent word to the superintendent of the building, who went up to the thirteenth floor. He asked Didier if he had been hurt, to which Didier replied no, but that he was badly scared, and he asked the superintendent to instruct his men to be more careful in the future, which the superintendent promised to do. Didier continued to work during the afternoon and apparently finished the alterations.

Moore, the superintendent of the building, testified that he did not report the accident, or, as he says, give it any further thought. But on February 14, 1914, the plaintiff received a letter from a lawyer, saying that Didier's spine had been seriously injured when the freight elevator struck him. This letter was delivered to the defendant on February 17th, and constituted the notice to the defendant of the accident. As has been said, the defendant denied liability because the notice was too late.

It appeared that some six weeks prior to the plaintiff's receipt of this letter, a young

man who said he was a law student inquiring as to an accident to a man named Didler, which happened on the tenth floor of some apartment in Riverside Drive, called upon superintendent Moore. The superintendent did not know Didler by that name and did not associate the statement of the law student with the occurrence of November 3d, and on inquiry made of the elevator men and others employed in the apartment house learned nothing to refresh his recollection. He could therefore give no information to the law student.

There was, of course, other evidence in the case not in harmony with this statement; but the jury might have taken the view which I have set forth.

The court submitted to the jury the question whether the plaintiff had complied with the provisions of the policy as to giving immediate written notice of the accident to the defendant, with the following charge:

"I am going to leave that to you. And then, if you find from all the evidence that the fact is that Mr. Moore (the superintendent) had no reason to believe there was any injury there of any kind and had no reason to believe that the thing that happened there would tend toward any bodily injury on the part of this man, then I would tell you you have the right to consider that, because then he would be justified in not sending notice to the company because there was neither a claim of injury made nor any such condition existing which would warrant a reasonable man in believing that there was any injury."

Acting under these instructions, the jury rendered the verdict in favor of the plaintiff. I am of the opinion that the instructions given by the court were as favorable to the defendant as the defendant could ask, and that the verdict should not have been interfered with.

It is not every trivial mishap or occurrence that the assured under such a policy of liability insurance must regard as an accident of which notice should be given immediately to the insurance company, even though it may prove afterwards to result in serious injury. The Supreme Court of Nebraska has had occasion to consider the insurance company's liability under similar circumstances, and has said:

"The word 'accident' is susceptible of and has received many definitions, varying with the connection in which it is used. * * * As used in an indemnity policy such as this, we are of the opinion that the word 'accident' means an undesigned and unforeseen occurrence of an afflictive or unfortunate character resulting in bodily injury to a person other than the insured. It is evident that it cannot have been the intention of the parties that such an accident as a mishap, casualty or misadventure occurring without bodily injury to anyone should be reported, since, with such an occurrence, the defendant has no concern. * * * If no appar-

ent injury occurred from the mishap, and there was no reasonable ground for believing at the time that bodily injury would result from the accident, there was no duty upon the assured to notify the insurer." Chapin v. Ocean Accident & Guarantee Corp., 96 Neb. 213, 147 N. W. 465, 52 L. R. A. (N. S.) 227.

The conclusion is that the reversal by the Appellate Division was error.

I therefore recommend that the judgment of the Appellate Division be reversed, and the judgment of the Trial Term be affirmed, with costs to the appellant in this court and in the Appellate Division.

HISCOCK, C. J., and CHASE and ORANE, JJ., concur.

COLLIN, HOGAN, and ANDREWS, JJ., dissent.

Judgment reversed, etc.

(226 N. Y. 199)

**SWEETING v. AMERICAN KNIFE
CO. et al.**

(Court of Appeals of New York. April 8, 1919.)

**MASTER AND SERVANT — § 347 — WORKMEN'S
COMPENSATION ACT — AWARD FOR DISFIG-
UREMENT.**

Workmen's Compensation Law, § 15, subd. 3, as amended by Laws 1916, c. 622, § 3, providing that in case of an injury resulting in serious facial or head disfigurement, the commission may make an award not to exceed \$3,500, is constitutional, at least in so far as facial disfigurement is related to loss of earnings.

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the claim of George Sweeting, employé, for compensation under Workmen's Compensation Law, against the American Knife Company, the employer, and insurance carrier. From an order of the Appellate Division of the Supreme Court for the Third Department (172 N. Y. Supp. 921), affirming an award of the state Industrial Commission, the employer and insurance carrier appeal. Order affirmed.

Wm. H. Foster, of Syracuse, for appellants.
Charles D. Newton, Atty. Gen. (E. O. Aiken, of Albany, of counsel), for respondent.

CARDOZO, J. The claimant was employed in the grinding department of the American Knife Company. The explosion of an emery wheel destroyed the bridge of his nose, giving him what is commonly called a flat nose, with deep scars upon his face. The state Industrial Commission made an award of \$2,500 for serious facial disfigurement. Subdivision 3 of section 15 of the Workmen's

Compensation Law (Consol. Laws, c. 67 [as amended in 1916]) provides that—

"In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed \$3,500."

The employer and the insurance carrier insist that this provision of the statute is unconstitutional and void.

The argument is that the purpose of the amendment is to compensate the workman for injuries that have no relation to his earning power. If that were in truth the purpose, the statute would still be valid. *Matter of Erickson v. Preuss*, 223 N. Y. 365, 119 N. E. 555. The Constitution (article 1, § 19) authorizes the adoption of a system of insurance to compensate employes for injuries without regard to fault. Insurance against pain of mind and body is as legitimate, if the amount is kept within the bounds of moderation, as insurance against loss of earnings. It is of no moment that some other measure of compensation may have prevailed in the past. The Constitution does not stereotype the forms of legislation. The common law gave the workman compensation for pain and suffering, as well as for loss of earnings, when the employer was at fault. The statute takes that remedy away, and substitutes insurance within prescribed limits, irrespective of fault. Pain and suffering are part of the risks of the employment. The Legislature may make them part of the risks of the insurance. The one restriction on its power is that the burden must be reasonable. *Mountain Timber Co. v. Washington*, 243 U. S. 219, 240, 241, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; *N. Y. Central R. R. Co. v. White*, 243 U. S. 188, 207, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1 Ann. Cas. 1917D, 629.

The statute would stand, therefore, though facial disfigurement were unrelated to loss of earnings. But in truth it is related, and so the Legislature must have found. One cannot defeat a statute by a presumption that in its enactment the truths of life have been ignored. The presumption is, on the contrary, that they have been perceived and heeded. But one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims. In some callings it would rule out altogether an applicant for employment. In most it would put him at a disadvantage when placed in competition with others. There may, of course, be individual instances of disfigurement without impairment of earning power. That is true also where there has been the loss of a finger or a foot or an eye. Lawmakers framing legislation must deal with general tendencies. The average and not the exceptional case determines the fitness of the remedy.

The argument is made, however, that the findings are defective. If the purpose of the statute is to compensate for loss of earnings, there should be a finding, it is said, that the result of the claimant's disfigurement will be diminished earning power. One might as well argue that without a like finding there could be no recovery for the loss of a finger or a foot or an eye. The commission has found that there has been serious facial disfigurement, and that an award of \$2,500 is fair and equitable. Those are the ultimate facts to be embodied in the decision. The capacities and opportunities of the individual claimant have at the utmost an evidential value. It is true that the commission has a wide discretion, and in fixing a fair and equitable compensation it may inquire into all the circumstances that will help to guide its judgment. But those circumstances, however pertinent as evidence, have no place in the findings. The mutilated face, like the mutilated arm or leg, is the capital fact upon which liability depends. The injury alone, without other proof of loss, makes out the claimant's handicap in the struggle of existence. Given the fact of injury, the commission is to assess the damages. The presumption is that all relevant circumstances have been weighed in the assessment. These findings, therefore, would be adequate even if the commission were a court. But in truth it is not a court, and the niceties of code practice have no place in its procedure. Its decision states the facts essential to liability. No more should be exacted.

There is nothing in the point that the extent of compensation must be determined by a jury. The Constitution authorizes "the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation." Const. art. 1, § 19. The award is not redress for a tort. It is an allotment to an insured workman of his proportion of a fund maintained for his insurance. *Mountain Timber Co. v. Washington*, supra, 243 U. S. at page 235, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642. Nor does the statute become invalid because the commission has some discretion in fixing the amount. The Legislature may provide for such a method of "adjustment, determination and settlement" as it will. There is reason for the distinction which it has drawn between facial disfigurement and other injuries, though the reason is hardly our concern. Some injuries, as for instance the loss of a limb, may be so defined and classified that the appropriate compensation may, with a fair average of justice, be estimated in advance. But cases of disfigurement have their special problems. It is difficult, if not impossible, to define and classify the injuries. A flexible compensation makes for justice alike to employer and to workman. It is not important that a lump payment is exacted. That may be done in other

cases. Workmen's Compensation Law, § 27. The payment is not made by the employer himself, if he insures in the state fund, except to the extent of the premium which he pays for his insurance. Sections 50, 53. It is a charge upon the fund. He may, of course, be a self-insurer, or pay his premiums to an insurance company (section 50), but that is only at his option.

The statute is constitutional, and the proceedings under it have been regular.

The order should be affirmed, with costs.

POUND, J. (concurring). I concur in the result. The compensation awarded to the employé under the Workmen's Compensation Law is based on loss of earning power. An allowance for serious facial or head disfigurement, so far as such disfigurement has no relation to disability, is an anomaly. Matter of Marhoffer v. Marhoffer, 220 N. Y. 543, 116 N. E. 379; The language of the opinion in the Erickson Case, 223 N. Y. 365, 368, 119 N. E. 555, 556. "The commission may now make an award for serious facial or head disfigurement, *even though such disfigurement does not diminish or impair the earning capacity of the claimant*," is unnecessarily broad, and might have been limited to the language of the act itself, which does not include the words italicized.

Doubtless the general language of the New York Constitution (article 1, § 19) would permit us to uphold a statute which awards compensation to employés for *all* industrial injuries, without trial by jury, but the theory of the Compensation Acts is that the community rather than the injured workman should carry the burden of *impaired earning capacity* due to accident. If that theory is extended to cases where the injured man can still work and get work and an administrative board is permitted to assess the damages, a new problem is introduced as to the limits of legislative power (U. S. Const. Amend. 14) and the reasonableness of the burden, the solution of which is not so easy. N. Y. Central R. R. Co. v. White, 243 U. S. 188, 202, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1 Ann. Cas. 1917D, 629.

Serious facial or head disfigurement may leave one *able* to work and *unable* to get work. Employers might refuse to employ a disfigured man in his trade either from lack of confidence in his unimpaired ability or because it would be unpleasant for others to work beside him or unprofitable to have him meet the customers. A woman whose hair had been torn off or whose face was badly scarred might be so repulsive to the eye that no one would employ her and yet be as competent as ever to do her work. In a lesser degree, the seriously disfigured face or head of a man might lead to discrimination against him. The House of Lords in *Ball v. Hunt &*

Sons (1912, A. C. 496), upholding an award for such injuries, said:

"The injury for which the statute gives compensation is not mutilation or disfigurement or loss of physical power, but loss or diminution of the capacity to earn wages."

The New York statute, by mentioning facial injuries, merely makes plain what the English act leaves to interpretation. If this award for disfigurement is placed on the broad ground of impaired ability *to get work*, no violence is done to the purpose of the act. In the absence of a finding of fact negating such impaired ability on the facts in this case, the award should be sustained. W. C. L. § 21. The order should be affirmed, with costs.

McLAUGHLIN and ANDREWS, JJ., concur with CARDOZO, J.

HISCOOK, C. J., and POUND, J., concur in result in memorandum, by POUND, J.

CHASE and HOGAN, JJ., vote to remit case to Industrial Commission for further hearing because of absence of findings showing that disfigurement has resulted in loss of earning power or of ability to obtain employment.

Order affirmed.

(226 N. Y. 57)
MCGRAW v. GRESSER.

(Court of Appeals of New York. March 18, 1919.)

1. MUNICIPAL CORPORATIONS ⇐218(10)—EMPLOYÉS—WRONGFUL REMOVAL—REMEDIES—DAMAGES.

The remedy of mandamus for reinstatement, given to a civil service employé, wrongfully discharged, by Civil Service Law, § 22, does not preclude recovery of damages for the wrongful removal by the borough president.

2. MUNICIPAL CORPORATIONS ⇐218(10)—OFFICERS—LIABILITY—WRONGFUL DISCHARGE OF EMPLOYÉ.

The removal by a borough president of a civil service employé without a hearing is a ministerial act, which renders the president liable in damages.

3. OFFICERS ⇐71—WRONGFUL REMOVAL—DAMAGE.

Though a public office is not property, an officer under the civil service has a right to his office, of which he is deprived by removal without a hearing, and for such injury can recover as damages the salary of which he was deprived by the wrongful removal.

4. ELECTION OF REMEDIES ⇐3(1)—WRONGFUL REMOVAL FROM OFFICE—DAMAGES—MANDAMUS.

The failure of a civil service officer to claim damages for a wrongful removal in the manda-

mus proceeding by which he was reinstated, as authorized by Code Civ. Proc. § 2088, is not a waiver of his right to such damages, but he can recover them by separate actions.

Hiscock, C. J., and Collin and Cuddeback, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Thomas J. McGraw against Lawrence G. Gresser. Judgment for plaintiff was affirmed by the Appellate Division (176 App. Div. 887, 162 N. Y. Supp. 1129), and defendant appeals. Affirmed.

Plaintiff was executive clerk in the office of the president of the borough of Queens in the city of New York. He had served a term in the volunteer fire department of Long Island City and was wrongfully removed from his position by the defendant, the president of the borough, for political reasons and without a hearing (Civil Service Law [Consol. Laws, c. 7] § 22), and the position was filled by the appointment of another.

After his removal he was reinstated in his position, pursuant to a writ of peremptory mandamus, and the amount of the recovery herein is the compensation attached to his position from the time of his removal until he was reinstated.

Charles H. Street, of Huntington, for appellant.

Solon Welt, of New York City, for respondent.

POUND, J. The question is whether a former volunteer fireman, wrongfully discharged from a position in the civil service, may maintain an action to recover damages against the officer who removed him; his position having meanwhile been filled by the appointment of another.

[1] Exempt volunteer firemen were first protected from removal from positions in the civil service of the various cities and counties, "except for cause shown after a hearing had," by Laws 1892, c. 577. This statute provided no remedy, but it was held in *People ex rel. Coveney v. Kearny*, 44 App. Div. 449, 61 N. Y. Supp. 41, affirmed 161 N. Y. 648, 57 N. E. 1121, that a veteran fireman wrongfully discharged from a subordinate position was entitled to a common-law writ of mandamus to compel his reinstatement when no question arose between the relator and any actual incumbent of the position.

The statutory provision for a writ of mandamus for the benefit of firemen appears in Laws 1899, c. 370, § 21, now section 22, Civil Service Law. The effect of this amendment was merely to extend the remedy by mandamus to cases where the position had been filled by the appointment of another. *People ex rel. Mesick v. Scannell*, 63 App. Div. 243,

246, 247, 71 N. Y. Supp. 383. But mandamus was essentially a remedy for reinstatement and reinstatement is not a complete remedy.

[2] The act of defendant in removing plaintiff without a hearing was ministerial. *Nuttall v. Simis*, 31 App. Div. 503, 52 N. Y. Supp. 308. Defendant is, therefore, also liable in damages to plaintiff by reason of his misfeasance. *Hover v. Barkhoof*, 44 N. Y. 113; *Bryant v. Town of Randolph*, 133 N. Y. 70, 30 N. E. 657; *Beardslee v. Dolge*, 143 N. Y. 160, 38 N. E. 205, 42 Am. St. Rep. 707.

[3] A public office or position is not property in the sense in which that term is generally used, but it is idle to say that one who is wrongfully removed from a position in the civil service does not sustain an injury. He is deprived of a right. *Nichols v. MacLean*, 101 N. Y. 528, 533, 5 N. E. 347, 54 Am. Rep. 730. In the "great case" of *Ashby v. White* (1703) 2 Ld. Raym. 938, 950, 3 Ld. Raym. 323, 1 Smith L. C. (11th Ed.) 240, the House of Lords, approving the dissenting opinion of the famous Sir John Holt, C. J.; below, held that an action lies in behalf of any person having a right to vote against election officers who refused to receive his vote, because he has been deprived of a right and where there is a right there is a remedy. *Willy v. Mulledy*, 78 N. Y. 310, 314, 34 Am. Rep. 536. The loss is the amount of salary of which plaintiff has been deprived by defendant's wrongful act.

[4] If plaintiff had so elected, he might have, with proper parties and allegations, had damages awarded to him in the mandamus proceeding wherein he was reinstated (Code Civ. Proc. § 2088; *People ex rel. Goring v. Prest*, etc., of Wappingers Falls, 151 N. Y. 386, 389, 45 N. E. 852); but the alternative was not between such election and a waiver of his rights. Where a statute gives a right, it does not follow that other consistent rights are taken away. *Central Trust Co. v. N. Y. City & No. R. R. Co.*, 110 N. Y. 250, 255, 18 N. E. 92, 1 L. R. A. 260. Even if we adopt, as did the learned trial justice, the dictum of *Laughlin, J.*, in *People ex rel. Walker v. Ahearn*, 139 App. Div. 88, 94, 123 N. Y. Supp. 845, affirmed *People ex rel. Walker v. McAneny*, 202 N. Y. 551, 95 N. E. 1137, that public policy protects officials who make unauthorized removals "in the absence of bad faith or improper motive," plaintiff is entitled to recover. But the law may not be violated with impunity, even by public officials with good motives.

I think that the judgment is right, and should be affirmed, with costs.

HOGAN, CARDOZO, and ANDREWS, JJ., concur.

HISCOCK, C. J., and COLLIN and CUDDEBACK, JJ., dissent.

Judgment affirmed.

(232 Mass. 596)

EMACK'S CASE.(Supreme Judicial Court of Massachusetts.
Suffolk. April 17, 1919.)**1. MASTER AND SERVANT §-361, 403—LENDING MACHINE AND SERVICES—CHANGE OF EMPLOYMENT—PRESUMPTION.**

Where person in general employment of contractor assists, with machine or other appliances belonging to contractor, in work of subcontractor or other employer to whom he is lent, he may become, with his consent, servant of the other contractor of special employer, but there is a rebuttable presumption that in management of machine or appliance he remains servant of general employer.

2. MASTER AND SERVANT §-405(2)—WORKMEN'S COMPENSATION ACT—CHANGE IN EMPLOYMENT—FINDING OF INDUSTRIAL ACCIDENT BOARD—EVIDENCE.

In proceedings for compensation for death of engineer of locomotive crane lent by contractor to subcontractor, finding of Industrial Accident Board that engineer did not become servant of subcontractor in care and management of crane, but in such respect remained employé of contractor, *held* supported by evidence.

3. MASTER AND SERVANT §-417(7)—WORKMEN'S COMPENSATION ACT—REVIEW—FINDING OF INDUSTRIAL ACCIDENT BOARD.

Where there was evidence to support finding of Industrial Accident Board on a question of fact, such as whether engineer of locomotive crane lent by contractor to subcontractor became servant of latter in respect to management of crane, Supreme Judicial Court cannot set finding aside.

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act by Mabel B. Emack for compensation for the death of Albert M. Emack, the employé, against the Aberthaw Construction Company and the Holbrook, Cabot & Rollins Corporation, as employers, and the Contractors' Mutual Liability Insurance Company and the Travelers' Insurance Company, as insurers. Compensation was awarded against the Contractors' Mutual Liability Insurance Company, and denied as against the Travelers' Insurance Company, and from the decree of the superior court ordering payment by the Contractors' Mutual Liability Insurance Company, and dismissing the claim against the Travelers' Insurance Company, the claimant and the Contractors' Mutual Liability Insurance Company appeal. Affirmed.

Peter F. McCarty, of Boston, for appellant Emack.

Norman F. Hesseltine, J. Frank Scannell and J. Waldo Bond, all of Boston, for appellant Contractors' Mutual Liability Ins. Co.

Walter I. Badger and Louis C. Doyle, both of Boston, for appellee Travelers' Ins. Co.

CARROLL, J. Albert M. Emack, employed by the Aberthaw Construction Company as the engineer in charge of a locomotive crane, received a fatal injury. Holbrook, Cabot & Rollins Corporation, a subcontractor, on March 13, 1918, wrote to the Aberthaw Company stating that it required a locomotive crane to act "as auxiliary to our derricks, also to provide motive power for getting piles from the pile yard out to the wharf. We understood from Mr. Garrod that the crane would be forthcoming and could be held absolutely at our disposal for the continuance of our work." On the following day the supervisor of the Aberthaw Company replied, saying that the company "has furnished you at Squantum this morning, March 14, 1918, with one locomotive crane equipped with a 50-foot boom, and one standard flat car. . . . Please note that the Aberthaw Construction Company will furnish the engineer and fireman on the locomotive crane throughout its work for you."

Sunday morning (March 17, 1918) Green, a rigger employed by Holbrook, Cabot & Rollins, ordered Emack to go to the dock and hoist an engine from the deck of a lighter to a flat car. The crane was run down to the dock, employé of the subcontractor adjusted the chains about the engine and connected them with the hoisting tackle of the crane. The crane was equipped with jacks to support the platform when lifting, and clamps to fasten the crane to the rail. Neither the jacks nor clamps were in use when the employé was killed. Before attempting to hoist the engine, Emack's firemen asked Green its weight, to which Green replied, "From 4½ to 5 tons." The fireman then said, "You think that is a 30-foot radius?" and Green answered, "Yes." The fireman then looked at the guideplate on the crane and saw that with a 30-foot radius the crane could lift 11,500 pounds. After this conversation, Green gave Emack the signal to hoist the engine. As soon as the crane started it became unbalanced by the heavy burden and turned over on its side, so severely scalding Emack that he died in a few hours.

Both the Aberthaw Company and the Holbrook Company were insured under the Workmen's Compensation Act. The Industrial Accident Board awarded compensation against the insurer of the Aberthaw Construction Company in favor of Mrs. Emack, the employé's widow. She appealed, in order to protect her rights against the Holbrook, Cabot & Rollins Corporation, in

case it should be found that the Industrial Accident Board was in error. The insurer of the Aberthaw Company also appealed.

[1] Where a person in the general employment of a contractor assists with a machine or other appliance belonging to the contractor, in the work of an employer to whom the servant is lent, the person so lent may become, with his consent, the servant of the special employer. But in such a case it will be presumed that in the management of the machine or appliance the employé in charge remains the servant of the general employer and does not become the servant of the special employer. *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922; *Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648; *Pigeon's Case*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; *Peach v. Bruno*, 224 Mass. 447, 113 N. E. 279; *Clancy's Case*, 228 Mass. 316, 117 N. E. 347; *Scribner's Case*, 231 Mass. 132, 120 N. E. 350.

This presumption, however, may be overcome by evidence to the contrary; and the facts may be such as to warrant the finding that the owner of the machine has so far surrendered the right of control that even in this particular the person in charge of the machine has become the servant of the special employer. See in this connection *Scribner's Case*, supra; *Cain v. Hugh Nawn Contracting Co.*, 202 Mass. 237, 88 N. E. 842.

[2, 3] In the case at bar there was evidence upon which the Industrial Accident Board could have found that Emack, in the operation and management of the locomotive crane, became the employé of the Holbrook, Cabot & Rollins Corporation. The correspondence between the two corporations indicates that the crane was to be at the disposal of the Holbrook, Cabot & Rollins Corporation. There was evidence that, when Emack and his fireman started the work for the Holbrook Company, they were informed by the master mechanic of the Aberthaw Company "to do absolutely as they were told by the subcontractor," and that they made no objection to this direction. But the Industrial Accident Board was called upon to decide a question of fact; and it might well have found that, even if Emack was temporarily in the employment of the Holbrook, Cabot & Rollins Corporation, in the care and operation of the crane he remained the employé of the Aberthaw Company. It could have found that the crane was a complicated machine, requiring experience and skill in its operation; that Emack was an experienced engineer and that the control was left entirely to him, with no direction for its management given by the Holbrook Company. It does not appear that any one employed by the subcontractor understood how to op-

erate the crane, and the master mechanic of the Aberthaw Company testified that "Mr. Emack was supposed to know what the crane would lift on a certain job, and it was left to Mr. Emack to use his judgment as to how much he should lift. If Mr. Emack was told to lift a greater load than the crane would stand, he would be supposed to say that the crane would not stand it," and "for the protection of the crane as property of the Aberthaw Company * * * was expected to do only work which would not endanger the crane." On this evidence the board found that Emack did not become the servant of the Holbrook, Cabot & Rollins Corporation in the care and management of the locomotive crane, but in this respect remained the employé of the general employer. We cannot say that this finding was wrong. The question was one of fact; there was evidence to support the finding, and we cannot set it aside.

Decree affirmed.

(232 Mass. 557)

McCARTHY'S CASE. In re TOWN OF DANVERS. In re EMPLOYERS' LIABILITY ASSUR. CORPORATION, Limited.

(Supreme Judicial Court of Massachusetts.
Suffolk. April 11, 1919.)

1. MASTER AND SERVANT \S 405(4) — WORKMEN'S COMPENSATION ACT—OPPORTUNITY TO ESCAPE INJURY—SUFFICIENCY OF EVIDENCE.

Finding of Industrial Accident Board that employé, who suffered sunstroke, had no opportunity to escape effects of exposure to heat before he collapsed, *held* warranted by evidence.

2. MASTER AND SERVANT \S 373—WORKMEN'S COMPENSATION ACT—"ARISING OUT OF EMPLOYMENT"—SUNSTROKE.

Where town's employé, who worked in gravel pit, suffered a sunstroke, injury arose out of his employment, which exposed him to danger of sunstroke, an injury naturally connected and reasonably incident to employment, as distinguished from ordinary risk which general public is exposed to.

Appeal from Superior Court, Suffolk County.

Proceeding for compensation for injuries under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571) by John E. McCarthy, the employé, opposed by the Town of Danvers, the employer, and the Employers' Liability Assurance Corporation, Limited, the insurer. Compensation was awarded by the Industrial Accident Board, the award affirmed by the superior court, and from its decree the insurer appeals. Affirmed.

All the material evidence introduced at the hearing follows:

Dr. James E. Simpson, testified:

That he is from Salem and has been practicing for 28 years; that he is a graduate of the Harvard Medical School; that he spent one year as resident surgeon at the Salem Hospital and then engaged in general practice of medicine in Salem; that he has testified many times on cases in court for the defense. The employee's counsel questioned the doctor: Assuming a man is in a gravel pit, which is closed on three sides on a day when there is little or no air, working there with pick and shovel in the company of other men, and he is sunstruck, suffering from heat prostration, and it is found as a fact that he was subjected to a materially greater danger of sunstroke on August 2, 1917, last year, what knowledge would he have that he was suffering from heat prostration? (Mr. Gleason objects to the question on the ground that he does not feel that this is evidence that bears on the purpose for which case is recommitted. The objection is overruled by Mr. Kennard.) Dr. Simpson further testified that he is a medical examiner and has been for 16 years; that he has attended sunstroke cases, fatal and otherwise; that as medical examiner, he has made reviews of persons who had suddenly died from heat prostration or sunstroke before a doctor was called on such cases; that occasionally in the summer months he has had cases of sunstroke and in 1911, during the extreme heat, about the 1st of July, he reviewed 23 bodies, people who have dropped dead or died from heat exhaustion; that he also treated persons who did not meet with favorable results; that he has treated patients for heat exhaustion—men in the military service for several years—men in the encampment, who dropped from heat; that there are certain definite signs by which he can determine heat prostrations. Dr. Simpson stated in answer to first question objected to by counsel for insurer, that his opinion is that the length of time which elapses between the time when a man begins to get the first symptoms, knocked out and incapacitated from sunstroke, is an unappreciable length of time; that the man begins to feel that the heat is affecting him; that he drops from exhaustion; that the heat affects his head in the beginning, affects his intelligence; that he gets into a stupor or unconscious condition; later things get dark before him, he becomes faint and assumes the thing is beginning to affect him; that he has a hazy knowledge of things; that he does not know, before the thing does get him all of a sudden, that he is any different from his usual condition. Dr. Simpson stated further he has a general knowledge of the intensity of the heat in a sand pit surrounded as indicated.

Cross-examined, the doctor testified:

That the immediate effect of a sunstroke on the body is a congestion, particularly of the blood vessels of the brain; the heart action becomes rapid and much increased, there is a sudden rise in the temperature of the body and in cases which get well, the conditions which he has described gradually disappear and the man is restored to normal; in other cases, the men collapse after a little while and die from the collapse; and in certain other cases they get partly well and some definite change is left in the brain which incapacitates them afterwards,

even though they don't die. The direct effect of the heat is what causes the rise in temperature, and then something takes place in the system whereby a man becomes, in a measure, sort of toxic and poisoned from internal conditions because the tissues are in such a state they cannot resist the effect of things which ordinarily ought to be taken care of internally in the system. Persons who have sunstrokes have to be subjected to heat; he should think they would have to be subjected more than a minute; of course, it is indefinite. One cannot tell the length of time because certain individuals have less resisting power than others; some get acclimated in a way and how long they have to be subjected to the heat is a matter that cannot be determined in any definite case. He should suppose that the resisting power of a man not acclimated would be less than that of a person who was used to the heat. A weak or frail person's resisting power would be less than that of a husky person. He has no way of determining in a given case how long the heat is affecting a person; there are many features that govern that besides the resistance of the thing. There are cases where men work day after day, all summer long, in excessive heat, and never get a heat stroke. There are cases of heat stroke where the person needs to be exposed two or three hours before the heat overcomes him; there are persons who can be exposed to heat any length of time and never get overcome, where others will be overcome under the same conditions; when it comes, it comes all of a sudden—there is no leading up to it. A man has to be in the heat some time before his organs suddenly give out and refuse to work. What that period may be, nobody can tell. He knows nothing about McCarthy except what he was told to-day. A man who is working in a hot place, if he is a man of normal mentality, knows it. "We all know that when we are working in a hot place, we are liable to get a sunstroke." He knows nothing about August 2d except what he has been told.

"Q. You do not know whether it is a fact that 13 people died on that day of heat prostration? A. I don't.

"Q. I understood you to say that when a heat prostration comes on, there are practically no premonitory symptoms, as you call them? A. Yes. Either momentary, or else the man doesn't know a thing until he drops. By premonitory symptoms he means that when a man has a mild stroke, or a stroke of insufficient intensity to knock him out at once, he begins to feel heavy-headed, dizzy, faint, things grow dark before him, he staggers, feels weak, prostrated, and drops. He may not get to the state of collapse, unconsciousness. He may revive after a few minutes, if he lies down. Insolation is the medical term for sunstroke; that is the term that governs all cases from mild ones that revive up to the ones that die in a few minutes. There is a difference in the symptoms, depending on the severity of the case; in severe cases a man does not have time to get premonitory feelings from which he revives, if it is a slight case; he does not remember anything about it, simply drops in his tracks, and is carried off unconscious, perhaps going on to a condition of collapse and death; if a person is fighting for him, he may bring him around.

"Q. Is it true that the longer a person stays

in the heat, the more serious will be the condition? A. I don't know that that would have direct bearing. It is not always so that the persons who have the slight sunstrokes are the weaker persons. The first thing a man notices is a headache, feels stupid, weak, cannot move himself up, gets dizzy, staggers. The headache is coincident with the condition; there is no particular order, the whole group of symptoms appearing at the same time. The headache comes on immediately before the man drops."

He has seen men hold themselves up for a short length of time; that short length of time might be a moment or a few minutes; he cannot tell exactly. Before the headache comes on, he does not think a man feels anything; this thing hits him all of a sudden. A person working in the heat feels hot; he feels the heat when he is not working. If a man feels hot, stops work and receives treatment, he supposes the sunstroke is more likely to be avoided than if he continues. He has seen people get sunstruck who were not working, but were in the shade in their own houses. On a hot day when the temperature is 90 degrees, a person in the shade in his own house is not just as likely to be overcome, but he may be overcome. Whether or not a person will have sunstroke if he stops working before the premonitory symptoms come on is speculative; he thinks one cannot tell who the individuals are who will not be overcome by the heat on a hot day; of course, he realizes that the man who gets the greatest degree of exposure is the man who will be more likely to be affected; it is not only the temperature, but largely a question of the humidity that has a bearing upon the thing. He thinks that avoiding a sunstroke is a good deal like avoiding being struck by lightning, as far as selecting the people who will not be the victims, is concerned. A man cannot tell any better that he is going to be struck by the heat than he can that he is going to be struck by lightning. (Counsel for claimant objected to last question and answer.) If a man is exposing himself to the heat, if he stops to think of it, he knows that it is a hot day and something may happen to him; when a man is out in a thunder storm, and he stops to think of it, he thinks that he may get struck, but neither man can tell that he is going to be.

On redirect examination, witness testified:

That he thinks sunstroke is always sudden. (The last question was objected to by counsel for the insurer on the ground that it was nothing that was opened up on cross-examination. Chairman of the board allowed the question.) Whether or not a man will be affected depends partly upon the general makeup of the man. One cannot tell which persons are going to be victims either of sunstroke or lightning when men are exposed to the same conditions.

In answer to Mr. Kennard, witness stated:

That he thinks that an examination of the man one-half hour before he was overcome, by a man skilled in the treatment of sunstroke cases, would not have shown anything; there would have been no change that could have been discovered until the man was affected by the heat suddenly. All of the occupants of this hearing room might be exposed to similar conditions; perhaps none of them would be overcome; per-

haps one would be overcome; no one can tell why that one should have been overcome more than the others. When soldiers, rugged men of equally good physical condition, are on parade, some will fall in the ranks and be carried off with heat prostration, others will not be affected at all. If the occupants of the hearing room went out and engaged in violent exercise on a hot day, there would be more likelihood that some would be stricken with the sun than if they stayed in the room.

Being questioned by Mr. Parks, the doctor testified:

That when a sunstroke is beginning to come over a man, it is a condition rather to put him off his guard as far as his safety is concerned.

Questioned by counsel for insurer, witness stated:

That at the time of sunstroke, the heart begins to beat very violently, the pulse bounds, becomes strong and full, the face becomes flushed and the blood gets congested in his brain and head so that it begins to stupefy him and give him a headache and a heavy feeling.

George W. Giles, called by the claimant, testified:

That he lives at 158 High street, Danvers, and his business is that of carpenter. On August 2, 1917, he was working in the pit with Mr. McCarthy. (Counsel for the insurer objects to all evidence that has no bearing on what was agreed was the issue.) He went to work at 7 o'clock in the morning and worked until about 11. (Mr. Gleason objects.) He saw Mr. McCarthy on the job that morning. Mr. McCarthy was shoveling and picking. (Objection by insurer overruled by chairman. The objection is a general one and the ruling a general one.) He (Mr. McCarthy) and the rest of the men were filling cars with gravel for the town of Danvers. There was a motor truck and the other cars the men pushed. He saw Mr. McCarthy just before he was sunstruck. Mr. McCarthy was working on the next truck. If he is not mistaken, there were five men working on the truck besides himself, some shoveling and some picking. Mr. McCarthy was working on the motor truck and he was working on a truck on the other side, about 30 feet away, more or less. He saw Mr. McCarthy come across for water which was behind a pile of piping. He did not pay any attention to him. When he turned again, Mr. McCarthy was staggering towards the truck. He and another man went over to Mr. McCarthy and carried him into the shade, put ice on his head, gave him some water and ginger and sent for a doctor. Mr. McCarthy looked like a person who was pretty sick and seemed to be dazed. It was only a few minutes between the time Mr. McCarthy went to get the drink and the time he saw him going back towards the truck. When the trucks are filled, they are sent to the men building the roads to keep them working. There was only one truck to take the gravel to the men on the roads. The work done in the pit required that the men work steadily for the purpose of keeping that truck going. They were kept working pretty regularly on the morning of August 2.

Questioned by chairman:

Mr. McCarthy was filling the truck just before he went to get the water, using a pick sometimes and sometimes a shovel.

Continued direct examination:

He did not know of any orders to quit that day before Mr. McCarthy was taken down. He cannot say exactly how many men were on the shoveling job with Mr. McCarthy; there are sometimes six, sometimes five and sometimes four. The time required to fill a truck varies; it might take half an hour or it might only take 15 minutes, depending upon the number of men, and the condition of the shovel.

Cross-examined, the witness testified:

That he was filling a different car from the one Mr. McCarthy was filling. The men pushed the car he was filling. There were four on his car. There were 12 or 14 men all told working in the pit. There would be days when a man would stay out of work. When one man would be out a day, the rest would keep on working just the same. All the men did about the same kind of work. One truck was higher than the other. On the day Mr. McCarthy was taken sick, the rest of the men did not continue working. He did not work that afternoon because he considered it was a little bit too hot to work.

Questioned by chairman:

To his knowledge, there was no objection to his stopping work.

Continued cross-examination:

When Mr. McCarthy went away from the drinking place, he was staggering. When he was going toward the drinking place, he did not notice that Mr. McCarthy was in the condition he was in a short time afterwards.

Frank H. Harrigan, called by the claimant, testified:

That he lives at 15 Porter street, Danvers. On August 2, 1917, he was employed by the town of Danvers working in the pit with Mr. McCarthy. (Insurer made same objection as in the testimony of previous witness; same ruling made.) The work was picking and shoveling into cars and trucks. The cars run on rails. There were about 10 or 12 men there at the time. He was as near to Mr. McCarthy about 11 o'clock on August 2 as he was to door of hearing room. When he last saw Mr. McCarthy, he was shoveling onto the truck accompanied by five or six other men. It took about one-half hour to fill a truck. When the truck is filled, it is taken out to the street workers using the steam roller. He saw Mr. McCarthy when he went after the drink of water, having passed him on the way. Mr. McCarthy came back past him and was staggering. The men got to Mr. McCarthy before he fell and took him to the shed where he was attended by the doctor. He did not notice Mr. McCarthy particularly when he started after the water. They had worked pretty steadily that morning, having started about 7 o'clock and continuing to 11 o'clock. They worked continuously in the sun. Every-

body stopped at 11 and went home. Mr. McCarthy went about 20 feet from where he was standing, and was retracing that 20 feet when he saw him staggering. It was probably two or three minutes from the time he passed him to go to the water until he came back.

Cross-examined, the witness testified:

That Mr. McCarthy was working about 15 or 20 feet away from him and the water was about 20 or 30 feet away from Mr. McCarthy the other way. The men stayed with Mr. McCarthy until the doctor took him away and then they went home. He thinks Mr. Whittier had left before the doctor arrived. Nobody made any objections because he and Mr. Giles went home.

"Q. That is, you understood that you were at liberty to stop work if you wanted to? A. We understood that after McCarthy was taken sick. Mr. Whittier knocked us all off. Mr. Whittier told them they had better quit. He was not told by anybody that he could not quit work that morning. If they wanted to quit work, they could, and lose a day's pay.

George W. Whittier, called by the claimant, testified:

That he lives at 13 Essex street, Danvers. On August 2, 1917, he was foreman and had charge of the men and material in the pit. The men in the pit were feeding gravel part of the time and perhaps stone part of the time. (Insurer objects to this line of testimony on the ground that it is not material to the issue.) The men were feeding a motor truck and a stone crusher. After the material was prepared for the truck, the truck was taken on the road. There was a road gang building and repairing the roads and using the steam roller. There were from four to six men in the gang road building. (Insurer objects specifically to last question.) From four to six men spread the material and prepared it for the roller. In order to keep that number of men going, it required from ten to twelve men in the pit. At this particular time there was a shortage of help. Mr. McCarthy was not a resident of Danvers; he lived in Salem and was hired through an advertisement in the paper which witness inserted for help, at \$3, eight hours a day. He was in the lower pit at the time Mr. McCarthy was sunstruck. His attention was first called to the fact that Mr. McCarthy had been sunstruck when he saw him lying in the shade in company with Mr. Giles and Mr. Harrigan. He cannot say how long he had been away from where Mr. McCarthy was before he was struck. In order to do the work, he was anxious to have the men continue to work. Mr. McCarthy was there that morning, doing picking and shoveling. The men were working filling trucks that ran on tracks. As they left the place where they were filled, they went into some sort of a bin. If he had ten men, he would have five on each car; if he had twelve, it would be six to each car. He cannot say how many men were on the car with Mr. McCarthy at the time. They had two push cars running that day, and the men on the ground were evenly divided. When the cars were filled, the men would push them down the incline. In the meantime another one would come back and the men would keep it moving all the time. He thinks he told the

men to go home after Mr. McCarthy had been stricken because of the heat of the day. If one or two or three men stopped work, it would "bother" the work very much, and he would not be able to get the work out as well as would be required to keep the crew on the street. It would stop the men from going along to the degree they were supposed to work. They could not get enough material up to them. He testified at the previous hearing.

Cross-examined, the witness testified:

That he supposes some days he had nine men working; sometimes a man would not come in to work. When a man did not come in to work, he would take a man from the crusher so as not to break up the crew. On the day of this accident, he does not know whether he had ten or twelve men working. If one man quit work on that day, the work would still go on in the pit. One man away would make a great deal of difference in some respects. He had men working on the crusher the day of the accident. He does not know how many men were working on the road that day. He does not know whether one of the men quit because of the heat. He does not remember whether or not he told the men to quit on this particular day. What he said at the last hearing was true. His memory is just as good to-day of things at that time, as it was at the last hearing. If he testified in Danvers that he told the men they could quit if it got too hot, it must have been true. He does not remember testifying about that. He has not talked with anybody about this case since that hearing.

Questioned by chairman, the witness testified:

That the men were doing practically steady work because the car was hauled away as fast as it was filled. The cars run on elevated tracks and dump into a bin which is about 200 or 300 feet away; then the truck backs under the bin, a man pulls the lever, and the material goes into the truck. There was a car being filled practically all the time. Every crew had their car; it might take two minutes for it to go down and back. The men take turns going down with the cars and the men who remain behind pick up the stone, which has been thrown to one side, to be put in the crusher. There was no one on the job on August 2nd, except himself, acting as boss.

Questioned by counsel for the insurer, witness stated:

That the gang of workmen were employed by the street department of the town of Danvers, under the head of laborers. The men of this gang, at times, worked very hard; they did not loaf at other times. When his back was turned, he did not know whether the men worked except by knowing how often the cars came down. (Objection to last statement by counsel for claimant.) Mr. McCarthy was a good worker. He does not remember testifying at the previous hearing that no one kills himself when he is doing town work. If he made that statement, it was true. He still thinks that no one kills himself doing town work. He has been a foreman since a year ago last April.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

McSweeney & McSweeney, F. H. Caskin, Jr., and A. Glovsky, all of Salem, for appellee.

DE COURCY, J. The employé received a sunstroke while working for the town of Danvers in a sand or gravel pit on August 2, 1917. The Industrial Accident Board awarded him compensation, a decree in accordance with their decision was entered in the superior court, and the insurer appealed. This court, in May, 1918, reversed the decree, and ordered that the case be recommitted to the board "to hear the parties on the question whether the employé was at liberty to stop his work in time to protect himself from injury." *McCarthy's Case*, 230 Mass. 429, 119 N. E. 697.

Thereupon the parties submitted expert and other testimony, and after a hearing the board made the following finding:

"That the length of time which elapsed between the time when the employé began to get the first symptoms and the time that he collapsed from sunstroke was inappreciable and that he had no opportunity to escape the effects of the personal injury occasioned by reason of his exposure to the heat. While the employé had the same right, or liberty, to leave his employment as any employé has when sickness overtakes him, he had no prior warning of the coming of the attack of sunstroke, was taken unawares, and was overcome thereby, because the heat in the gravel pit was greater than the heat to which an ordinary outdoor worker was exposed on the day of the injury."

[1, 2] This finding was amply warranted by the evidence. It settles in the employé's favor the only question bearing on his right of recovery that was left open on the earlier appeal. On all the evidence the board was warranted in finding that the employé's injury arose out of his employment. The place where he worked was a pit, with banks which attracted the extreme heat and shut off the air, except from the south. The nature of his work required him to remain at it steadily. The Board well might find as a fact that the location and nature of the work peculiarly exposed the employé to the danger of sunstroke; in other words, that the risk of injury by sunstroke was naturally connected with and reasonably incident to his employment, as distinguished from the ordinary risk to which the general public is exposed from climatic conditions per se. *McManaman's Case*, 224 Mass. 554, 113 N. E. 287; *Mooradjian's Case*, 229 Mass. 521, 118 N. E. 951; *Hallett's Case*, 121 N. E. 503, Jan. 13, 1919; *Morgan v. Owners of Steamship Zenaida*, 2 B. W. O. C. 19; *Davies v. Gillespie*, 5 B. W. O. C. 64; *Kanscheit v. Garrett Laundry Co.*, 101 Neb. 702, 164 N.

W. 708; State ex rel. Rau v. District Court, Ramsey County, 138 Minn. 250, 184 N. W. 916, L. R. A. 1918F, 918; Hernon v. Holahan, 182 App. Div. 126, 169 N. Y. Supp. 705.

Decree affirmed.

(233 Mass 16)

KOLTIN v. BROWN.

(Supreme Judicial Court of Massachusetts.
Suffolk. April 18, 1919.)

1. PAWNBROKERS AND MONEY LENDERS ⇐6 —DISCHARGE OF LOANS—STATUTE—APPLICATION TO RENEWALS.

It was the legislative intent, as expressed in Rev. Laws, c. 102, § 51, relative to discharge of loans of less than \$1,000 on payment or tender by debtor of principal sum and interest at 18 per cent. per annum, etc., to make statute applicable to loans for which renewal notes should be given from time to time for the amount, principal and interest, then due, which transactions, in each instance, do not constitute a new loan.

2. BILLS AND NOTES ⇐94(1)—LACK OF CONSIDERATION—DISCHARGE OF LOAN—STATUTE.

Under Rev. Laws, c. 102, § 51, where there has been paid on account of a loan of less than \$1,000, by different persons liable, a sum exceeding the amount actually borrowed, interest at 18 per cent. per annum, and \$5 for expense of making and securing loan, a note given by an indorser of prior notes for the claimed balance is without consideration; the debt having been discharged.

3. PAWNBROKERS AND MONEY LENDERS ⇐6 —DISCHARGE OF LOAN—WAIVER.

A borrower could waive his rights under Rev. Laws, c. 102, § 51, relative to the discharge of loans of less than \$1,000 on payment or tender of the amount actually borrowed and interest at 18 per cent. per annum, etc., if he saw fit to do so.

Appeal from Municipal Court of Boston, Appellate Division; Michael J. Creed, Judge.

Action by Julius A. Koltin against George H. Brown, resulting in finding for defendant. The case was reported to the appellate division of the municipal court of the city of Boston, which ordered judgment to be entered for plaintiff, and defendant appeals. Order of the appellate division reversed, and judgment ordered entered for defendant.

W. R. Scarritt, Jr., of Boston, for appellant.

H. C. Dunbar, of Boston, for appellee.

CROSBY, J. This is an action on a promissory note made by the defendant and delivered to one Rubenstein, who transferred it to the plaintiff after maturity. The defense is want of consideration.

The history of the transaction between the

parties so far as material to the determination of the issue involved is as follows:

On March 21, 1915, a corporation known as the Dinsmore Power Process Company borrowed \$590 from Rubenstein and gave to him its promissory note for that amount payable to his order in two months. The note was indorsed by the defendant and also by one Mintz. This note was renewed five times and a new note was given upon each renewal for the balance then due; the interest on the new note was paid in advance by the maker at the rate of 3 per cent. a month, and the old note was delivered up to the maker for cancellation. On all the notes above referred to the defendant and Mintz were indorsers.

On March 6, 1916, a note was given to Rubenstein for the amount then due. The defendant Brown was the maker of this note, but it was not indorsed by Mintz nor was the Dinsmore Power Process Company a party to it. There were five renewals of this note so given by the defendant of which the one in suit is the last. At the time of each of these renewals the old note was delivered up and a new note given for the amount then due. Payments were made from time to time upon the principal of the loan, and at the time of each renewal the interest on the new note was paid in advance. The entire amount of the interest payments upon the twelve notes so given amounted to \$286.80; and the entire amount of the payments on account of principal amounted to \$440. It was agreed before the trial judge that—

“the sum of the respective interest payments (except the last payment of \$9 on the note in suit, which it is contended by the plaintiff is within the statutory minimum) in excess of 18 per cent. per annum upon the amount and for the period for which each interest payment was made is sufficient if it should be applied to the note in suit to fully pay the same.”

As it is admitted by the plaintiff that the total payments made upon the loan by all the different parties liable on the notes were in excess of the amount required by R. L. c. 102, § 51, to discharge the loan, it is the contention of the defendant that the loan was fully discharged before the note in question was given and that it was without consideration; and having been acquired by the plaintiff after maturity, the defendant is not liable thereon. It is the contention of the plaintiff that the statute is not applicable to the case at bar.

[1, 2] While the questions presented have not been previously considered by this court, we are of opinion that it was the intention of the Legislature as expressed in the statute to make it applicable to loans of this kind. Under the statute, the giving of the notes from time to time for the amount then due did not constitute in each instance a new loan.

The payments on account of principal and interest are to be treated as payments on account of the original loan, and not as separate and independent transactions. All the payments were made on account of the original sum borrowed; and as the loan was for less than \$1,000, and there has been paid on account thereof a sum exceeding the amount actually borrowed and a sum equal to \$5 for the actual expenses of making and securing the loan, it follows that when the note in suit was given the debt had been discharged; and as the note is without consideration no legal liability is imposed upon the defendant. The circumstance that the defendant was not the maker of the first six notes cannot affect the conclusion reached; as an indorser of these notes he was liable thereon, and as to all subsequent notes except the last he was primarily liable as maker.

[3] It could not properly be found that there was a waiver by the borrower of any rights given by the statute. Undoubtedly the borrower could waive his rights if he saw fit to do so, as the statute was intended for his benefit. *Reed v. Boston Loan Co.*, 180 Mass. 237, 35 N. E. 677; *Shawmut Commercial Paper Co. v. Brigham*, 211 Mass. 72, 97 N. E. 636. In *Spofford v. State Loan Co.*, 208 Mass. 84, 94 N. E. 287, it was held that where a borrower executed to the lender a release of all his rights under the statute, he was bound thereby. That case is not an authority in favor of the plaintiff. *Shawmut Commercial Paper Co. v. Brigham*, supra, does not support the plaintiff's contention. In that case the borrower had not paid or tendered the full amount of the loan, and therefore could not take advantage of the statute. In the present case the note had been paid in full under the statute before the last note was given.

It being admitted that the lender has received payments sufficient to discharge the loan under the statute, it is immaterial that such payments have been made by different persons liable for the amount borrowed. It follows that the order of the Appellate Division that judgment be entered for the plaintiff for the amount therein stated with interest, must be reversed and judgment entered for the defendant.

So ordered.

(233 Mass. 9)

ERNST v. RIVERS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. April 18, 1919.)

1. PERPETUITIES §4(15) — TRUST NOT IN CONTRAVENTION OF RULE.

Will of life tenant of trust, bequeathing part to sister for life, rest to trustees to pay income

to such sister and another for life, other sister to receive all, if first died first, and, if other died first, fund to be divided into equal parts, one to be held for first sister for life, other to be divided into three equal parts, one to go to other sister's son absolutely, and other two-thirds to be held for other sister's two daughters for life, on death of each trustee to convey principal of share to daughter's children then living and issue of any deceased child of daughter, and, if neither daughter should leave issue, to convey her share to "lineal heirs" of testator's mother, and, if none, to cousins, etc., did not create trust contrary to rule against perpetuities; three children of testator's other sister being all born before death of his mother.

2. WILLS §506(1) — CONSTRUCTION — "LINEAL HEIRS" AS MEANING DESCENDANTS.

Will of life tenant of trust, bequeathing part to sister for life, rest to trustees to pay income to such sister and another for life, other sister to receive all, if first died first, and, if other died first, fund to be divided into equal parts, one to be held for first sister for life, other to be divided into three equal parts, one to go to other sister's son absolutely, and other two-thirds to be held for other sister's two daughters for life, on death of each trustee to convey principal of share to daughter's children then living, and issue of any deceased child of daughter, and, if neither daughter should leave issue, to convey her share to "lineal heirs" of testator's mother, and, if none, to cousins, etc., held to have meant by "lineal heirs" the mother's descendants; such heirs to be ascertained on the happening of a future event, when the trustees were to convey the fund.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Lineal Heirs.]

3. WILLS §629 — CONSTRUCTION — VESTING OF RIGHTS — INTENTION.

The general rule that the rights of devisees or legatees are to be taken to vest at the time of testator's death cannot prevail, if contrary to his clearly expressed intention.

4. WILLS §531(2) — CONSTRUCTION — GIFT TO "HEIRS" OR "ISSUE" — CLASS REFERRED TO.

It is a general rule, to be followed, unless testator has clearly manifested a contrary intent, that a devise or bequest to "heirs" or "issue" refers to class of beneficiaries who would be entitled to take under law of intestate succession, if designated ancestor had died at time fixed for ascertaining the class, and also indicates members of class so determined are to share as such persons would share under statute relating to distribution of intestate estates, so that distribution is not to be per stirpes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs; Issue.]

5. WILLS §498, 506(1) — GIFT TO HEIRS OR ISSUE — COMPETITION BETWEEN GRANDCHILDREN AND PARENTS.

Where a gift is made to members of a class described as "heirs" or "issue," grandchildren and their descendants will not be allowed to compete with their parents, unless such was testator's intention.

Case Reserved from Supreme Judicial Court, Suffolk County.

Bill for instructions by Roger Ernst, trustee, against Robert Wheaton Rivers and others. On reservation on the amended bill and answers for consideration of the full court. Decree ordered to be entered directing the petitioner.

Clifford H. Walker, of Boston, guardian ad litem (Roland Gray, of Boston, of counsel), for defendants George R. R. Rivers and others.

Walter L. Van Kleeck and Edwin A. Howes, Jr., both of Boston, for defendants Shields and others.

Channing, Corneau & Frothingham, of Boston, for defendant Robert Wheaton Rivers.

CROSBY, J. This is a bill for instructions by the surviving trustee under the will of Jonathan Russell.

The trust fund respecting which the trustee desires instructions has been held heretofore for the benefit of one Mary Rivers, a niece of the testator, who died on August 7, 1918, thereby ending the trust except for the purposes of distribution.

By her will as modified by the first and third codicils, Lydia Smith Russell, mother of Jonathan Russell, disposed of her estate (so far as material to the questions involved in this case) as follows:

She devised and bequeathed one-fourth of her estate (increased to one-third by the death of her daughter Ida before the testatrix's death) to her son Jonathan, to have and to hold for and during his natural life with the power of appointment by will, which in its final form as expressed in the third codicil is as follows:

"It is my will that my daughters and son shall have power of disposing of their respective shares of my estate among my lineal heirs, to have and enjoy the same upon such terms and provisions as may be prescribed by my children. The foregoing provisions are made for appointments to take effect in case of the death of any of my children without issue then living."

The testatrix, Lydia Smith Russell, was survived by three children, namely, Jonathan Russell, who died in 1875 without issue, Geraldine I. (Rivers) Upton, who died in 1885 leaving three children, and Rosalie G. Russell, who died in 1897 without issue.

The children of Geraldine who survived her were George R. R. Rivers, who died in 1900 and is survived by one child, Robert Wheaton Rivers; Rosalie G. Sheffield who died in 1909 leaving nine children, one of whom has since deceased without issue; and Mary Rivers who died in 1918 without issue. She was the last of the grandchildren. It thus appears that at the time of the death of Mary Rivers there were living nine great-

grandchildren of Lydia Smith Russell, namely, the surviving son of George R. R. Rivers and eight surviving sons and daughters of Rosalie G. Sheffield; and no issue of any deceased great-grandchildren. The son of George R. R. Rivers has three children. One of the sons of Rosalie G. Sheffield has two children; one of her daughters had four children at the date of Mary Rivers' death, one of whom has since died. The descendants of Lydia Smith Russell living at the date of Mary Rivers' death therefore were nine great-grandchildren and nine children of three of these same great-grandchildren.

Under the will of Lydia Smith Russell as modified by the first and third codicil thereto, Jonathan Russell received one-third of his mother's estate in trust for his benefit for life with power (in the event of his death without issue then living) to appoint by will the principal among the "lineal heirs" of his mother at his decease.

Under the third article of Jonathan Russell's will as modified by the first codicil, he devised and bequeathed the fund as follows: To his sister Rosalie G. Russell he gave a life estate in certain real estate in Milton; and the rest of his estate to trustees to pay the income in equal shares to his two sisters, Geraldine I. Upton (formerly Rivers) and Rosalie G. Russell, during their respective lives—Geraldine to receive the entire income if Rosalie should die first. If (as happened) Geraldine should die first, the trust fund should then be divided into two equal parts, one of which the trustees should continue to hold for the benefit of his (the testator's) sister Rosalie during her life; the other half was to be divided into three equal parts, one of which was to go to Geraldine's son George R. R. Rivers absolutely, and the other two thirds were to be held in trust for the benefit of Geraldine's two daughters, Mary Rivers and Rosalie G. Sheffield, equally during their respective lives; it being provided that on the death of each of these two daughters the trustees "shall convey in fee simple and transfer" the principal of the share so held in trust for her benefit to her children then living and the lawful issue of any deceased child of such daughter; and in the event that either daughter should leave no lawful issue surviving at her death, then they (the trustees) shall under the first codicil "convey in fee simple and transfer" such share "to the lineal heirs of my mother, Mrs. Lydia Smith Russell" and if there be no such "lineal heirs" then living to my cousins Mrs. Lucinda Jameson and Mrs. Sarah Ernst, in equal shares, "or if either of them be then dead, to convey in fee simple, transfer and pay over her said share to her lawful issue then living." The provision so made under the first codicil was in substitution for a provision in the original will which directed

the trustees upon the contingency above referred to "to convey and transfer the same to the persons who shall then be the heirs at law of my said sister Geraldine." The will and codicil provide for the same disposition of Rosalie G. Russell's share after her death, including the real estate in Milton. This real estate has been sold and one-third of each half of the principal of the fund, and of the proceeds of the real estate has been distributed to George R. R. Rivers.

That part of the remainder which was held in trust for Mrs. Sheffield (Geraldine's daughter) and one-third of the proceeds of the real estate in Milton have been distributed to her surviving heirs under the terms of the will. *Leverett v. Rivers*, 208 Mass. 241, 84 N. E. 470. As previously stated this bill for instructions relates to the final distribution of the portion of the trust fund held for the benefit of Mary Rivers, Geraldine Upton's unmarried daughter who died August 7, 1918, without issue. The trustees are directed by the testator upon the happening of this contingency to "convey in fee simple and transfer" the fund so held in trust for Mary Rivers to the "lineal heirs of my mother, Mrs. Lydia Smith Russell," and the questions are what persons are entitled thereto, and in what proportions?

The trust fund so to be distributed consists of one-third of the trust estate created by the testator's will—being one-third of the one-half which was partially distributed on the death of Geraldine, and one-third of the one-half which was thereafter held for the use and benefit of Rosalie G. Russell, and was partially distributed after her death, and also one-third of the proceeds of the real estate in Milton.

[1] The trust created by the will of Jonathan Russell is not contrary to the rule against perpetuities, as it appears that the three children of Geraldine I. Upton were all in being before the death of Lydia Smith Russell. *Leverett v. Rivers*, *supra*.

In exercising the power of appointment given to him by his mother's will, the testator followed closely the language used by her in her will; and it is a reasonable inference that in making his appointment he used the words "lineal heirs" in the same sense in which he believed them to have been used in her will, and intended them to have the same meaning.

[2] It is plain that "lineal heirs" means descendants. While the testator's mother died in 1859, his death did not occur until 1875, and it would seem certain that he did not intend to use the word "heirs" in the strict legal sense of heirs as they existed at the time of his mother's death. At that time they were his two sisters and himself. If he had meant them the use of the word "lineal" would have been unnecessary. When the will is construed as a whole, in view of

all the circumstances it could not reasonably be found that he intended to include himself and his two sisters as the only members of a class who should take upon the final distribution of the fund. Having provided an equitable life estate for each of the daughters of Geraldine who should survive her mother, this sister would not have been living when the contingency happened upon which "lineal heirs" would become entitled: besides, he expressly provided in the first codicil that his trustee should convey to his two cousins "if there shall be no such 'lineal heirs' then living." In view of these considerations and the other provisions of his will, it is manifest that he did not intend to make a gift to a class the members of which were to be determined as of the date of his mother's death, but that such heirs should be ascertained on the happening of a future event, at which time the trustees were to transfer and convey the fund.

[3, 4] The general rule of construction that the rights of devisees or legatees are to be taken to vest at the time of the testator's death cannot prevail if contrary to the clearly expressed intention of the testator. *Heard v. Read*, 169 Mass. 216, 47 N. E. 778; *Bosworth v. Stockbridge*, 189 Mass. 260, 75 N. E. 712; *Crapo v. Price*, 190 Mass. 319, 76 N. E. 1048; *White v. Underwood*, 215 Mass. 299, 102 N. E. 426. The time when the trustees are directed to transfer and convey the fund to the "lineal heirs" of the testator's mother must be held to have referred to the time when Mary Rivers died, without issue. It is a general rule of construction to be followed unless the testator has clearly manifested a contrary intention that a devise or bequest to "heirs" or "issue" refers to that class of beneficiaries who would be entitled to take under the law of intestate succession if the designated ancestor had died at the time fixed for ascertaining the class, and also indicates that the members of the class so determined are to share in the same manner and proportions as such persons would share under the statute relating to the distribution of intestate estates. *Houghton v. Kendall*, 7 Allen, 72; *Rand v. Sanger*, 115 Mass. 124; *Allen v. Boardman*, 193 Mass. 284, 286, 79 N. E. 260, 118 Am. St. Rep. 497.

[5] Where a gift is made to members of a class described as "heirs" or "issue" in accordance with the rule last above stated it is held that grandchildren and their descendants will not be allowed to compete with their parents unless such was the intention of the testator. We find no such intention on the part of the testator in the case at bar. In *Manning v. Manning*, 229 Mass. 527, at page 529, 118 N. E. 676, at page 677, it was said:

"By allowing the grandchildren and great-grandchildren to take simultaneously it admits

children to compete with their living parents—a construction to be avoided unless such plainly was the testator's intention." *Jackson v. Jackson*, 153 Mass. 374, 26 N. E. 1112, 11 L. R. A. 305, 25 Am. St. Rep. 643; *Coates v. Burton*, 191 Mass. 180, 77 N. E. 311; *Dexter v. Inches*, 147 Mass. 324, 17 N. E. 551.

It follows that the "lineal heirs" of Lydia Smith Russell at the date of Mary Rivers' death are her nine great-grandchildren; and that their children, although descendants of Mrs. Russell, are not members of the class described in the will of the testator because, their parents being alive, they would not be entitled to inherit from Mrs. Russell under the statute of distribution. R. L. c. 133, § 1. And as all of the nine members of the class are of the same degree of kindred to Mrs. Russell they are entitled to share equally.

While it is agreed by counsel for the great-great-grandchildren that the "lineal heirs" are those living at the time of the death of Mary Rivers, and that when she died, the time for distribution had arrived, he contends that the words "my lineal heirs" as used in the third codicil of Mrs. Russell's will which gave to her son Jonathan the power of disposing of his share of her estate "among my lineal heirs," mean all the descendants of Mrs. Russell however remote, and that those words were so construed by this court in the case of *Leverett v. Rivers*, supra. In that case the question for decision was whether the appointment, to children of Mrs. Sheffield born after Jonathan Russell's death was valid. The statement in the opinion that "when a power is given to appoint among

the lineal heirs [which in this case as matter of construction means descendants] of the testator * * *" meant that "lineal heirs" were direct descendants as distinguished from collateral heirs. The court did not undertake to define in that case the limits of the class who would be entitled to take on final distribution upon the contingency which has happened in the case at bar.

We cannot agree with the contention of Robert Wheaton Rivers that he is entitled to one half of the estate, and that the other half should be divided between the eight surviving children of Rosalie G. Sheffield. There is nothing to show that the testator intended that the distribution should be per stirpes; such a division would not be in accordance with the rule of the statute of distribution, and would be contrary to the rule of construction applied in cases hereinbefore referred to where the word "heirs" and the word "issue" have been used in description of a class.

A decree is to be entered directing the petitioner to transfer and convey one-ninth part of the trust fund with accumulations of income since the death of Mary Rivers, to each one of the eight surviving children of Rosalie G. Sheffield, and the remaining one-ninth part to Robert Wheaton Rivers, the only surviving child of George R. R. Rivers. Costs and counsel fees are to be allowed to be paid out of the fund to the guardian ad litem of the great-great-grandchildren for his services, the amount to be determined by a single justice.

So ordered.

(233 Mass. 29)

LEVY v. RADKAY.

(Supreme Judicial Court of Massachusetts.
Suffolk. April 23, 1919.)1. EVIDENCE \Leftrightarrow 599 — DISBELIEF OF TESTIMONY OF PARTY.

In seller's action for price of goods ordered from sample, trial court was not bound to believe the buyer's testimony that the goods were to be delivered to him at his store.

2. SALES \Leftrightarrow 201(2) — PASSAGE OF TITLE ON DELIVERY—SPECIAL CONTRACT—STATUTE.

In action by seller of goods for the price, the trial court, under St. 1908, c. 237 (Sales Act) pt. 2, § 19, rule 5, and part 3, § 43, was not required to rule that the order sent by the seller's salesman, "Send to [the buyer] Hyde Park avenue," constituted a special or implied contract that title should not pass until delivery to buyer at Hyde Park.

3. SALES \Leftrightarrow 201(4)—REFUSAL TO RULE—IMPLICATION OF FINDING.

Under St. 1908, c. 237, pt. 2, § 19, rule 4 (2), title passed to the buyer on delivery by the seller to the expressman designated by the buyer for delivery to him.

4. SALES \Leftrightarrow 168(5) — SALE BY SAMPLE — INSPECTION AND VERIFICATION.

Where goods are sold by sample, and selected and sold by the seller, the buyer has a right of inspection and verification before acceptance, and there is no acceptance until he has exercised or waived the right.

Appeal from Municipal Court of Boston, Appellate Division; Thomas H. Dowd, Judge.

Action of contract by Albert J. Levy against Irving C. Radkay, resulting in a finding for plaintiff. The case was reported to the appellate division of the municipal court of the city of Boston, which dismissed the report, and defendant appeals. Order of appellate division affirmed.

James E. Kelley, of Boston, for appellant.
Philip Rubenstein, of Boston, for appellee.

PIERCE, J. This is an action of contract brought by the seller to recover from the buyer the price of goods ordered from samples shown at the buyer's store.

[1, 2] The evidence warranted the finding of the presiding judge "that defendant directed the plaintiff to ship the merchandise in suit by Mahoney's Express, and that the defendant was to pay the express charges for transportation." The judge was not bound to believe the testimony of the defendant that

the goods were to be delivered to the defendant at his store in Hyde Park. Nor was he required to rule that the order sent by the salesman, "Send to I. Radkay, Hyde Park Ave., * * *" constituted a special or implied contract that the title to the goods should not pass until delivery to the buyer at Hyde Park. St. 1908, c. 237, pt. 2, § 19, rule 5; St. 1908, c. 237, pt. 3, § 43. The evidence warranted a finding that the plaintiff selected and packed the goods as ordered, and delivered them for transmission to the defendant to Mahoney's Express, the carrier or bailee named by the defendant for that purpose. St. 1908, c. 237, pt. 2, § 19, rule 4 (2). The goods were destroyed by fire while in the possession of Mahoney's Express.

[3] The request to rule that "upon the whole evidence plaintiff cannot recover" could not have been given rightly. The judge by his refusal to rule as requested must be taken to have found that there was no agreement that the title should not pass until delivery at the place of business of the defendant, and to have ruled as he did rule "that the title to the merchandise passed to defendant upon delivery to Mahoney." *Twitcheil-Champlin Co. v. Radovsky*, 207 Mass. 72, 92 N. E. 1038; *Garvan v. N. Y. C. & H. R. R.*, 210 Mass. 275, 96 N. E. 717.

The finding of fact necessarily made by the judge in refusing the first request also necessitated a refusal to give rulings numbered 2, 3, 4 and 5.

[4] The sixth request: "The goods were sold by sample and selected and shipped by the seller, and the buyer had the right of inspection and verification before acceptance. There was no acceptance until he had exercised this right or waived it"—is sound as a general statement of the law governing sales by sample, but is inapplicable, and could not have been given when the goods were lost by fire or otherwise, and, as here, in pursuance of the terms of the contract they were to be and were in fact delivered to a carrier chosen by the purchaser. *Williston on Sales*, § 473, and cases cited. After the passing of title the risk of loss and other incidents of ownership fall upon the buyer. *Murphy v. Sagola Lumber Co.*, 125 Wis. 363, 368, 103 N. W. 1113; *McNeal v. Braun*, 53 N. J. Law, 617, 620, 23 Atl. 687, 26 Am. St. Rep. 441, and following; *Skinner v. Griffiths & Sons*, 80 Wash. 291, 293, 141 Pac. 693.

The order of the appellate division "report dismissed," must be affirmed.

So ordered.

(233 Mass. 1)

KEOWN v. HUGHES et al.(Supreme Judicial Court of Massachusetts.
Suffolk. April 17, 1919.)**1. COSTS \S 112(1) — FAILURE OF NONRESIDENT TO FURNISH SECURITY—WAIVER.**

Under ordinary circumstances, failure of nonresident to furnish indorser for costs is taken to have been waived, if objection is not made at first term of court; but where fact that plaintiff is not an inhabitant is not disclosed in the pleadings, and is not known to defendant, the rule has no application.

2. COSTS \S 117 — NONRESIDENT — REQUIREMENT OF SECURITY — ORDER — ABSENCE OF STATEMENT OF AMOUNT.

An order requiring a nonresident plaintiff to furnish an indorser for costs was not void, on the ground of obscurity and the impossibility of securing an indorser, because it did not state the amount.

3. APPEAL AND ERROR \S 684(4) — RESERVATION OF GROUNDS OF REVIEW—NONSUIT—INDORSER FOR COSTS—EVIDENCE.

Trial court's order of nonsuit for failure of plaintiff, a nonresident, to furnish an indorser for costs, cannot be held to have been void, for the court's refusal to admit evidence, where what the evidence was is not set forth, and no exception was taken to the exclusion of any evidence offered by plaintiff.

4. EVIDENCE \S 208(2)—PLEADINGS.

On hearing of defendants' motion for nonsuit for failure of nonresident plaintiff, to furnish an indorser for costs, pleadings in another case were admissible in evidence on behalf of defendants to show plaintiff was not an inhabitant of the commonwealth.

5. APPEAL AND ERROR \S 257—RESERVATION OF GROUNDS OF REVIEW—EXCEPTION—CONTINUATION OF HEARING.

Action of trial court in continuing, without solicitation by plaintiff, hearing on defendants' motion for nonsuit for failure of plaintiff, a nonresident, to furnish indorser for costs, cannot be complained of, in absence of exception taken by plaintiff.

6. DISMISSAL AND NONSUIT \S 73—MOTION—FAILURE TO FURNISH SECURITY FOR COST—CONTINUATION OF HEARING.

It was within trial court's discretion to continue, without plaintiff's solicitation, hearing on defendants' motion for nonsuit on ground that plaintiff, a nonresident, had not furnished indorser for costs.

7. COSTS \S 106—INDORSER FOR NONRESIDENT—STATUTE—CONSTITUTIONALITY.

Rev. Laws, c. 173, \S 39-43, requiring a nonresident to furnish an indorser for costs, is constitutional.

8. APPEAL AND ERROR \S 134(1)—INTERLOCUTORY ORDERS—ABSENCE OF JUDGMENT.

No appeal lies from interlocutory orders, where no judgment has been entered.

Appeal and Exceptions from Superior Court, Suffolk County; Charles F. Jenney, Judge.

Action of contract by James A. Keown against James Joseph Hughes and trustee. From a judgment of nonsuit, from refusal of the trial court to allow evidence to be introduced in regard to the nonsuit, and from refusal to remove the nonsuit and rule plaintiff was not requested to furnish any evidence, plaintiff appeals and excepts. Appeals dismissed, and exceptions overruled.

See, also, 121 N. E. 153.

James A. Keown, of Lynn, in pro. per.

LORING, J. On July 5, 1918, the defendant made a motion that the plaintiff in the above-entitled cause, not being an inhabitant of the commonwealth, should be nonsuited because his writ had not been indorsed for costs in compliance with R. L. c. 173, \S 39. The motion was made more than a year after the date of the writ. It was alleged in the motion that the fact that the plaintiff was not an inhabitant was a fact not disclosed on the face of the pleadings and that it was a fact which "only recently" had come to the knowledge of the defendant. A hearing was had on this motion on July 9, 1918, at which evidence on the issues involved was introduced. The judge reserved his decision. On July 12 the motion was allowed "in the absence of the plaintiff." To the ruling allowing the motion the plaintiff took an exception. That is the only exception stated in the first bill of exceptions now before us.

It is stated in the second bill of the exceptions that the order made on July 12 was that the plaintiff be ordered "to furnish an indorser for costs within ten days without specifying the amount that the indorser should be responsible for." No indorser was furnished within the ten days. Thereafter on July 23, 1918, the defendant made a motion that the plaintiff be nonsuited "for failure to furnish an indorser for costs." It is stated in this bill of exceptions that—

"After hearing the parties upon their motion it was continued to August 12, 1918. On August 12, Judge Frederic Chase in the absence of the plaintiff, due notice having been given, granted the defendant's motion to nonsuit in the plaintiff's absence and ordered the action dismissed, to which an exception was promptly filed on the same day and made an oral motion to remove the nonsuit within an hour after the same had been granted, which motion was refused."

It is stated further in this bill of exceptions that on August 14, 1918, the plaintiff filed a motion to remove—

"the nonsuit entered in the above-entitled case August 12, on the ruling of Judge Frederic H. Chase in the absence of the plaintiff, who bases his motion upon: (1) The pleadings and papers filed in the case. (2) The affidavit hereto attached, and made a part of this motion. A copy

of affidavit is herewith annexed and marked Exhibit A."

Neither Exhibit A nor the substance of it is set forth in the bill of exceptions. On August 20, 1918, this motion was denied and an exception was taken. That is the first exception set forth in the second bill of exceptions.

The second exception set forth in this bill of exceptions is set forth in these words:

"The judge rendered no decision at the time but subsequently denied the motion to remove the nonsuit, and also refused to grant the plaintiff's oral motion to introduce evidence and having the evidence reported to the Supreme Judicial Court is ruled upon the evidence to which the plaintiff then and there duly objected and excepted."

We find no error in the matters covered by the exceptions set forth in these bills of exceptions.

Taking up the arguments made by the plaintiff in the order in which they are made on his brief:

[1] 1. It is true that under ordinary circumstances the failure of a nonresident to furnish an indorser for costs is taken to have been waived if the objection is not made at the first term of court. That was decided in *Whiting v. Hollister*, 2 Mass. 101, *Gilbert and another v. President et al. of Bank*, 5 Mass. 97, and *Carpenter v. Aldrich*, 8 Metc. 58, relied upon by the plaintiff, but where the fact that the plaintiff is not an inhabitant is not disclosed on the pleadings and is not known to the defendants this rule does not apply.

[2] 2. There is nothing in the plaintiff's contention:

"That the order for costs without stating the amount is void on the ground of obscurity and the possibility of securing an indorser under the circumstances."

[3] 3. The plaintiff's next contention is that the order was void because the judge refused to admit evidence in the court below. What this evidence was is not set forth and no exception was taken to the exclusion of any evidence offered by the plaintiff.

[4] 4. The next matter complained of is that the judge at the hearing allowed the defendants to introduce in evidence pleadings in another case to show that the plaintiff was not an inhabitant of this state. No exception was taken to the admission of this evidence. There does not appear to have been any error in admitting it. *Bliss v. Nichols*, 12 Allen, 443. See, also, note to the case relied on by the plaintiff, namely,

Walcott v. Kimball, 95 Mass. (13 Allen) 460, at page 462.

[5, 6] 5. The next matter complained of by the plaintiff is that—

"Judge Frederic H. Chase continued the hearing on the defendant's motion for a nonsuit from July 30 to August 12, 1918, on the court's own motion without solicitation on the part of the plaintiff, upon the plea that the court was reluctant to dismiss the case under the circumstances."

No exception was taken to this action of the court. The action of the court could not have been complained of if an exception had been taken.

6. We find nothing that helps the plaintiff in the cases of *Paine v. Hapgood*, 13 Pick. 152, *Feneley v. Mahoney*, 21 Pick. 212, *Johnson v. Sprague*, 183 Mass. 102, 66 N. E. 422, and *Shute v. Bills*, 198 Mass. 544, 84 N. E. 862, relied on by him. We have examined all the citations relied upon by the plaintiff with the exception of one which we have not been able to find. There is nothing in them which requires notice.

[7] 7. We are of opinion that R. L. c. 173, §§ 39 to 43, requiring a nonresident to furnish an indorser for costs, is constitutional.

[8] The plaintiff has taken appeals from the interlocutory orders made in this case. No appeal lies because no judgment has been entered.

The entries must be:

Appeals dismissed.

Exceptions overruled.

(233 Mass. 19)

KEOWN v. TRUDO et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. April 17, 1919.)

Appeal from Superior Court, Middlesex County.

Action of contract by James A. Keown against Julia E. Trudo and another. From a judgment of nonsuit, the refusal of the court to allow evidence to be introduced in regard to the nonsuit, and refusal to remove the nonsuit, plaintiff appeals, and prays that his exceptions be allowed. Appeals dismissed, and exceptions overruled.

James A. Keown, of Lynn, in pro. per.
Freeman Hunt, of Boston, for appellee.

PER CURIAM. All questions raised on this record are disposed of adversely to the contentions of the plaintiff by the decision just rendered in *Keown v. Hughes*, 123 N. E. 98.

Appeals dismissed.

Exceptions overruled.

(223 Mass. 601)

In re OPINION OF THE JUSTICES.

(Supreme Judicial Court of Massachusetts.
April 2, 1919.)

1. CONSTITUTIONAL LAW §285 — GRAND JURY §32—PRESENCE OF POLICE OFFICER—CONSTITUTION—"LAW OF THE LAND."

Under Declaration of Rights, art. 12, providing no person shall be arrested, imprisoned, etc., or put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land, the grand jury, on request of the district attorney or otherwise, may not permit to be present at the examination of witnesses in a case a police officer who has prepared the case; "law of the land" implying a secret indictment or presentment by the grand jury, except for the presence of the prosecuting attorney or assistant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

2. CONSTITUTIONAL LAW §251 — DUE PROCESS—RULES OF PROCEDURE.

Mere rules of procedure practiced at the adoption of the Constitution did not become an inherent part of due process of law, but no change can be made disregarding the fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private rights against the arbitrary action of government.

3. GRAND JURY §2—STATUTE—EMPLOYMENT OF INTERPRETER.

A statute authorizing the use of an interpreter before the grand jury in cases where a witness cannot speak English, or speaks it so deficiently as not to convey intelligible information, would not be unconstitutional.

Opinion of the Justices as to the constitutionality of Senate Bill No. 102.

Senate, April 2, 1919.

Whereas, there is pending before the General Court a bill numbered Senate 102, a copy of which is hereunto annexed, providing that the grand jury may, upon request of the district attorney, permit to be present at an examination of witnesses in a case which it is investigating, a police officer or other person who has prepared the case, and also an interpreter for a witness unfamiliar with the English language; and

Whereas, grave doubt exists as to the constitutionality of said bill, in view of the decision of the Supreme Judicial Court in the case of Commonwealth v. Harris, reported in 231 Mass. 584, 121 N. E. 409:

Therefore, be it—

Ordered, that the Senate require the opinions of the honorable the Justices of the Supreme Judicial Court on the following important questions of law:

(1) Would the bill above described be constitutional if enacted into law?

(2) Is it within the constitutional power of the General Court to enact a statute authorizing the grand jury, upon request of the district attorney or otherwise, to permit to be present during its examination of witnesses a police officer or other person who has been engaged on the preparation of the case, or an interpreter to assist in the examination of witnesses who cannot speak English, or whose knowledge of English is so deficient as to render necessary the use of an interpreter?

Henry D. Coolidge, Clerk.

To the Honorable the Senate of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, have considered the questions upon which our opinion is required by the order of April 2, 1919, a copy of which is hereto annexed, and respectfully submit this opinion:

[1, 2] The first inquiry in substance and effect is whether under the Constitution, the grand jury, upon request of the district attorney or otherwise, may permit to be present at the examination of witnesses in a case a police officer who has prepared such case.

The Constitution by article 12 of the Declaration of Rights secures to every person protection against accusation and trial for crimes of great magnitude without an indictment by the grand jury. That protection is afforded by the phrase "the law of the land" in the provision that no person shall be "arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate but by the judgment of his peers or the law of the land." "The law of the land" implies an indictment or presentment by the grand jury in instances to which that proceeding is necessary. The grand jury is an ancient institution. It always has been venerated and highly prized in this country. It has been regarded as the shield of innocence against the plottings of private malice, as the defense of the weak against the oppression of political power, and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source. These blessings accrue from the grand jury because its proceedings are secret and uninfluenced by the presence of those not officially and necessarily connected with it. It has been the practice for more than two hundred years for its investigations to be in private, except that the district attorney and his assistant are present. Secrecy is a vital requisite of grand jury procedure. It was said in the recent decision of Commonwealth v. Harris, 231 Mass. 584, at page 585, 121 N. E. 409, at page 410, quoting in part the words of Chief Justice Shaw in Jones v. Robbins, 8 Gray, 329, 344:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." The above quotation is a declaration and decision that the twelfth article of the Declaration of Rights in part was aimed and intended to prohibit the scandal and disgrace of a trial in public of persons charged with infamous crimes and offenses when, in truth, there was no sufficient cause to suspect their guilt. It is also a declaration that it shall no longer be possible for one or more judges to compel or direct the examination of a witness to be held in open court before the grand jury, should the judges seek to overawe the latter or the witness by the presence of other witnesses or bystanders, or should he or they be of opinion the prosecution is too indulgently or too vindictively conducted."

These essential characteristics of the grand jury would be broken down if a police officer or other person who had investigated the evidence, interviewed the witnesses, and formulated a plan for prosecuting the accused should be permitted to be present during the hearing of testimony. This conclusion follows irresistibly from the two decisions just cited, by which we are bound.

There is no inherent necessity in the efficient conduct of investigation by the grand jury which justifies such invasion of their proceedings by strangers. The presence of a police officer cannot be justified upon such ground. Indeed the attendance of the district attorney and his assistant subverts every rational purpose which could be accomplished by the proposed bill. The attendance of a police officer would afford opportunity for subjecting witnesses to fear or intimidation, for preventing freedom of full disclosure by testimony, and for infringing the secrecy of the proceedings. Mere rules of procedure practiced by our ancestors at the time of the adoption of the Constitution did not become an inherent part of due process. But no change—

"can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." *Twining v. New Jersey*, 211 U. S. 78, 101, 29 Sup. Ct. 14, 20 (53 L. Ed. 97).

[3] The second branch of the inquiry is whether a statute, authorizing the use of interpreters for witnesses whose ignorance of English renders such course necessary, would be constitutional. The use of interpreters in the presentation to the grand jury of the testimony of witnesses who cannot speak

English arises from inherent necessity. It always has been practiced. *Case of Norberg*, 4 Mass. 81. The investigations of the grand jury cannot be hampered because witnesses through ignorance or dumbness are unable directly to impart their knowledge of material facts. An interpreter is a witness. *Amory v. Fellows*, 5 Mass. 219, 226. The enactment of a statute to this end would not be unconstitutional. It would add nothing, however, to practice already existing in courts without any statute.

We answer, therefore, to the first question, that section 1 of Senate Bill No. 102 would be unconstitutional and that section 2 of that bill would not be unconstitutional; and to the second question, that a statute authorizing the presence with the grand jury, during the examination of witnesses, of a police officer or other person who has prepared the case, would be unconstitutional, and that a statute authorizing the use of an interpreter, in cases where a witness cannot speak English or speaks it so deficiently as not to convey intelligible information, would not be unconstitutional.

ARTHUR P. RUGG.
WILLIAM CALEB LORING.
HENRY K. BRALEY.
CHARLES A. DE COURCEY.
JOHN C. CROSBY.
EDWARD P. PIERCE.
JAMES B. CARROLL.

(233 Mass. 23)

GASTON et al. v. BOSTON PENNY SAV. BANK.

(Supreme Judicial Court of Massachusetts.
Suffolk. April 22, 1919.)

1. **BILLS AND NOTES §125 — ACCELERATION OF DUE DATE—PROVISIONS AS TO INTEREST.**

Where secured note provided that in case maker assigned for creditors it should become due immediately, maker promising to pay immediately in case of nonperformance, authorizing sale of collateral, proceeds to be applied to payment of all liabilities previously stipulated, "with interest thereon to maturity," on happening of contingency of assignment, payee was entitled to as much interest at rate mentioned as should accrue until note was paid; words "with interest thereon to maturity" referring to accrual of interest after liabilities of principal and interest had been determined by happening of any of contingencies.

2. **BILLS AND NOTES §125 — ACCELERATION PROVISION — SECONDARY CONTRACT TO PAY PRINCIPAL AND INTEREST.**

No secondary contract by maker of secured note to pay principal sum and an amount of interest reserved by contract for use of particular fund came into existence by acceleration provision of note, that it should become due if maker made assignment for creditors, by reason of ex-

pression "this note" shall become due, instead of the common phrase "all sums due."

3. BILLS AND NOTES \S 129(1) — ACCELERATION PROVISION.

Where note secured by collateral provided that it should become due and payable immediately, if maker made a general assignment for creditors, principal debt, with accrued interest, became payable and demandable when such an assignment was made.

4. BILLS AND NOTES \S 125 — ACCELERATION PROVISION — PAYMENT OF PRINCIPAL — OBLIGATION TO PAY INTEREST.

Where payee of such note sold the collateral and applied proceeds to payment of principal, incidental obligation to pay interest came to an end, in absence of express agreement to continue to pay it.

Appeal from Municipal Court of Boston, Appellate Division.

Action by William A. Gaston and others against the Boston Penny Savings Bank. The court found for plaintiffs, and reported the case to the appellate division of the municipal court of the city of Boston, which dismissed the report, and defendant appeals. Order dismissing report affirmed.

Dallinger & Stearns, of Boston, for appellant.

Gaston, Snow & Saltonstall, of Boston (Dunbar F. Carpenter, of Boston, of counsel), for appellees.

PIERCE, J. The case is before this court on appeal from a final order "Report dismissed" of the appellate division of the municipal court of the city of Boston. The case was submitted on an agreed statement of facts. The defendant asked the presiding judge to rule as a matter of law that the defendant was entitled on the facts to a finding in its favor. This the judge declined to do and found for the plaintiff on the first and second counts in the sum of \$615.95, and reported the case to the appellate division.

The agreed facts disclose that Mr. Foss borrowed \$25,000 from the defendant, secured by a pledge of certain securities. The note was dated July 6, 1917, and was payable in 12 months from date "with interest at the rate of 5% per centum per annum, payable semiannually in advance." In conformity with the terms of the note the interest for the first 6 months was paid in advance. The note provided that the due and demandable time of payment fixed therein should be accelerated upon the happening of certain specified events. So far as is material to the issue now presented that provision reads:

"In case * * * we make a general assignment for the benefit of creditors * * * this note shall become due and payable immediately, anything to the contrary herein notwithstanding, and we hereby promise to pay the same im-

mediately, and in case of the nonperformance of this promise, we hereby authorize and empower * * * [the defendant] * * * to sell any or all of the securities then held * * * it being mutually agreed * * * that the proceeds of said sale after deducting all costs and expenses are to be applied to the payment of any or all the liabilities aforesaid, with interest thereon to maturity. * * *"

Mr. Foss made a general assignment to the plaintiffs for the benefit of creditors on November 7, 1917. Shortly thereafter, in the exercise of the power given by the note the bank sold the securities pledged and realized therefrom a sum insufficient to pay the principal and the interest for the second 6 months. The bank applied the proceeds to the payment of the principal debt, and to the payment of the interest so far as the money received went.

It contends that the obligation of Mr. Foss on making the assignment was not to pay the principal debt immediately, but was to pay that debt and a definite amount of interest which did not accrue from day to day, but was "reserved by contract for the use of the particular fund for a 12 months period and represented a present debt—an established liability." In a word, that a fair construction of the contract is that the maker of the note agrees to pay for the loan of the money at once, a sum of money equal to 6 months' interest on the principal; and on a general assignment for the benefit of creditors the principal sum and a further sum of money equal to 6 months' interest on the principal debt. The defendant further contends that this is not a case where the payee has exercised an option to call the principal debt and by that act has made the debt due and payable immediately, because, he argues, by the terms of the instrument itself "this note," not the principal, becomes due and payable immediately on the happening of the event, and that the additional words "with interest thereon to maturity," import an additional payment to be made by the maker, and unless these words are held to carry interest on the liability to the maturity date of the primary contract, they are given no meaning at all and may as well have been omitted from the instrument."

[1] We are of opinion the provisions of the note as to the payment of interest are to be taken in their common signification, and import that the payee is entitled to as much interest at the rate mentioned as shall accrue until the note is paid. And we are also of opinion that the words "with interest thereon to maturity," as used in the provision "that the proceeds of said sale after deducting all costs and expenses are to be applied to the payment of any or all the liabilities aforesaid, with interest thereon to maturity," have reference to the accrual of interest after the liabilities, that is, principal and interest,

in the note have been determined by the happening of any one of the contingencies specified in the note.

[2] We do not assent to the contention of the defendant that a secondary contract to pay the principal sum and "an amount of interest reserved by contract for the use of the particular fund" came into existence upon the assignment by reason of the expression "this note" shall become due, instead of the more common phrase "all sums due."

[3, 4] We are of opinion the principal debt with accrued interest thereon became payable and demandable when the assignment was made November 9, 1917. We are of the further opinion that when the debt was paid, the incidental obligations to pay interest thereon came to an end in the absence of any express agreement to continue to pay it thereafter. The plaintiff, under the third count of his declaration, is entitled to recover the excess of interest paid in advance for the use of the money, and also that part of the money retained from the proceeds of the sale of the securities on account of the interest accruing on the note from January 6, 1918 to July 6, 1918.

Order dismissing report affirmed.

(233 Mass. 20)

ANDREWS ELECTRIC CO., Inc., v. ST. ALPHONSE CATHOLIC TOTAL ABSTINENCE SOC. et al.

(Supreme Judicial Court of Massachusetts. Plymouth. April 22, 1919.)

1. ASSIGNMENTS ⇨50(1)—CONTRACTOR'S ORDER ON SPECIFIC FUND.

Contractor's order on owner for payment to subcontractor of a specific sum out of the amount coming to the contractor was a good assignment between the parties, having been given in consideration of a pre-existing debt, been drawn on a specific fund identified by the order, been delivered to the payee, and notice thereof been given the owner.

2. BANKRUPTCY ⇨172 — ASSIGNMENT — VALIDITY.

Assignment of whole fund due a bankrupt, which was made more than four months before the commencement of bankruptcy proceedings, and did not affect the rights of creditors, is good between the parties and against the trustee in bankruptcy of the assignor.

3. ASSIGNMENTS ⇨30 — ASSIGNMENT OF PART OF FUND—VOID CHARACTER AT LAW.

Assignment of part of fund against the consent of the drawee is void at law, because the partial assignee is not an attorney with power to sue in the assignor's name, and because a debtor is not to have his responsibilities so varied from the terms of the original contract as to subject him to distinct demands by several persons.

4. ASSIGNMENTS ⇨58 — ASSIGNMENT OF PART OF FUND—VALIDITY IN EQUITY.

An assignment of part of a fund without the assent of the debtor, trustee, or stakeholder is valid in equity, since all persons in interest can be brought before the court in a single suit, and a decree entered protecting all parties.

5. BANKRUPTCY ⇨155 — ASSIGNMENT BY BANKRUPT—RIGHT OF TRUSTEE.

Trustee in bankruptcy of contractor took assets of estate subject to contractor's assignment to subcontractor of part of the amount due on the contract, which assignment was valid in equity, and not void as in fraud of creditors, or as contravening the Bankruptcy Act.

Report from Superior Court, Plymouth County; Nelson P. Brown, Judge.

Action by the Andrews Electric Company, Incorporated, against the St. Alphonse Catholic Total Abstinence Society and others. On report to the Supreme Judicial Court. Decree directed for plaintiff.

William G. Rowe, of Brockton, for plaintiff.

H. F. Parker, of Brockton, for defendant trustee in bankruptcy.

PIERCE, J. The plaintiff in 1915 was employed as a subcontractor on a building erected for the defendant St. Alphonse Catholic Total Abstinence Society. The contractor was the defendant James Shields. The defendant Ovide V. Fortier is the trustee in bankruptcy of the estate of Shields. At the completion of the work of the plaintiff, Shields owed it \$223. It requested Shields to make payment of the debt due, and he thereupon delivered to it the following order upon the society:

"St. Alphonse Total Abstinence Society, Gentlemen: Kindly pay to Andrews Electric, Inc., the sum of \$223 out of the amount coming to me on my contract with the society, same being the balance due them on wiring contract.

"James Shields."

Before March 9, 1916, the plaintiff delivered this order to one Barlow, an architect employed by the society and the architect on the building in question. On March 9, 1916, the plaintiff wrote to the treasurer of the society a letter wherein it was stated that—

"He [Shields] has given us an order on his account with you for the balance, thus releasing any claim he may have on so much of the balance due on the building due him as will satisfy our bill, namely, \$223. This order has been handed to Mr. Barlow."

When the order was delivered through Barlow to the society it claimed certain deduction

tions from the balance of the contract price for the work done by Shields, because of defective work, and it was therefore uncertain what amount if any was due Shields. The order was never in fact accepted. Upon an adjustment of the account in March, 1918, under authority of the bankruptcy court it was agreed that the society owed Shields \$419 when the order was given to the plaintiff.

[1, 2] The order was a good assignment between the parties. *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072. It was given in consideration of a pre-existing debt, was drawn upon a specific fund identified by the order itself, was delivered to the payee and notice thereof was given to the debtor. *Putnam v. Story*, 132 Mass. 205, 212; *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456.

Shields was adjudicated a voluntary bankrupt on January 25, 1917. There is nothing in the agreed statement of facts to show Shields had any other creditor than the plaintiff when the order was given it, and the existence of creditors on March 9, 1916, cannot be inferred from the fact that Shields was bankrupt on January 25, 1917. The assignment appears to have been made in good faith, it did not affect the rights of creditors and was made more than four months before the commencement of bankruptcy proceedings. An assignment of the whole fund made under these circumstances is good between the parties and against the trustee in bankruptcy of the assignor. *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149, 43 L. R. A. (N. S.) 404; *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235.

[3] An assignment of part of the fund against the consent of the drawee is void at law because the partial assignor is not an attorney with power to sue in the assignor's name and because "a debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of several persons, when his contract was one and entire." *Gibson v. Cooke*, 20 Pick. 15, 32 Am. Dec. 194; *Palmer v. Merrill*, 6 Cush. 232, 52 Am. Dec. 782; *Papineau v. Naumkeag*, 126

Mass. 372; *Mandeville v. Welch*, 5 Wheat. (U. S.) 277, 286, 5 L. Ed. 87. In equity, however, the objections to a partial assignment disappear. All persons in interest can be brought before the court in a single suit and a decree can be entered which will protect the rights of all parties concerned. *National Exchange Bank v. McLoon*, 73 Me. 498, 40 Am. Rep. 388.

[4] The question at issue has never been directly decided in this commonwealth, but inferentially the decisions are in accord with the very great weight of authority in England and the United States in the support of the legal statement that such an assignment is valid in equity without the assent of the debtor, trustee or stakeholder; and we are of opinion that such is the true rule and should be followed in this commonwealth. *Putnam v. Story*, supra; *James v. Newton*, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; *Richardson v. White*, supra; *Kingsbury v. Burrill*, 151 Mass. 199, 24 N. E. 36; *Nashua Savings Bank v. Abbott*, 181 Mass. 531, 63 N. E. 1058, 92 Am. St. Rep. 430; *Security Bank of New York v. Callahan*, 220 Mass. 84, 107 N. E. 385; *Row v. Dawson*, 1 Ves. Sr. 331; *Ex parte Moss*, 14 Q. B. D. 310; *Perceval v. Dunn*, 29 Ch. D. 128; *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Peugh v. Porter*, 112 U. S. 737, 5 Sup. Ct. 361, 28 L. Ed. 859; *Fourth Street Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; *Nat. Exchange Bank v. McLoon*, supra; *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Appeals of Philadelphia*, 86 Pa. 179; *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. 171.

[5] The assignment being valid in equity and not void as in fraud of creditors or as contravening the Bankruptcy Act, the trustee took subject to it. *Bridge v. Kedon*, supra; *Fletcher v. Morey*, 2 Story, 555, Fed. Cas. No. 4,864; *Parker v. Muggridge*, 2 Story, 334, Fed. Cas. No. 10,743; *In re Hanna* (D. C.) 105 Fed. 587.

It follows that a decree should be entered that the St. Alphonse Catholic Total Abstinence Society pay the plaintiff from said fund of \$419 the sum of \$223, with interest thereon from the filing of the bill, and the balance of the fund to the trustee in bankruptcy. Decree accordingly.

(233 Ill. 49)

DUNN et al. v. KEARNEY et al.
(No. 12381.)

(Supreme Court of Illinois. April 15, 1919.)

1. WILLS §608(1) — CONSTRUCTION — FEE SIMPLE — RULE IN SHELLEY'S CASE.

A will clause, by which testator gives and devises to his brother all his real estate "to have and to hold the same to him and his heirs forever," devised a fee-simple title, and the rule in Shelley's Case is not applicable thereto.

2. WILLS §775 — DEVISE — LAPSE — DEATH OF DEVISEE.

It is a general rule that a legacy or a devise will lapse when the legatee or devisee dies before the testator.

3. WILLS §202 — REPUBLICATION BY CODICIL — LAPSED DEVISE.

Where testator devised to a brother and "his heirs forever" the devise was in fee simple, unless the will contains language which constitutes a devise in terms the fact that the will as republished contained a devise lapsed because of the brother's death is not in itself sufficient to vest title in the brother's heirs.

4. WILLS §199 — CONSTRUCTION — REPUBLICATION — CODICIL — EFFECT.

The execution of a codicil operates as a republication of the will, yet, a codicil does not operate to alter the original will except where it so designates.

5. WILLS §202 — REPUBLICATION BY CODICIL — EFFECT AS TO LAPSED DEVISE.

Where a codicil makes no reference to a clause in a will creating a devise which has lapsed, the republication of the will by the codicil does not alter such clause, nor create new or different devises from that which has lapsed.

6. WILLS §478 — CONSTRUCTION — DEVISE BY IMPLICATION — INTENTION.

A recital in a will to the effect that testator has devised something in another part of the will, when he has not done so, may operate as a devise of property by implication, since it shows an intention to devise property by the will.

7. WILLS §478 — CONSTRUCTION — GIFT BY IMPLICATION — CONJECTURE.

To uphold a gift by implication, the inference from the will of the testator's intention cannot rest upon conjecture, but must be such as to leave no hesitation in the mind of the court and permit of no other reasonable inference.

8. WILLS §858(4) — RESIDUARY CLAUSE — LAPSED DEVISES.

The general rule is that, if a legacy or devise lapses and there is a general residuary clause broad enough to embrace it, such legacy or devise will sink into the residuum.

9. WILLS §587(1) — RESIDUARY CLAUSE — "RESIDUE."

The term "residue," as used in a will, means that which remains, and no particular mode of expression is necessary to constitute a residuary clause.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Residue.]

10. WILLS §858(4) — CONSTRUCTION — RESIDUARY CLAUSE — LAPSED DEVISE.

Where a testator designated the residuum of his estate as "residue of my estate," and there is nothing in the will to indicate the exclusion of a lapsed devise of real estate to his brother therefrom, and nothing to indicate an intention that the real estate should pass as intestate property, it will be held as passing under the residuary clause.

Appeal from Circuit Court, Jo Daviess County; James S. Baume, Judge.

Suit by Margaret Dunn and others against Howard Kearney and others involving the construction of a will. Decree for plaintiffs, and defendants appeal. Decree affirmed.

Sheean & Sheean, of Galena, and James M. Sheean, of Chicago, for appellants.

Martin J. Dillon, of Galena, and F. J. Stransky, of Savannah, for appellees.

STONE, J. This is an appeal from a decree of the circuit court of Jo Daviess county sustaining the bill of appellees for partition. The questions presented to this court involve the construction of the last will and testament of Hamilton Kearney, deceased, and a codicil thereto.

The will in question was executed December 31, 1898. The portions of the will necessary to a decision of this case are as follows:

"Second. I give, devise and bequeath to my brother John Kearney all of my real estate, to have and to hold the same to him and his heirs forever.

"Third. I give, devise and bequeath to my dear friend Mrs. Jane Mosely the sum of \$1,000 and my old gray mare, buggy and harness; also, if she remains with me until my death, I give, devise and bequeath to her all my household goods of every description, including all articles in the cellar, but she shall not have power to sell the same but may give them away if she feels so disposed, but it is my express wish that they be not sold.

"Fourth. I give, devise and bequeath to my friend Mrs. Daisy Matthews the sum of \$500.

"Fifth. I give, devise and bequeath to the widow of my brother David Kearney, Mrs. Rebecca Kearney, the sum of \$500.

"Sixth. It is my will that my executor shall sell and convert into money all the grain and live stock remaining in my possession at the time of my death, and the proceeds of the same, together with the residue of my estate after the payment of the legacies and bequests heretofore set forth, shall be divided equally among my nephews and nieces who are living at the time of my death, and William Hamilton Bertsch, who is the only relative bearing my name and the son of my niece, Mrs. Emma Bertsch. The names of my nephews and nieces, the children of my brothers John and David, and my sister, Mrs. Ann McKinley, are Mrs. Mary Knapp, William Kearney, son of David Kearney, Howard Kearney, John Kearney, Mrs. Ruth Schaible,

Sarah Kearney, and Bessie Kearney, William Kearney, son of my brother John Kearney, Mrs. Margaret Dunn, Anna Kearney, John McKinley, George McKinley, they each, together with my namesake, William Hamilton Bertsch, to take share and share alike in the residue of my estate as hereinbefore set forth."

On June 29, 1912, Hamilton Kearney made the following codicil, to wit:

"Whereas, I, Hamilton Kearney, did on the thirty-first day of December, 1898, make my will; and whereas in said will I did in clause 3 of my said will give, devise and bequeath to Mrs. Jane Mosely the sum of \$1,000 and other property, and also in clause 4 of my said will I bequeathed to Mrs. Daisy Matthews the sum of \$500; and whereas in the dispensation of Providence my friend Mrs. Jane Mosely has departed this life, and by her last will and testament she has provided for her daughter, the said Mrs. Daisy Matthews above mentioned; therefore it is my will that the sums mentioned in clauses 3 and 4 of my will bequeathed to Mrs. Jane Mosely and Mrs. Daisy Matthews shall not be considered and are hereby canceled, and the sums mentioned therein shall be divided equally by my executor among my nephews and nieces mentioned in clause 6 of my will, and William Hamilton Bertsch, he taking an equal portion with each of them."

William Kearney, son of David Kearney, one of the nephews named in the original will, died before the death of the testator.

Prior to 1886, Robert Kearney, Hamilton Kearney, and John Kearney owned and occupied the land in question, consisting of 472 acres in Jo Daviess county, as tenants in common. Robert and Hamilton Kearney were never married and lived with their brother John. Prior to his death, on February 24, 1886, Robert Kearney executed his last will and testament, in which he gave to Hamilton and John Kearney, his brothers, all his interest and share in said real estate. This will was duly probated and entered of record. After the death of Robert, his brothers, Hamilton and John, lived upon and farmed said premises as tenants in common until December 4, 1904, at which time John died intestate, leaving a widow and children surviving him. On June 29, 1912, William Kearney, son of John Kearney, and his mother, occupied the premises, and Hamilton Kearney made his home with them. Hamilton Kearney died in January, 1916, leaving personal estate aggregating \$9,666.15 and an undivided one-half interest in said 472 acres, which undivided one-half is the land in question. The complainants are the daughters of David Kearney, a brother of John, Robert, and Hamilton, who died some 20 years prior to the death of Hamilton.

The decree of the circuit court found, as alleged in the complainants' bill, that the devise contained in the second clause of the will lapsed, and that the sixth clause of the will included the lapsed devise, so as to vest

in each of the testator's nephews and nieces an undivided one-seventeenth of testator's undivided half of said premises, and that a like share in said estate was vested in William Hamilton Bertsch, son of Emma Bertsch, a niece of the testator.

The seven children of Annie McKinley, deceased sister of Hamilton Kearney, who were made defendants below, entered their appearances in the circuit court and answered, admitting the allegations of the bill and that the relief prayed for should be granted. They appear here urging that the decree of the circuit court be affirmed.

Appellants, who are the seven children of John Kearney, deceased, contend that under the will, as modified by the codicil, Hamilton Kearney devised his interest in said real estate to them, the heirs of John Kearney; that the testator, knowing that his brother John was dead when the codicil was executed, republished the original will, and by clause 2 in effect devised all of his lands to the heirs of John Kearney, or that if said legacy lapsed, as charged in complainants' bill, then said real estate descended as intestate property to the 16 nieces and nephews to the exclusion of William Hamilton Bertsch, who is not an heir of Hamilton Kearney; that the sixth clause did not include real estate; and that final division under said sixth clause had been made by the executor and accepted by the legatees thereunder.

[1] By the second clause of the will the testator gives and devises to his brother John Kearney all of his real estate, "to have and to hold the same to him and his heirs forever." He by this clause devised a fee-simple title to the lands in question to his brother John. The ordinary form of a conveyance of a fee at common law was to the grantee and his heirs. *Winter v. Dibble*, 251 Ill. 200, 95 N. E. 1083. It is contended by appellees that said second clause of the will is a devise within the rule in *Shelley's Case*. The rule as stated by Coke (volume 1, 104a) is that—

"When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase."

The clause in question does not purport to devise to John Kearney a freehold estate with a limitation by way of remainder to his heirs, but said clause is a devise to John Kearney and his heirs, which is the proper mode for devising a fee simple. The words "to have and to hold the same to him and his heirs forever" are not the words necessary to be employed to confer a freehold upon the ancestor with a remainder to his heirs, but are the words which in a will or convey-

ance transfer the fee. The rule in *Shelley's Case*, therefore, has no application to this devise. *Johnson v. Buck*, 220 Ill. 223, 77 N. E. 163.

[2, 3] John Kearney died subsequent to the execution of the original will in question and prior to the making of the codicil thereto. The general rule is that a legacy or devise will lapse where the legatee or devisee dies before the testator. 40 Cyc. 1925, and cases there cited. As we understand the contention of appellants, this is not disputed; but they contend that when the testator executed the codicil to his will without making any reference to the second clause of the original will, although he then knew of the death of his brother John, he in executing the codicil republished the will as of the date of the codicil, and that the legal effect of such republication was to vest the fee to the real estate in the appellants, heirs of said devisee, John, and it is contended that parol evidence should have been admitted to show the circumstances surrounding the testator at the time the codicil was executed, as proof of his intention to so devise said real estate. As we have seen, by the language of the original will the testator devised a fee simple to his brother John. This being so, the grant to "his heirs forever" could not be held to be a devise to certain of his heirs, and, unless there be found in the codicil language which constitutes a devise in terms, the fact that the will as republished contains a lapsed devise is not, of itself, sufficient to vest the title to the property, described in the lapsed devise in the heirs of the deceased devisee, where such devisee was given a fee.

[4, 5] While the execution of a codicil operates as a republication of the will (*De-frees v. Brydon*, 275 Ill. 530, 114 N. E. 336; *Mosser v. Flake*, 258 Ill. 233, 101 N. E. 540, Ann. Cas. 1914B, 425; *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151), yet a codicil does not operate to alter the original will except where it so designates (*Doe v. Kett*, 4 Durn. & East, 601; *Comfort v. Mather*, 2 Watts & S. [Pa.] 450, 37 Am. Dec. 523; *Campbell v. Jamison*, 8 Pa. 498). In the case of *Doe v. Kett*, supra, the testator devised certain real estate "to Elizabeth Folsom and the heirs of her body lawfully to be begotten." Elizabeth Folsom died during the lifetime of the testator and prior to the date on which the testator made a codicil to his will. It was there contended that the execution of the codicil was a republication of the will, and that, inasmuch as Elizabeth Folsom had died prior to the time of the making of the codicil, leaving a son, which facts were then known to the testator, the testator must have intended by the codicil that said son should take the property under the words of the original devise, "to Elizabeth Folsom and the heirs of her body

lawfully to be begotten." But it was there said by Lord Kenyon, Chief Justice, that—

The codicil "would operate as a republication of the will for many purposes, such as that of passing lands purchased after making the will, but not so as to alter the will. * * * If this codicil were sufficient to pass the estate to the representatives of E. Folsom, there never would be a lapsed legacy when there was a republication of the will, but it would always go in favor of the executors of the legatees deceased."

To the same effect are the cases of *Comfort v. Mather*, supra, and *Campbell v. Jamison*, supra.

Counsel for appellants rely upon the case of *Davis' Heirs v. Taul*, 6 Dana (Ky.) 51.

We do not adopt the view announced in that case, but hold the true rule to be that, where the codicil makes no reference to a clause of the will creating a devise which has lapsed, the republication of the will by the execution of such codicil does not alter such clause of the will nor create a new and different devise from that which has lapsed.

[6, 7] But it is urged that by the codicil there arose in the language of the will, when considered with the codicil, a latent ambiguity, which makes admissible parol testimony to show the intent of the testator, and that if such testimony be admitted it would establish a devise by implication. Devises by implication are sustained where there is clearly shown an intention on the part of the testator to make a devise, as where a recital in the will is to the effect that the testator has devised something in another part of the will when, in fact, he has not done so, the erroneous recital operating as a devise of such property by implication, for the reason that it shows an intention to devise the property by the will. *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. (N. S.) 645. So in a case where a devise is not made in formal language by the will, the gift will be sustained by implication when the probability of the intention of the testator to make the gift is so strong that a contrary intention cannot be shown. *Martin v. Martin*, 273 Ill. 595, 113 N. E. 150. So, also, where there are no express words of gift but an intention to make a gift clearly appears from the will as a whole, such gift will be sustained as a gift by implication. *Connor v. Gardner*, 230 Ill. 258, 82 N. E. 640, 15 L. R. A. (N. S.) 73; *Rood on Wills*, § 495. To uphold a gift by implication the inference from the will of the testator's intention cannot rest upon conjecture, but must be such as to leave no hesitation in the mind of the court and permit of no other reasonable inference. *Connor v. Gardner*, supra, and cases there cited. Examining the codicil in question in the light of these rules, we are unable to discover such an intention on the part of the testator as to bring the devise of the real estate in question within

such rules, and appellants do not point out wherein such intention may be found. On the other hand, it is evident from the codicil that such an intention rests wholly in the realm of conjecture; that the only clauses to be affected by it were clauses 3 and 4, which give certain legacies to Jane Mosely and her daughter, Daisy Matthews. The testator, by the use of the term "whereas" in said codicil, clearly indicates that the only reason for making the codicil was the fact that Jane Mosely had died and had provided for her daughter, Daisy Matthews. These legacies he directs shall be divided among his nieces and nephews and William Hamilton Bertsch. There is nothing in the will and codicil, considered together or separately, to indicate that any clauses other than 3 and 4 were to be affected. We are of the opinion that no gift by implication was made, as contended by appellants.

[8-10] Appellants further contend that, if the republication of the will did not create a devise of the real estate to them, then such real estate passed as intestate property and not as a part of the residuum of the estate, for the reason that the residuary clause (clause 6) is not broad enough, in terms, to include real estate. The testator by clause 6 directs that his executor sell and convert into money certain personal property, and, further directs that "the proceeds of the same, together with the residue of my estate after the payment of the legacies and bequests heretofore set forth, shall be divided," etc. Appellants contend this language is not broad enough to include the real estate in question. The general rule is that, if a legacy or devise lapses and there is a general residuary clause broad enough in terms to embrace it, such legacy or devise will sink into the residuum. This is based on the presumed intention of the testator that the residuary clause shall include everything not effectually devised or disposed of. *Dorsey v. Dodson*, 203 Ill. 32, 67 N. E. 395. This rule is further aided by the presumption of law that where a man dies testate he intended by his will to dispose of all his property and leave no part of his estate intestate. *Martin v. Martin*, supra; *Eyer v. Williamson*, 256 Ill. 540, 100 N. E. 188; *Wixon v. Watson*, 214 Ill. 158, 73 N. E. 306; *Greenwood v. Greenwood*, 178 Ill. 387, 53 N. E. 101; *Hayward v. Loper*, 147 Ill. 41, 35 N. E. 225. The term "residue" meaning that which remains, no particular mode of expression is necessary to constitute a residuary clause. 40 Cyc. 1563. It is a general rule to so construe a residuary clause as to prevent the intestacy of any part of the testator's estate unless there is an apparent intention to the contrary. *Dorsey v. Dodson*, supra; *Davis v. Davis*, 62 Ohio St. 411, 57 N. E. 317, 78 Am. St. Rep. 725; *In re Fuller*, 225 Pa. 626, 74 Atl. 623. Here the testator

designated the residuum of his estate as "the residue of my estate." There is nothing in the will to indicate the exclusion of this real estate therefrom and nothing to indicate that he intended that said real estate should pass as intestate property. We are therefore of the opinion that said real estate passed under the sixth or residuary clause of the will, and that the circuit court did not err in so finding.

There appearing to be no error in the record, the decree of the circuit court will be affirmed.

Decree affirmed.

(188 Ind. 331)

ADVISORY BOARD OF MORGAN TP.,
HARRISON COUNTY, v. STATE ex rel.
MARTIN et al. (No. 23472.)*

(Supreme Court of Indiana. April 24, 1919.)

APPEAL AND ERROR §—757(2)—RECORD ON
APPEAL—SUFFICIENCY.

Error in overruling demurrer to a complaint will not be considered, where appellant's brief does not set out the complaint, the demurrer, nor memorandum attached thereto, nor give any statement of the record by which the appellate court can tell what its contentions are, as required by rule 22, subd. 5 (55 N. E. vi).

Appeal from Circuit Court, Harrison County; Wm. Ridley, Judge.

Proceeding by the State of Indiana, on the relation of Oswell Martin and others, against the Advisory Board of Morgan Township, Harrison County. Judgment for relators, and defendant appeals. Affirmed.

C. W. Cook and Kirkham & O'Bannon, all of Corydon, for appellant.

Thos. S. Jones and Clyde R. Lottick, both of Corydon, for appellees.

TOWNSEND, J. Appellees obtained a judgment of mandate against appellant. The complaint was in four paragraphs. The trial court sustained demurrer to all except the third. The cause was tried by jury on issue formed by answer to the third paragraph.

Appellant says in its brief that it relies for reversal of the cause upon error of the court in overruling the demurrer to the third paragraph of the complaint. Appellant's brief does not set out this paragraph of complaint, does not set out the demurrer thereto, does not set out memorandum attached to the demurrer, and does not give any statement of the record by which this court can tell what its contentions are. Subdivision 5, rule 22 (55 N. E. vi). Section 3, c. 143, p. 523, Acts 1917, is void so far as briefing is concerned. *Solimito v. State* (at the November term) 122 N. E. 578.

Judgment of the trial court is affirmed.

(189 Ind. 1)

ARMSTRONG et al. v. OSTER et al.
(No. 23321.)

(Supreme Court of Indiana. April 25, 1919.)

1. DRAINS §33 — REMONSTRANCES — SUFFICIENCY—NUMBER OF REMONSTRATORS—DETERMINATION.

In a proceeding to establish a drain, a remonstrance reciting that the remonstrators constituted more than two-thirds of the landowners named in the petition, or who may be affected by any assessment or damages, resident in the county or counties where the lands affected are situated, was sufficient under Burns' Ann. St. 1914, § 6142, as against the claim that only the resident remonstrators of the county were considered in determining their number.

2. APPEAL AND ERROR §996—REVIEW—EVIDENCE—SUFFICIENCY.

Evidence on appeal is sufficient, if the inferences therefrom are sufficient to support the judgment; it not being necessary that the facts be established by positive evidence.

Appeal from Circuit Court, De Kalb County; Dan M. Link, Judge.

Petition by William Armstrong and another to establish a drain, opposed by Winifred D. Oster and others. The petition was dismissed, a new trial was denied, and petitioners appeal. Affirmed.

C. S. Smith, of Auburn, and H. W. Mountz, of Garrett, for appellants.

Edgar W. Atkinson, of Auburn, for appellees.

WILLOUGHBY, J. This was a proceeding filed in the De Kalb circuit court, of De Kalb county, Ind., in which the appellants sought to have constructed and established a certain drain in De Kalb county. The petition was filed under section 6142, Burns' R. S. 1914 (Acts 1907, p. 508), and contained all the necessary averments required under said statute. The appellants, William Armstrong and Elizabeth Armstrong, were the only petitioners. What is termed a two-thirds remonstrance in writing was filed in said court to said petition, in which the remonstrators alleged that they constituted "more than two-thirds in number of the landowners named as such in the petition, or who may be affected by any assessment or damages, resident in the county or counties where the lands affected are situated," and asked that said proceedings be dismissed by the court, on the grounds named in said remonstrance. Upon the issues made by the petition and remonstrance the case was tried in the De Kalb circuit court, and the court found in favor of the remonstrants, and rendered judgment that the petition be dismissed, and that remonstrators recover costs from petitioners.

The petitioners filed a motion for a new trial, which was overruled, and petitioners appealed.

The errors relied on for reversal are:

"The court erred in overruling appellant's motion for a new trial and dismissing appellant's petition."

The motion for a new trial alleges that the decision of the court is not sustained by sufficient evidence and that the decision of the court is contrary to law.

The remonstrance is signed by 64 persons and in such number are included all the persons, except 2, the petitioners, William Armstrong and Elizabeth Armstrong, who are named in the petition as persons whose lands would be affected by said proposed drainage. The appellants claim that the remonstrance is insufficient for the reason that it says "that the remonstrants constitute more than two-thirds of the resident landowners of De Kalb county named in the petition and affected by said proceeding," and would therefore confine the issue to residents of De Kalb county only. An examination of such remonstrance shows, however, that it contains the further statement:

"That the remonstrators constitute more than two-thirds in number of the landowners named as such in the petition, or who may be affected by any assessment or damages, resident in the county or counties where the lands affected are situated."

[1] The remonstrance was sufficient under the statute to present the question. The statute provides:

"That if within twenty days, exclusive of Sundays, from the day set for the docketing of such petition, two-thirds in number of the landowners named as such in such petition, or who may be affected by any assessment or damages, resident in the county or counties where the lands affected are situated, shall remonstrate in writing against the construction of such drain or ditch, such petition shall be dismissed at the cost of the petitioners."

The proper construction of section 6142, Burns' 1914, is that, in determining the sufficiency of a two-thirds remonstrance filed thereunder, the status of the parties proper to be considered is fixed as of the date on which the remonstrance is filed (*Denham et al. v. Orr et al.*, 179 Ind. 519, 101 N. E. 811); that a remonstrance, to defeat the construction of a drain, must be signed by two-thirds in number of the landowners named as such in the petition, or who may be affected by the assessment or damages, resident in the county or counties where the lands affected are situated, and the burden of showing that the remonstrance is so signed is on the remonstrators (*Rankin v. McCollister*, 175 Ind. 387, 93 N. E. 200).

Special findings showing that, from the lands of certain remonstrators, not named in the drainage petition, the "surface water by natural and artificial courses finally flows into the proposed drain," do not authorize the Supreme Court, as a matter of law, to say that such lands were either benefited or damaged; there being nothing in the findings to show that such lands would be affected by any assessment or damages. *Rankin v. McCollister*, 175 Ind. 387, 93 N. E. 209.

Persons whose lands are affected by a proposed drain, even though they are not named in the petition or remonstrance, may be counted in determining the sufficiency of a remonstrance with reference to the number of remonstrators, since such persons, as well as owners named in the petition or remonstrance, must bear the burden of any assessment that may be made against their lands, and by standing silent they as effectually express their wishes as do those who remonstrate. *Rayl et al. v. Kirby*, 180 Ind. 553, 102 N. E. 136, 103 N. E. 440.

The first proviso of article 6142, Burns' 1914 (Acts 1907, p. 508), providing that where "two-thirds in number of the landowners named as such in such petition, or who may be affected by any assessment or damages, resident in the county or counties where the lands affected are situated, shall remonstrate in writing against the construction of such drain or ditch, such petition shall be dismissed at the cost of the petitioners," requires that not only those named in the petition, but also those affected by the assessment or damages, should be counted, regardless of the size or value of their interests, and a decision that a remonstrance filed in a drainage proceeding contains the names of two-thirds of such affected property owners is fatal to the drainage proceedings. *Thorn v. Silver*, 174 Ind. 504, 89 N. E. 943, 92 N. E. 161.

The petition in this case was filed July 8, 1916, and the day set for docketing was August 7, 1916, and on the same day, after said cause was placed on the docket as an action pending, the remonstrance was filed, asking that said cause be dismissed, for the reasons stated in said remonstrance.

The appellants contend that one of the 64 remonstrants was a resident of California,

and that a large number of persons, not named in the petition or remonstrance, and who lived in the counties in which the lands affected by such drainage were situated, owned lands which would be affected by such drainage, and when they were counted the remonstrance would not contain two-thirds in number of the persons whose lands were affected by said ditch proceedings. The appellants also insist that the remonstrants did not discharge the burden which the law puts upon them by proving that the remonstrance was signed by two-thirds of all the landowners who might be affected by any assessment or damages. One of the petitioners, William Armstrong, testified that as near as he could tell he had placed in his petition the names of all persons affected by the drainage.

[2] The trial court heard the evidence, and found upon the issues presented by the remonstrance in favor of the remonstrants. We have examined the record, and find the evidence contradictory, but that the finding of the court is amply sustained by the evidence. The evidence is sufficient on appeal, if the inferences from the evidence are sufficient to support the judgment. It is not essential that the facts be established by positive evidence. *Continental Ins. Co. v. Bair* (App.) 114 N. E. 763. It is sufficient that the evidence supplies reasonable grounds for inferring facts essential to recovery. *Chicago, etc., R. Co. v. Mitchell*, 184 Ind. 383, 110 N. E. 215. Where the evidence is conflicting, in determining whether a finding in favor of appellee is warranted, only the uncontroverted facts and the evidence most favorable to appellee and the favorable inferences that may be drawn therefrom can be considered on appeal. *Union Nat. Bank of Muncie v. Finley*, 180 Ind. 470, 103 N. E. 110; *Peabody-Alwert Coal Co. v. Yandell*, 179 Ind. 222, 100 N. E. 758.

This court cannot reverse a case for lack of evidence, when the court is not convinced that some essential element of the case is wholly unsupported by evidence. *Shira v. State*, 119 N. E. 833.

There was evidence to support the decision of the trial court, and the court did not err in overruling appellant's motion for a new trial, and in dismissing appellant's petition. Judgment affirmed.

(198 Ind. 337)

KOEHLER v. STATE. (No. 23387).*(Supreme Court of Indiana.
April 25, 1919.)**1. INDICTMENT AND INFORMATION ¶86(7)—VENUE OF CRIME.**

Count of an indictment that falls to state that the county in which a crime is charged to have been committed is in the state is sufficient, where it appears in the caption and upper marginal title that the county is in the state.

2. RAPE ¶38(1)—EVIDENCE.

In a statutory rape case, testimony of the mother of the prosecuting witness regarding a conversation had with the accused, or in his presence, as to the girl's age, was admissible for the purpose of showing guilty knowledge, although it was not incumbent on the state to show such knowledge.

3. WITNESSES ¶408—EXPLANATION OF CONTRADICTORY MATTER.

In a statutory rape case, the court did not err in permitting the prosecuting witness to explain why she wrote a certain letter to the accused, read in evidence on the part of the defense to exonerate accused from the offense and to contradict the evidence of the prosecuting witness.

4. CRIMINAL LAW ¶406(8)—RAPE ¶44—EVIDENCE—ADMISSIONS.

In a statutory rape case, the court properly permitted a witness to detail a conversation with the accused, wherein the witness stated that she told accused that he had no business to go with the prosecuting witness, in reply to which the accused said they would not catch him, although the conversation occurred prior to the time fixed when the offense was committed; such evidence, while in the nature of an admission, being competent for the purpose of showing the association, acquaintance, and familiarity of the parties.

5. CRIMINAL LAW ¶695(4)—OBJECTIONS TO EVIDENCE.

Even if it was improper for the prosecuting attorney to ask accused on cross-examination whether he was thrown out of two certain lodges for immorality, there was no error in admitting it over an objection that it was not admissible "for the reason that secret societies are not subject to the same sort of investigations as persons."

6. CRIMINAL LAW ¶1043(2) — APPEAL — SCOPE OF OBJECTIONS.

Where there are specific objections to the admission of evidence, the implication follows that there are no others, or, if others, that they are waived, and a party cannot be allowed to make one objection in the trial court and another on appeal.

7. CRIMINAL LAW ¶795(4)—INSTRUCTIONS—DOUBT AS TO DEGREE OF OFFENSE.

An instruction in a rape case that, if the jury were convinced beyond a reasonable doubt that defendant was guilty of some one of the offenses included in the charge, but entertained a reasonable doubt as to which offense he was

guilty of, then they should find him guilty of the lowest offense, was substantially in the language of Burns' Ann. St. 1914, § 2137, and was properly given.

8. CRIMINAL LAW ¶822(1) — INSTRUCTIONS AS A WHOLE.

In determining whether an instruction was misleading, the instructions must be taken as a whole.

Appeal from Circuit Court, Allen County; Wm. H. Eichhorn, Special Judge.

John H. Koehler was convicted of having carnal knowledge of a girl under 16 years of age, and he appeals. Affirmed.

Samuel M. Hench, W. O. Ryan, and L. H. Dunten, all of Ft. Wayne, for appellant.

Ele Stansbury, of Indianapolis, Elmer E. Hasting, of Washington, Ind., and Dale F. Stansbury, of Indianapolis, and Franklin A. Emrick, of Ft. Wayne, for the State.

MYERS, J. Appellant was tried and convicted upon an indictment returned by a grand jury of Allen county charging him with carnal knowledge of a female child under 16 years of age. Acts 1907, p. 85; section 2250, Burns 1914.

[1] In this court the only errors well assigned and not waived are: (1) That the trial court erred in overruling his motion to quash the indictment and each count thereof; (2) that the trial court erred in overruling his motion for a new trial. The only point made against each count of the indictment is that it falls to state that the county of Allen is in the state of Indiana. This identical question has been decided by this court against appellant's contention in *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711. In that case it was held that under our Criminal Code the caption and upper marginal title is to be considered a part of the indictment. The indictment in the case at bar with reference to the caption and marginal title reads as follows:

"State of Indiana, Allen County—ss.:

"In the Allen Circuit Court, November Term, 1916.

"The State of Indiana v. John H. Koehler. Indictment for Rape.

"The grand jury of the county of Allen upon their oath do present that on the — day of August, 1916, John H. Koehler, at the county of Allen, in the state of Indiana. * * *

It is perfectly clear from that part of the indictment quoted that it was returned into the Allen circuit court by a grand jury of Allen county, which is stated in the caption to be in the state of Indiana. The offense is directly charged to have been committed in "Allen county, Ind." The objection of appellant is not well taken, and the motion to quash was properly overruled. *Winegardner v. State*, 181 Ind. 525, 104 N. E. 969; *Long*

v. State, 56 Ind. 183, 26 Am. Rep. 19; Turpin v. State, 80 Ind. 148; Hawkins v. State, 136 Ind. 630, 36 N. E. 419.

Appellant in support of his motion for a new trial has assigned many reasons, nearly all of which pertain to the admission or rejection of evidence at the trial. A number of these specifications present no question; therefore we will give attention only to such specifications as are reasonably before the court.

[2] It is first contended that the court erred in permitting the mother of the prosecuting witness to testify to a conversation had with the accused or in his presence as to the girl's age, in which she said that she was keeping her daughter back from high school. The question was objected to on the ground that it called for a conversation prior to the time of the alleged offense, that it was in the nature of hearsay, and that her age at that time was immaterial. The witness had testified that the prosecuting witness was 14 years of age at the time of the trial, and from the record we learn the trial was begun on June 18, 1917. It appears that the conversation inquired about took place after February, 1915, and before the offense was committed in August, 1916. This testimony tended to show knowledge on the part of the defendant of the girl's age; a fact not incumbent on the state to prove; yet it was proper for the purpose of showing guilty knowledge. Appellant's objection was not well taken.

[3] It is further insisted that the trial court erred in permitting the prosecuting witness to explain why she wrote a certain letter to the appellant which had been read in evidence on the part of the defense. The effect of this letter was to exonerate appellant from the offense for which he was then on trial, and to contradict the evidence of the prosecuting witness given at the trial. It is clearly the right of a witness to explain or reconcile any inconsistent utterances as well as the situation or condition under which such contradictory statements are made, and to have such explanations submitted to the jury. Underhill on Criminal Evidence (2d Ed.) § 238; Buehner v. Feulner, 164 Ind. 368-374, 73 N. E. 816.

[4] Appellant insists that the court erred in admitting a witness to detail a conversation had with the appellant, wherein she (witness) stated that she (witness) told the appellant that he had no business to go with the prosecuting witness, that they would get caught, and that appellant said they would not catch him, and if they got caught it would be all right with him. The objection urged to the question calling for this testimony was that this conversation took place prior to the time fixed when the offense was committed; that it raised a collateral issue. While this testimony was in the nature of an admission, it was competent for the purpose of showing the acquaintance, associations, and familiarity of the parties.

[5, 6] Appellant also complains of the action of the trial court in permitting the prosecuting attorney to ask him on cross-examination whether he was thrown out of two certain lodges for immorality, and in requiring him to answer that question. Appellant objected to this question—

"for the reason that secret societies are not subject to the same sort of investigations as persons. As to whether he was expelled from any secret society in which they have laws that might be different from the laws which govern the courts of justice in the state of Indiana with its right of appeal, we claim he should not have asked that question."

These are specific objections to the admission of evidence, and from which the implication follows that there are no others, or, if others, that they are waived. Bass v. State, 136 Ind. 165, 36 N. E. 124; Pichon v. Martin, 35 Ind. App. 167, 73 N. E. 1009.

In this court appellant insists that the question and answer tended to impeach the witness, or at least it tended to affect his credibility before the jury. The law is well settled that a party will not be allowed to make one objection to the admissibility of evidence in the trial court and another in this court. Van Spanje v. Hostettler (App.) 119 N. E. 725; Cleveland, etc., Ry. Co. v. Woodbury Glass Co., 120 N. E. 426-434. The question raised must be determined upon the record as made in the trial court. That record, as we see it, does not raise the question discussed here. While we do not hold that the question called for admissible evidence, yet we do hold that there was no error in admitting it over the objection interposed.

[7] Error is claimed on the giving of instruction No. 13 by the court on its own motion. This instruction in substance told the jury that, if they were convinced beyond a reasonable doubt that the defendant was guilty of some one of the offenses included in the charge contained in the indictment, but entertained a reasonable doubt as to which of the several offenses he was guilty of, then they should find him guilty of the lowest offense. This instruction was substantially in the language of section 2137, Burns 1914, and there was no error in giving it.

[8] In addition it may be said that the court in other instructions clearly advised the jury in regard to the lower grades of offenses included in the charge of rape. Taking the instructions as a whole, the jury could not have been misled by the questioned instruction. Coolman v. State, 163 Ind. 508, 72 N. E. 568; Newport v. State, 140 Ind. 299, 39 N. E. 926.

After a careful consideration of the record in this case, we are fully convinced that appellant had a fair trial, and that his alleged errors do not warrant us in granting him a new trial.

Judgment affirmed.

(139 Ind. 601)

CLARK et al. v. ALLEN et al. (No. 23257.)*

(Supreme Court of Indiana. April 25, 1919.)

1. WILLS §702—ACTIONS FOR CONSTRUCTION—PLEADING—ISSUES.

In an administrator's action for the construction of a will, the manner of forming issues is informal; the complaint requiring each defendant to show his special interest therein, and the issues being tried on the complaint and answer filed without the formation of separate issues between the several defendants.

2. WILLS §493—CONSTRUCTION—AMBIGUITY IN DESIGNATION OF DEVISEES.

In an action to construe a legacy to the children of two of testator's brothers, where it appeared that one of the brothers had never had any children, while a brother not named had children, but the court found no fact tending to show an intention of the testator to bequeath to the children of the latter, a conclusion that there was no patent or latent ambiguity in the will was justified.

3. WILLS §449—CONSTRUCTION—FAILURE OF ISSUE—PRESUMPTION AGAINST INTES-TACY.

Where testator bequeathed his property to the children of two brothers who should be living at the death of a life tenant and one of the brothers never had any children, the presumption against intestacy justifies a conclusion that the children of the other brother should take the entire fund.

4. WILLS §489(5)—CONSTRUCTION—EVIDENCE—MISTAKE IN DESIGNATION OF DEVISEES.

In an action for construction of a will bequeathing property to the children of two brothers, evidence held to support a finding of the court that the testator did not intend to include the children of a brother not named, instead of one of the named brothers who had no children.

5. PLEADING §147—WILLS §702—ACTION FOR CONSTRUCTION—PLEADING—CROSS-COM-PLAINT.

A cross-complaint in an administrator's action to construe a will, presenting the same issue that is presented by the complaint, is not contemplated by the Code, nor by the rules at common law or in equity, and such cross-complaint, and any admissions therein, will be disregarded.

Appeal from Circuit Court, Cass County; H. J. Paulus, Judge.

Action by the Logansport Loan & Trust Company, administrator de bonis non of the estate of Levi H. McKaig, deceased, against Grace Clark and others and Lida Allen and others, for the construction of a will. Judgment construing the will as contended by Lida Allen and others. Grace Clark and others appeal. Affirmed.

McConnell, Jenkins & Jenkins, of Logansport, and Stuart, Hammond & Stuart, of Lafayette, for appellants.

Rabb, Mahoney & Fansler, of Logansport, for appellees.

HARVEY, C. J. This action is brought by the Logansport Loan & Trust Company, administrator de bonis non, with the will annexed, of the estate of Levi H. McKaig, deceased, for construction of the will of said testator.

The particular clause in the will of which construction is asked is as follows:

"I give and bequeath to my sister, Martha Watts, the north half of the southwest quarter of section sixteen, in Noble township, Cass county, Indiana, to have and to hold the same for and during her life. On her death I direct that the said land be sold by my executor and the proceeds thereof be equally divided between the children then living of my brothers, John F. McKaig and Watson C. McKaig."

The complaint alleges: That said Martha Watts died in September, 1915. That the executor is taking proper legal steps to make a sale of the real estate described in the quoted clause. That both John F. McKaig and Watson C. McKaig, named in said clause, are now dead; and at the time of the death of said Martha C. Watts certain of the defendants were the living children of said John F. McKaig, and that said Watson C. McKaig was never married and left no children.

That at the time of Martha C. Watts' death there were six living children of Robert N. McKaig, another brother. That said children of Robert N. McKaig are claiming and asserting that there was an error and mistake made in the preparation and writing of said will on the part of the scrivener who prepared the same. That it was the intention and purpose of said testator to name the children of his said brother Robert, instead of the children of his brother Watson. That the testator intended the name of Robert N. McKaig to be written into said will instead of the name of Watson C. McKaig, and that the children of Robert N. McKaig are claiming they are entitled to share equally in the proceeds of the sale of said property with the children of John F. McKaig.

That the children of John F. McKaig are asserting that they are entitled to the entire proceeds of the sale, because they are the only living children of the two brothers named in said clause.

That the other heirs of said Levi H. McKaig are claiming and asserting that the net proceeds of said sale should be divided into two equal parts, one of which should be distributed among all the heirs at law of the said Levi H. McKaig, on the theory that he died intestate as to said one-half.

That the administrator is in doubt as to the proper interpretation, and cannot safely make distribution of the funds to be derived

from said sale without a construction by the court.

To this complaint all the heirs at law and beneficiaries named in the will were made defendants.

The appellants, who are the children of the said brother Robert, filed an answer in which they allege, in substance, the same facts which are recited in the complaint; and, particularly, allege an error and mistake made by the testator and the scrivener, in that the name of Watson C. McKaig was written in said will instead of the name of Robert N., and that the testator intended the name Watson C. written therein to be Robert N. and that they are therefore claiming to be entitled to share equally with the children of John F. McKaig in the proceeds of said real estate.

They further allege that—

They "neither admit nor deny the other allegations in said petition contained, for the reason that they have no certain information as to these facts, and demand that as to these facts proof be made. All other facts alleged in said petition not herein traversed or admitted are denied."

To the administrator's complaint the children of John F. McKaig filed answer in which they admit all the facts in the complaint alleged, and aver that, at the time of the death of said Martha C. Watts, they were the sole and only children then living of said John F. McKaig and Watson C. McKaig, and that they are entitled to the entire proceeds of the sale to the exclusion of all other heirs, legatees, or devisees of the testator.

No replies were filed to these answers. The children of Robert N. McKaig filed a cross-complaint, which was amended, to which they made the administrator and all of their codefendants parties. They set out the relationship of the various parties to the testator as his heirs and under the will. They describe the same controversies described in the complaint and the answers thereto, and allege facts showing a mistake of the testator, and that there exists a latent ambiguity in the said will.

The children of John F. answered the amended cross-complaint:

"That said decedent was intimately acquainted with all of his said brothers and knew the name of each of them, and was not in the habit of referring to and speaking of his brother, Robert N. McKaig, by the name of Watson C. McKaig, or of speaking of Watson C. McKaig by the name of Robert N. McKaig; and at said date the said Watson C. McKaig, although an unmarried man, was in good health and under 50 years of age."

To this answer the cross-complainants replied by general denial, and Robert N. McKaig answered the complaint and amended cross-complaint by disclaimers. The cause was tried, and at the request of all the par-

ties the court made a special finding, and stated its conclusions: (1) That there is no ambiguity, latent or patent, in said will; (2) that the children of said John F. McKaig are entitled to all of the proceeds arising from the sale of the land described in said fourth clause of the will. Proper exception to each conclusion was reserved by appellants; and they thereupon filed a motion for a new trial, which was overruled.

Appellants allege that the court erred in each of its conclusions of law, and in rendering judgment on the facts found and the conclusions stated, and in overruling the motion for a new trial.

[1] Proceedings of this character are infrequent, and the manner of forming issues therein, so far as same can be gathered from decisions in cases of this character, is somewhat informal. It is held that, when such a complaint is filed for construction of a will, the court will decline to merely advise petitioners as to the court's view of such construction, because this would bind no one. The court will not act until the cause is made adversary by bringing in all persons as defendants whose interests will be affected by such construction. *Traphagen v. Levy*, 45 N. J. Eq. 448, 451, 18 Atl. 222.

While it must be borne in mind that it is the duty of an administrator, executor, or trustee to remain neutral as between beneficiaries and legatees, except to sustain and execute the will, and therefore not the duty of such petitioner to make specific allegations for or against the rights of any of the legatees or beneficiaries, yet it may be fairly said that a complaint by an administrator for construction requires that each defendant show his special and separate claims or interests against other defendants, or suffer default and abide a construction made without his assistance.

This being so, it results that when a defendant to such a petition files an answer to the complaint, and said answer alleges facts tending to affect the interests of other defendants said other defendants are thereby challenged to an issue. And it has been the practice, as shown by the decisions, to try such causes upon the petition, or complaint, and, upon default, or upon such answers as are filed, to render judgment construing the will for or against parties defendant; and that such parties defendant are bound thereby, although no issue has otherwise been formed between the defendants themselves.

The issue thus presented to the court on the complaint herein, briefly stated, was: (1) Whether there was a latent ambiguity in said will; and (2) whether, if Robert's children are excluded, the children of John take all or only half of the proceeds of said real estate, i. e., whether decedent was intestate as to one-half of said proceeds.

[2, 3] As bearing upon this issue, the court failed to specially find any fact tending to

show that the testator intended that the name of Robert N. should be written into said will instead of the name of his brother, Watson C.; therefore the court was justified in its conclusions of law that there was no latent ambiguity; and, considering the well-established rule that courts will not, if the same can be reasonably avoided, declare a testator to have died intestate as to any part of his property when he has shown an intention to die testate as to all thereof, and considering the fact found by the court that the children of John F. are the only children of the brothers John F. and Watson C., surviving the sister, Martha, the court was, when the facts specially found are alone considered, justified in its conclusion that said children of John F. take all of the proceeds arising from the sale of the land described in said clause of the will, and that the testator was not intestate as to one-half thereof.

The exceptions to the conclusions of law are not sustained.

[4] As to the motion for a new trial, so far as it relates to issues formed on the complaint, it may be said that while there is some evidence tending to show the high regard of the testator for his brother Robert N., and Robert N.'s children, and that the testator was, to some extent, ill humored toward his brother Watson C., who had no children, and that the testator had stated to Robert N. that he intended to provide for his children in his will, and after making the will stated that he had so provided, and other similar facts having a tendency to show a mistake in said will, we must remember that it was for the trial court to weigh this evidence; and inasmuch as there was some evidence tending to show that the testator did not frequently mistake the names of his brothers, and speak of Robert N. as Watson C., and there was evidence to the effect that the testator was in good health and mental condition, except as he was to some extent disabled by overwork and rheumatism, which testimony fairly tends to support the decision of the court, we cannot say that the decision of the court was not sustained by sufficient evidence.

[5] The cross-complaint is directed against the administrator and all codefendants named in the complaint, and not against any other parties. It seeks a construction of the will, and nothing more. Therefore, it tenders only the same issue that is made upon the complaint.

It is not contemplated by the Code, nor by the rules at common law or in equity relating to such matters, that by cross-complaint exactly the same issue may be presented between the same parties as is presented by the complaint and answers, with the possibility that the exigencies or accidents of practice will produce different results. Such practice would be useless and lead to confusion. This cross-complaint and

all consequences claimed by reason of only a partial answer thereto should be, and are, disregarded.

An admission thus made in an attempt to duplicate an issue already made in the same cause, being improper and immaterial, does not in itself operate to overthrow a result reached upon the same issue made upon the complaint in the trial of which latter issue no such admission is made.

The judgment below is affirmed.

(188 Ind. 393.)

CROMER et al. v. BRIDENBAUGH et al.*
(No. 28147.)

(Supreme Court of Indiana. April 24, 1919.)

1. DRAINS \S 32—REPORT OF COMMISSIONERS—CONSTRUCTION.

In a proceeding for a drainage ditch, commissioners' report held to provide for an underground tile drain in an old ditch, and to contemplate that the old ditch was not to be used.

2. DRAINS \S 32—ESTABLISHMENT OF DITCH—REPORT—SPECIFICATIONS.

A report of commissioners, in a proceeding to establish a drainage ditch, is defective, where there are no specifications as to the width, depth, slope, or condition of an old drainage ditch to be used as a portion of the ditch to be constructed.

3. DRAINS \S 34—REPORT OF COMMISSIONERS—DISMISSAL—AMENDMENT.

In a proceeding to establish a drainage ditch, where the court found that the proposed work decided on and reported by the commissioners was not sufficient to properly drain the land, and dismissed the petition, a request that the commissioners be permitted to amend the report, made 23 days after dismissal, was too late.

4. EVIDENCE \S 536, 572—EXPERT TESTIMONY—KNOWLEDGE.

In a proceeding regarding the sufficiency of a proposed drain, witnesses who had any knowledge of the subject were properly permitted to testify as experts; the extent of their knowledge going only to the weight of the evidence and not to its admissibility.

5. EVIDENCE \S 536—EXPERT TESTIMONY.

In a proceeding to establish a drain, a commissioner, who was not familiar enough with his own report to know the sizes of the tile provided for therein, was properly not allowed to give his opinion as to the sufficiency of the proposed work to drain the land, especially where the report itself was in evidence, signed and sworn to by him, in which he had given his opinion as to the efficiency of the proposed drainage.

Appeal from Circuit Court, Pulaski County; W. O. Pentecost, Judge.

Petition by Jacob Cromer and others for opening a drainage ditch, Otto Bridenbaugh

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied.

and others, remonstrators. From an order dismissing the proceedings, the petitioners appeal. Affirmed.

Reidelbach & Reidelbach and John M. Spangler, all of Winamac, and Myers, Gates & Ralston, of Indianapolis, for appellants.

Horner & Thompson and James W. Noel, all of Indianapolis, and Long, Yarlott & Souder, of Logansport, for appellees.

TOWNSEND, J. Appellants filed their petition in the Pulaski circuit court for an open dredged ditch. This ditch lies wholly within the county. Commissioners were appointed and made their report. They afterwards amended this report. The cause was tried and proceedings dismissed on the tenth statutory ground of remonstrance to the amended report. Acts 1907, p. 508, section 6143, Burns' 1914. The trial court construed the commissioners' report to provide for an underground tile drain in the main ditch from station 0 to station 226, plus 74 feet.

It transpires from the evidence that this main ditch, all but about a mile at the upper end thereof, lies in the channel of an old dredged ditch that was constructed in 1897, commonly known as Mud creek. It is appellants' contention that they should not have been defeated on this cause of remonstrance for the reason that the report of the commissioners contemplated that Mud creek should be left open as it was at the time of the filing of the report.

The report provided that in this main ditch from stake "0" to 30 there should be a 10-inch tile; from stake 30 to 75 there should be a 12-inch tile; from stake 75 to stake 100 there should be a 14-inch tile; from stake 100 to 144 there should be a 16-inch tile; from stake 144 to stake 226, plus 74 feet, there should be a 24-inch tile; from stake 226, plus 74, to stake 243 to be an open ditch.

Appellants seem to admit that, under the evidence, a 24-inch tile would not be sufficient for the drainage in question, unless Mud creek is left open above the tile.

There were numerous branches leading into this main ditch, and the proposed drainage was to take care of about 2,000 acres; but appellants claim that there is sufficient in the report to show that the drainage commissioners intended that Mud creek should remain open to take care of overflow waters. They base this contention upon the proposition that the report of the commissioners provided for a concrete bulkhead at station 226, plus 74 feet, which was concave at the top, being 12 feet high at the ends and 7 feet high in the center, to conform to the bottom of the old ditch, Mud creek; also on the proposition that the tile were to be covered level with the bottom of Mud creek; also on the proposition that the report required the contractor to remove all trees

and shrubs to a distance of 25 feet on each side of the drain.

When the first witness was put upon the stand by the remonstrators in the course of his examination a controversy arose between counsel, on an objection, as to the relation that the proposed tile drain sustained to Mud creek, remonstrators' attorney asking the witness concerning the cleaning of Mud creek. Whereupon the trial court remarked: "What has the cleaning of Mud creek got to do with it?" And shortly thereafter, attorney for the petitioner added to the objection to the question the following: "I want to add an objection that the proposed ditch is a new ditch." Thus it is seen that at the very outset of the trial the court indicated his view of the commissioners' report, and counsel for the petitioners adopted that view in this objection.

It will hardly do to say that petitioners tried this cause on the theory that this tile drain was supplemental to Mud creek; or that Mud creek was to remain as an adjunct to this drain. It seems quite apparent from the record that the case was tried on the theory that this was a new system of drainage, completely supplanting the old dredged ditch that was constructed in 1897, which the evidence showed was tramped full in places and had grown up to grass and weeds and brush, had no definite channel. In some places it was very wide and very shallow, in other places quite deep, varying from a few inches in depth to several feet in depth, and varying in width from a few feet to from 25 to 30 feet at different points.

[1] It seems from the record that petitioners were proceeding upon the theory that the report called for a tile drain down to station 226, plus 74 feet, and that this drain was to completely supplant the old open ditch; that only after they were met by evidence that the 24-inch tile would not take care of the drainage did they conceive the idea that Mud creek should be left open as an overflow channel. But, however this may be, it is not their contention that Mud creek should be left open according to the old specifications made in 1897, but that it is to be left open as it was at the time that the drainage commissioners made the report. But nowhere in the report of the drainage commissioners is there any specification as to the width or the depth or the slope of the banks of Mud creek as it now is. So that whatever the theory of the petitioners was on the trial of this cause, it seems to us, under the statute, of little consequence; because it cannot be conceded that the law would permit the condition of Mud creek, as an open channel, to be left in the waste basket of memory, and not require it to be made definite and certain as to its width and depth and slope. Those who were required to keep it in the condition that it was at the

time of the commissioners' report should have something to which they might refer to find out what the specifications were.

Appellants' contention about the bulkhead being concave and conforming to the bottom of Mud creek, and the other two contentions that we have set out about the grubbing of the shrubs and removing of the trees to a distance of 25 feet, and the covering of the tile up to the bottom of Mud creek, are not sufficient to authorize the interpretation of this report that Mud creek was to remain an open ditch. If the commissioners intended any such thing, they intended something that could not be done under the law, and something that would be utterly impossible because there would be no record anywhere to disclose the then dimensions of Mud creek. The concave bulkhead was evidently designed to take care of flood waters during the time of the construction of this tile drain. Tile ditch construction begins at the lower end thereof. If this bulkhead were not concave, it would operate as a dam to Mud creek, and would seriously interfere with digging the ditch and putting in the tile, in case of heavy rains.

So far as the other claim of appellants is concerned, about grubbing out the trees and taking out the shrubs, the commissioners simply took this from the statute itself, which requires that in the construction of a tile drain all shrubs and trees shall be removed on each side of the drain to a distance of 25 feet. See section 6142, Burns' 1914. The purpose of this, of course, is to keep the roots from filling up the tile and blocking and destroying the drainage. This provision of the report, instead of indicating that Mud creek was to be left open, rather indicated that it was to be plowed full and farmed over by the adjoining landowners, when the tile was once in. Appellants also say in this connection that, because the specifications require the contractor to cover the tile even with the bottom of Mud creek, therefore Mud creek was to be left open. This presents the rather anomalous situation of putting in a 24-inch tile, say at a point where the tile is 4 feet below the bottom of Mud creek, and still have 2 feet of earth left in the bottom of Mud creek after the tile was covered up to the level of the bottom. Thus this very construction would throw 2 feet of earth into the bottom of Mud creek and leave it there. All the lateral branches of this main drain that were provided for in the commissioners' report required the covering of the tile to the depth of 2 feet only, leaving it to the adjoining landowners to fill in the rest of the dirt.

It would seem as consistent for appellants to contend that these lateral branches should be left open, except the 2 feet filled in by the contractor, as it is for them to contend that Mud creek should be left open because of the provision that the tiles should be covered only to the level of the bottom of Mud creek.

[2, 3] Because the court found on the evidence that the proposed work as decided upon and reported by the commissioners was not sufficient to properly drain the land to be affected, the petition was dismissed. Twenty-three days after the judgment dismissing the petition, appellants asked that the commissioners be permitted to amend their report to provide that Mud creek should remain open. If this provision had been in the original report, appellees would have had the right to contest the provision under the eighth statutory ground of remonstrance that the expense exceeded the aggregate benefits. Section 6145, Burns' 1914. This proposed amendment to the report, even if it had been timely, is subject to the infirmity that no specifications are offered as to the width, depth, slope, or condition of the Mud Creek channel. The proposed amendment came too late, and was too indefinite, had it been timely.

[4, 5] Appellants also complain that the court permitted four witnesses, put upon the stand by remonstrators, to testify as experts on the subject of whether the 24-inch tile would drain the land. Appellants' contention about these witnesses goes rather to the weight of their evidence than to its admissibility. It is claimed by the appellants that they did not show sufficient familiarity with the drainage in question to testify as experts. If they had any knowledge of the subject about which they were talking, it was proper for the trial court to hear them. It may be that the testimony offered had little weight, but this did not preclude its being admitted. They also complain because the court excluded the testimony of one of the drainage commissioners which they offered in rebuttal. It appears that this commissioner was not familiar enough with his own report to know the sizes of the tile provided for therein. It was not error to exclude his evidence. The report itself was in evidence, signed and sworn to by him, and in that he had given his opinion as to the efficiency of the proposed drainage. The trial court was correct in his construction of the commissioner's report, and the finding of the court is not contrary to law, and is sustained by sufficient evidence.

The judgment is therefore affirmed.

(188 Ind. 239)

PIERSON v. STATE. (No. 23450.)

(Supreme Court of Indiana. April 22, 1919.)

1. WITNESSES ¶350 — ACCUSED AS WITNESS — CROSS-EXAMINATION — PRIOR CONVICTION.

Where accused testified in his own behalf, he may be cross-examined as to prior convictions, but such evidence can be considered only as affecting his credibility as a witness.

2. WITNESSES ¶330(1), 349, 372(1) — CREDIBILITY — CROSS-EXAMINATION — EXTENT.

Any fact tending to impair the credibility of a witness by showing interest, ignorance, motives, or bad character may be brought out by cross-examination, but the extent of such cross-examination is within the sound discretion of the court.

3. CRIMINAL LAW ¶369(1), 376 — WITNESSES ¶337(4) — INSTRUCTIONS — CHARACTER — PRIOR CONVICTIONS — CHARACTER OF CODEFENDANTS.

Where accused testified on cross-examination to prior convictions, and other offenses by his codefendants were shown, instructions that the character of accused and his prior convictions could be considered in determining his guilt, and that other offenses of codefendants could be considered as affecting his character, were erroneous.

4. CRIMINAL LAW ¶1172(2) — PREJUDICIAL ERROR — INSTRUCTIONS — EFFECT OF CHARACTER TESTIMONY.

Where the evidence was wholly circumstantial and contradictory, erroneous instructions permitting the jury to consider defendant's character and prior convictions in determining his guilt cannot be deemed harmless.

Appeal from Circuit Court, Randolph County; Theo Schockney, Judge.

Enoch L. Pierson was convicted of conspiracy to commit arson, and he appeals. Reversed, with instructions to sustain motion for new trial.

H. J. Paulus, of Marion, John Burns, of Gary, Jas. Burns, of Montpelier, George H. Ward, of Winchester, and Harry E. Roberts, of Marion, for appellant.

Ele Stansbury, Dale F. Stansbury, and Newman T. Miller, all of Indianapolis, for the State.

WILLOUGHBY, J. This is an appeal from a judgment of conviction upon an affidavit charging appellant, together with three others, with the crime of conspiracy to commit arson. Appellant upon his own motion was granted a separate trial from his codefendants, and the cause was submitted to a jury for trial on the issue formed by the plea of not guilty to the charge in the affidavit. The only error assigned is the court erred in overruling appellant's motion for a new trial. In appellant's motion for a new trial he insists that the court erred in giving,

over objection of appellant, certain instructions of its own motion.

The court of its own motion gave the following instruction, No. 20, over the objection of appellant:

"The good character of the accused, when satisfactorily established by competent evidence, is an ingredient which ought always to be considered by the jury, together with the other facts and circumstances in the case, in determining his guilt or innocence. You are therefore instructed that the evidence of good character of the defendant in this cause and the evidence of his bad character, if any is shown, is competent to be taken into consideration by you in determining his guilt or innocence. The good character of the accused, when satisfactorily established, may, of itself, create such reasonable doubt in the minds of the jury as would justify an acquittal, unless the facts and circumstances point so unerringly to his guilt that, notwithstanding his good character, the jury can say, beyond a reasonable doubt, that he is guilty."

And in instruction No. 26, given by the court of its own motion over appellant's objection, the court said:

"The court also instructs you that evidence has been permitted to be introduced touching upon the bad moral character of the defendant in the community in which he lived. This evidence is competent upon behalf of the state, and if the jury believe from the evidence that prior to the time it is alleged that the crime was committed the defendant bore a bad reputation in the community in which he lived for morality, then this is a fact proper to be considered by you, together with all the other facts proven in the case, in determining the guilt or innocence of the defendant, and after a careful consideration of all the evidence in this case, including that pertaining to his previous good character, if such evidence has been introduced, as well as the evidence with reference to his previous bad character, if such evidence has been introduced, the jury entertain any reasonable doubt of the defendant's guilt, he cannot be convicted. And also, if you find from the evidence that on and prior to the 10th day of July, 1916, either of the codefendants Frederick Drake, Elisha Roberts, or Calvin Lincoln were persons who bore a bad reputation for honesty and integrity, or for morality, this fact or these facts, if such facts appear in the evidence, should be considered by you, along with all the other evidence in the cause, in determining the guilt or innocence of the defendant Pierson, but you will not consider any specific offense alleged to have been committed by either one of the other defendants as in any way applying to the conduct of this defendant, except in so far as it applies, if it does apply, to the character of the defendant on trial."

Instruction No. 27, given by the court of its own motion over objection of appellant, is as follows:

"Evidence has been permitted to go to you concerning the whole period of the defendant's life, up to the alleged commission of the alleged

offense. This evidence has been proper, and must be considered by you in weighing the testimony on the question of the defendant's guilt or innocence. It was permitted for the purpose of showing what manner of man the defendant has been during all this period, that you might consider the question of whether or not such a man would be guilty of such an offense as charged in the affidavit, and also that you might consider his own testimony, and the truthfulness of the same, and in determining his guilt or innocence you will at all times have in your mind what manner of man this defendant has been shown to be by the evidence touching on that question. It will be also your duty to consider the evidence, if there is any evidence on that subject, tending to show the reputation of the defendant on trial for morality in that community."

Appellant claims that each of said instructions Nos. 20, 26, and 27 are erroneous and harmful to appellant, for the reasons: (1) That instruction No. 20 charged the jury that it was competent for them to take into consideration evidence of the defendant's bad character in determining his guilt or innocence when the law requires that the evidence of bad character of the defendant could only be considered as to his credibility as a witness, and not as to his guilt, and the evidence of the general moral character of defendant is admissible only as going to his credibility as a witness, and not as to whether he did, or did not, commit the crime with which he is charged. *Keyes v. State*, 122 Ind. 527, 23 N. E. 1007. (2) That instruction No. 26 told the jury that, if the defendant bore a bad reputation in the community in which he lived for morality, then that fact was proper to be considered by the jury in determining the guilt or innocence of defendant Pierson; that it instructed the jury that it can consider any specific offense committed by defendant Pierson as going to his guilt. There was some evidence that Frederick Drake, one of the codefendants, not upon trial, had been arrested for selling liquor in violation of law, and the court, in this instruction, tells the jury that, if specific offenses committed by the other defendants in any way applies to this defendant, then the jury could consider such evidence as to the character of defendant Pierson. (3) That instruction No. 27 told the jury that evidence of the bad moral character of the defendant, and evidence that he had pleaded guilty to associating with a prostitute and had been fined \$10, and given a jail sentence, must be considered by the jury in weighing the testimony on the question of the defendant's guilt or innocence.

[1] The defendant testified in his own behalf. He was cross-examined by the prosecuting attorney at considerable length, and, among others, the prosecuting attorney put the following question:

"I want to ask you whether or not on September 18, 1914, you were not arrested and

taken into the city court of Marion, Ind., to which you pleaded guilty to a charge of fornication, under the assumed name of Ed Pierce, and for which crime you were fined \$10, and given a sentence of 30 days in jail, which 30 days in jail was suspended by the mayor of Marion, acting as judge of the city court?"

The defendant objected to this question on the grounds that the defendant's moral character had not been put in issue, that only his character for honesty and integrity had been put in issue, and further that it is not proper to go to specific acts to attack reputation; but the court overruled the objections, and required the defendant to answer. He then answered, "I was; the date is wrong, that is all."

This evidence was brought out in cross-examination by the state, and under the rule laid down in *Vancleave v. State*, 150 Ind. 273, 49 N. E. 1060, it was not error for the court to require the defendant to answer this question upon cross-examination, when the court informed the jury that such evidence could only be considered by the jury as affecting the credibility of the defendant's testimony. The defendant in becoming a witness subjected himself to the same treatment as any other witness, but that did not authorize the court to instruct the jury that such impeaching questions should be considered by the jury in determining the guilt or innocence of defendant in the case on trial. The impeachment of a witness for moral character only goes to the weight of his evidence and not to prove any issue in criminal cases.

In *Vancleave v. State*, supra, it is held a person on trial for larceny, who becomes a witness in his own behalf, may be asked on cross-examination whether he had not previously been convicted of a similar crime, for the purpose of showing his credibility as a witness. In that case the appellant, while on the witness stand as a witness on his own behalf, was asked on cross-examination the following questions:

"I will ask you if you were arrested on the charge of larceny, and convicted in this court at the March term, 1886? A. Yes; I was. Q. I will ask you if you are not now under indictment and arrest for robbing Charles Keith? A. Yes, sir."

The court held these questions to be proper, and that there was no error in permitting such cross-examination. The court, however, told the jury that it was admitted only for one purpose, and its consideration by them must be confined to that purpose, and that purpose was to affect the credibility of appellant's testimony. *Parker v. State*, 136 Ind. 284, 35 N. E. 1105; *Bessette v. State*, 101 Ind. 85; *Blough et al. v. Parry et al.*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Shears v. State*, 147 Ind. 51, 46 N. E. 331.

[2] It has been held that any fact tending to impair the credibility of the witness by showing his interest, bias, ignorance, motives, or that he is depraved in character may be shown in cross-examination, but the extent to which such cross-examination may be carried is within the sound discretion of the court. *City of South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792; *Parker v. State*, 136 Ind. 284, 35 N. E. 1105; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726.

[3] In this case the court did not give any instruction limiting the evidence given by the defendant on cross-examination to the effect that said defendant had been fined and given a jail sentence on plea of guilty in the Marion city court on a charge of fornication to the question of defendant's credibility as a witness. But by instruction No. 20 the jury are told that it should be taken into consideration by them in determining the guilt or innocence of the defendant. The same direction is also given in instruction No. 26. And in instruction No. 26 the court goes still further by saying:

"You will not consider any specific offense alleged to have been committed by either of the other defendants as in any way applying to the conduct of this defendant, except in so far as it applies, if it does apply, to the character of the defendant on trial."

This instruction indicated to the jury that they should consider any specific offense alleged to have been committed by the defendant, and the court inferentially told them to take into consideration the Marion city court incident, brought out in cross-examination of this appellant, and it also told them that the evidence concerning the arrest of Frederick Drake on a charge of selling liquor in violation of law should be considered by them in determining the guilt or innocence of the defendant, if it in any way applied to this defendant.

In instruction No. 27 the jury are told that they must consider the evidence, which has been permitted to go to them, concerning the whole period of defendant's life up to the commission of the alleged offense, in weighing the testimony on the question of the defendant's guilt or innocence. Said instruction closes by saying:

"It will be also your duty to consider the evidence, if there is any evidence on that subject, tending to show the reputation of the defendant on trial for morality."

[4] The evidence in this case is wholly circumstantial. It is contradictory, and under such circumstances it cannot be said that the instructions complained of by appellant were not harmful to him. Our conclusion is that under the evidence instructions Nos. 20, 26, and 27 were erroneous and harmful to appellant. Other alleged errors are discussed

in appellant's brief, but, as they will not probably occur on a retrial of this cause, it is not necessary to extend this opinion by a discussion of them.

For error in giving instructions Nos. 20, 26, and 27, this judgment is reversed, and the Randolph circuit court instructed to sustain appellant's motion for a new trial.

(70 Ind. App. 83)

CACA v. WOODRUFF. (No. 10487.)

(Appellate Court of Indiana, Division No. 2.
April 25, 1919.)

1. MASTER AND SERVANT §362—WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT.

Although Workmen's Compensation Act, § 9, expressly excepts casual laborers from the compensatory provisions of the law, yet under section 76, cl. b, defining "employés," a workman can recover compensation even though his employment is casual, if his employment is in the usual course of the employer's business.

2. MASTER AND SERVANT §362, 367—WORKMEN'S COMPENSATION—"USUAL COURSE OF EMPLOYMENT"—"EMPLOYÉ"—INDEPENDENT CONTRACTOR.

A carpenter, working by the hour and paid weekly by a miller to make additions and repairs at the mill under the miller's supervision, first working a few weeks in September and later returning to do more of the work in November, was within the Workmen's Compensation Act as an "employé"; the work being in the "usual course" of the miller's business, and the carpenter not being an independent contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Appeal from Industrial Board.

Petition under the Workmen's Compensation Act by John H. Woodruff, employé, against Grant Caca, employer. From an award, the employer appeals. Affirmed.

Thos. E. Kane, of Noblesville, for appellant.

Gentry & Campbell, of Noblesville, for appellee.

McMAHAN, J. The appellee filed his petition with the Industrial Board for compensation under the Workmen's Compensation Law (Laws 1915, c. 106). He was awarded compensation at the rate of \$9.90 per week during total disability, not exceeding 500 weeks, and \$75 for medical and hospital services. The appellant has appealed from the award, and the error assigned and relied upon for reversal is "that the award of the full board is contrary to law."

The facts, as shown by the evidence, are

in substance as follows: During the months of September, October, and November, 1917, and prior thereto, the appellant was the owner and operator of a mill in Noblesville, Ind., in which he was engaged in the business of grinding wheat and corn and manufacturing feed stuffs; that during said time, and prior thereto, appellee was a carpenter; that in the early part of September, 1917, appellant desired to have a new room added to his mill and to make some repairs in the then existing mill building, and for that purpose employed appellee and another man to construct the said room and make the repairs, and agreed to pay them a fixed price per hour for their labor; that appellant was to and did furnish all the material. When appellant employed appellee, appellant informed him that the new room and part of the old building was to be covered with tin siding if he could get it. The appellee and his fellow workmen undertook said work and worked under the direction and instruction of appellant. The appellant during the progress of the work visited the work three or four times daily, and made suggestions and consulted with appellee as to the method of doing the work. The construction of the additional room and making said repairs took between two and three weeks' time. This work consisted in taking the roof off a shed or driveway, which was a part of the mill building, and constructing a room above one end of the driveway, in the lowering of a floor, in building a stairway and changing and hanging a door, and in constructing bins for holding grain, flour, meal, and feedstuffs. The men doing the work were paid each Saturday for the work done during the week. About the time the new room and the repairs were completed, appellant informed the appellee that, when he procured the tin siding, he would let appellee know, as he wanted appellee to return and put it on. Some time in November the tin siding was procured, and appellant sent word to appellee to come and put it on. Appellee, with the other workman, returned and began putting on the siding, working two days, and while engaged in such work on the morning of the third day, and while standing upon a ladder, became overbalanced and accidentally fell, fracturing his hip. A discharging sore developed as a result of the injury, and it continued its discharge for a period of six months, and from the time of his injury to the time of the hearing before the Industrial Board appellee was wholly disabled for work. That an average weekly wage of \$18 was being earned by appellee at the time of his injury. Appellant knew of the injury at the time, but failed to furnish a doctor, and appellee incurred an expense for that purpose of \$75, within the first 30 days after the injury.

[1] The appellant contends that the appel-

lee was a casual laborer and for that reason not entitled to compensation.

Section 9 of the Workmen's Compensation Act expressly excepts casual laborers from the compensatory provisions of the law.

Section 78, cl. b, of said act, provides that—

"The word 'employee' shall include every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer."

It is quite clear that under our statute a workman can recover compensation even though his employment is casual, if his employment is in the usual course of the employer's business.

[2] The appellant was engaged in the milling business, the proper conduct of which required a building and machinery. Buildings and machinery used in such a business at times need to have additions and repairs made thereto. These additions and repairs must be expected and provided for. They are necessary in any business such as that in which appellant is engaged. The making of repairs was a necessary part of his business which he was required to anticipate when the necessity of his business demanded, or his convenience dictated. The Supreme Court of Wisconsin, in a case similar to the one at bar, in speaking of repairs said:

"Being an essential and integral part of every business employing material things in its prosecution, no reason is perceived why one employed to make them should not be classed as an employee of the one for whom they are made. They are essential to the successful prosecution of every business whose implements are subject to the corroding touch of time and a usual concomitant thereof. They are foreseen, provided for, and made when necessary or convenient. The fact that one cannot exactly foretell just when they will have to be made is immaterial." *Holmen Creamery Ass'n v. Ind. Com.*, 167 Wis. 470, 167 N. W. 808.

Work like that which the appellee was performing at the time of his injury is usual, and, in our judgment, is within the purview of the Workmen's Compensation Act.

The work which appellee was doing when injured being in the course of appellant's business, it is not necessary for us to enter into a discussion of the question as to who is, or who is not, a casual employee.

We hold that the appellee was not an independent contractor, that the work which he was doing when injured was in the usual course of appellant's business, and that the award of the board should be affirmed.

The award is affirmed, and, by virtue of the statute, the amount is increased 5 per cent.

(70 Ind. App. 77)

BOYD et al. v. GREER et al. (No. 9762.)

(Appellate Court of Indiana, Division No. 1.
April 25, 1919.)**1. APPEAL AND ERROR ¶327(5)—REVIEW OF JUDGMENT—NECESSARY PARTIES.**

Where the only issue against one party to the trial was tendered by the plaintiff and there was a separate judgment in favor of such party from which no appeal was taken, such party is not a necessary party to the appeal, and will not be affected by its result.

2. EVIDENCE ¶419(13)—VENDOR'S LIEN — EXCHANGE OF LAND AND CHATTELS IN GROSS—EXTRINSIC EVIDENCE AS TO VALUE OF EACH.

When called upon to enforce an alleged vendor's lien arising out of a sale or exchange of land and chattels in gross, a court may hear extrinsic evidence as to the value placed upon each by the parties to such sale or exchange.

3. VENDOR AND PURCHASER ¶266(5)—VENDOR'S LIEN—EXCHANGE OF REAL AND PERSONAL PROPERTY.

Where land and chattels are sold or exchanged in gross, but the parties in making such sale or exchange have placed separate values on each, the court will enforce vendor's lien against the land for the balance due thereon, although the obligation taken may include the price of both.

4. PAYMENT ¶31—VENDOR AND PURCHASER ¶179, 254(4)—VENDOR'S LIEN — MODE OF PAYMENT.

The validity of sale of land or vendor's lien on the land is not affected by the fact that the sale takes the form of an exchange, and that the buyer pays a part or all of the purchase price in other lands; such payment, in the absence of fraud, having the same legal effect, as to right of the court to determine its application, as if the agreed value had been paid in money.

5. PAYMENT ¶46(1)—APPLICATION—SECURED AND UNSECURED DEBT.

In action to enforce vendor's lien for the amount of a note given for the balance of purchase price on sale in gross of farm land and chattels, the parties at the time of sale having estimated the separate value of each class of property, the court, in the absence of direction by the parties, would apply the value of land conveyed in part payment by defendants, first to discharging the debt owing for the personal property, and the remainder on the price of the farm land, since thus the amount yet due would be secured by vendor's lien on the farm land.

6. VENDOR AND PURCHASER ¶266(6)—VENDOR'S LIEN—WAIVER—TAKING NOTE.

Taking vendee's note for unpaid portion of purchase price does not waive vendor's lien.

Appeal from Circuit Court, Jackson County; Oren O. Swails, Judge.

Action by Ford W. Greer and another against William C. Boyd and Mattie L. Boyd

in which Hiram Brown was made a party. Judgment for defendant Brown and in favor of the plaintiff Greer on cross-complaint and against the defendant W. G. Boyd for stated sum and costs adjudged to be a vendor's lien, and a decree foreclosing the same, and a further judgment in favor of the plaintiff claiming against the defendant William G. Boyd for stated sum and costs, and defendants W. G. and Mattie L. Boyd filed motion for a new trial, which was overruled, whereupon they appeal. Judgment affirmed.

Bingham & Bingham, of Indianapolis, for appellants.

Floyd A. Sterrett, of Lafayette, Wilbur T. Gruber, of Indianapolis, and Kochenour & Prince, of Brownstown, for appellees.

BATMAN, P. J. This is an action by appellee Ford W. Greer against appellants, to recover a judgment on two promissory notes, and to have such judgment decreed to be a lien on certain real estate alleged to have been sold and conveyed to them by said appellee. The appellee Hiram Brown was made a defendant to said action to answer as to his interest in said real estate by reason of a certain mortgage thereon, executed to him by appellants since they became the owners thereof. Issues were duly joined on the complaint by appellants, who also filed a cross-complaint against appellee Greer, in which they set up the breach of a contract, alleged to have been entered into between them and said appellee, and by reason of which they asked damages. Issues on said cross-complaint were duly joined by appellee Greer. The appellee Hiram Brown filed an answer to the complaint of said Ford W. Greer in two paragraphs, the first of which was a general denial. The second alleged, in substance, that appellants had theretofore executed to him a mortgage on the real estate described in the complaint, which had been duly recorded in the proper mortgage record of said county; that he had taken and accepted the same in good faith, for a valuable consideration then and there given in the regular course of business, without any notice, actual or constructive, of the claim or lien of said appellee Greer, as set forth in his complaint. To this affirmative paragraph of answer appellee Greer filed a reply in general denial. The cause was submitted to the court for trial, and a judgment was rendered in favor of the said Hiram Brown against appellee Greer that the said Greer take nothing by his complaint against the said Brown, and that the said Brown recover of and from the said Greer all his costs and charges laid out and expended. A judgment was also rendered in favor of appellee Greer against appellants that they take nothing by their said cross-complaint, and that the said Greer recover of appellants

all his costs and charges laid out and expended on the issues tendered by said cross-complaint. A judgment was also rendered in favor of appellee Greer against appellant William G. Boyd for the sum of \$310.46 and costs, which amount was adjudged to be a vendor's lien upon the real estate described in said appellee's complaint, and a decree was entered foreclosing the same. A further judgment was rendered in favor of appellee Greer against appellant William G. Boyd, for the sum of \$17.50 and costs. Appellants filed a motion for a new trial, which was overruled, and has assigned this action of the court as the sole error on which it relies for reversal.

[1] The transcript on appeal was filed in this court on September 16, 1916. On December 29, 1916, appellee Greer filed a motion to dismiss the appeal on the ground that this is a vacation appeal; that Hiram Brown is a necessary party thereto; that no effective steps had been taken to give him notice thereof; that said Brown had not entered his appearance thereto or joined in error; that more than 90 days had expired since the filing of the transcript; and that the time allowed by law for taking an appeal had also expired. This motion was postponed until final hearing, and is now before us for determination. This is a vacation appeal. It will be observed that on the trial the only issue to which the said Hiram Brown was a party was one tendered by appellee Greer in his complaint, and on which there was a separate judgment in favor of said Brown, from which no appeal was taken. The judgment which forms the basis of this appeal is one rendered against appellants in favor of appellee Greer, and to which the said Brown is not a party. Under these circumstances the said Brown would not be affected by the result of this appeal, and is not a necessary party thereto. *Rooker v. Fidelity Trust Co.* (1916) 185 Ind. 172, 109 N. E. 766. The motion of appellee, Greer, to dismiss the appeal is therefore overruled.

[2, 3] Appellants contend that the decision of the court is not sustained by sufficient evidence and is contrary to law. In support of this contention they assert that the evidence shows, among other things, that on August 31, 1914, appellant William G. Boyd and appellee Greer entered into a plain and unambiguous contract, by the terms of which the latter agreed to exchange a farm and certain personal property in gross for certain real estate owned by appellants; that in pursuance to said contract the exchange of property was made, and appellant William G. Boyd executed to said appellee his promissory note for \$300, as a part of the agreed consideration for said exchange; and that the notes in suit, except as to a small amount, were given in renewal of said note. Appellants contend that under these facts appellee

was not entitled to a decree, establishing a vendor's lien in his favor on the farm which they obtained from him through said exchange. In making this contention they rely on the general rule that on a sale of land and personal property for a gross sum, without any separation of their values, so that the consideration for which the land was sold may be determined, no lien can be enforced on the land for the debt thereby created. They assert that since the contract in question is plain and unambiguous, and shows that the farm and personal property in question was traded to them in gross, it cannot be varied by oral or extrinsic evidence, and hence no portion of said indebtedness should have been decreed to be a lien on their said farm. We cannot agree with appellants that a court of equity, when called upon to enforce an alleged vendor's lien, arising out of a sale or exchange of land and chattels in gross, may not hear extrinsic evidence as to the value placed on each by the parties to such sale or exchange. *Gerstell v. Shirk*, 210 Fed. 223, 127 C. C. A. 41. In accord with this decision and the better reason, the contrary is evidently true. In the instant case there is evidence which tends to prove that the value placed on the personal property by the parties in the exchange of property was \$100, and other evidence which tends to prove that such value was placed at \$300. This afforded the court some evidence from which it could determine the separate values placed on the land and personal property by the parties in making the exchange. Under these circumstances the rule which appellants seek to invoke is not applicable. In reaching its decision the trial court evidently recognized and applied the rule that, where land and chattels are sold or exchanged in gross, but the parties in making such sale or exchange have placed separate values on each, the court will enforce a vendor's lien against the land for the balance due thereon, although the obligation taken may include the price of both. 39 Cyc. 1830; 29 A. & E. Ency. 745; *McCauley v. Holtz* (1878) 62 Ind. 205; *Gerstell v. Shirk*, supra; *Bergman v. Blackwell* (Tex. Civ. App.) 23 S. W. 243; *Russell v. McCormick*, 45 Ala. 587, 6 Am. Rep. 707. Under the evidence cited and rule stated, we cannot say that the decision of the court with reference to the vendor's lien decreed is not sustained by sufficient evidence or is contrary to law.

[4, 5] But appellants contend that in any event the amount decreed to be a lien against their land was too large. They base this contention on the fact that, inasmuch as appellee Greer testified that the parties, at the time of the exchange, placed a value of \$100 on the personal property, the court, in determining the amount of the lien, should have deducted said sum, at least, from the balance found due appellee on account of said exchange of property. In making this conten-

tion appellants evidently assume that no part of the value of the real estate which they conveyed to said appellee was applied, or ought to be applied, in payment of the amount which the evidence tends to prove the parties placed on the personal property, as its value, at the time of the sale or exchange. This assumption is unwarranted. The sale of land may take the form of an exchange. This occurs when the buyer pays a part or all of the purchase price in other lands. When this is done in the absence of fraud, it has the same legal effect as if the agreed value thereof had been paid in money. 39 Cyc. 1601; *Hare v. Van Deusen*, 32 Barb. (N. Y.) 92. As there is no question of fraud in the instant case, we may treat the conveyance of the real estate made by appellants to appellee Greer as the payment of its value in money, and determine its proper application accordingly. It was held in the case of *McCauley v. Holts*, supra, that where real and personal property is sold in gross, but the parties at the time of the sale make an estimate of the value of each, and payments are subsequently made on an unpaid balance of the purchase price, without any direction as to its application, and there is no evidence as to any specific application thereof by the vendor, the court will apply such payments to the debt owing for the personal property, under the recognized rule that, where one person is indebted to another upon several distinct accounts, he has a right to direct his payments to be applied to any one, as he chooses; but if he pays generally the creditor may apply as he elects, and if neither makes a specific application the court will usually apply the payments, first to the debt having the most precarious security, or no security, or to the oldest debt. *King v. Andrews* (1868) 30 Ind. 429. In other words, the law, in the latter class of cases, will make such application of the payments as justice between the parties most urgently demands. The only evidence which we have been able to discover that can be said to bear on the application of the payment made by appellants in the conveyance of their real estate to appellee Greer is from appellant William G. Boyd, and said appellee. The former testified that the original note for \$300 was given for the personal property, while the latter testified that said note was given as evidence of the amount due on the farm. This does not afford direct evidence as to how such application was made, but furnishes a basis for opposing inferences in that regard. Under such circumstances it became a question for the court as to what application of such payments, if any, was made. If it found that no application thereof was in fact made, but that such payment was made generally by appellants, and held by such appellee, without specific application, then under the rule stated supra the court

was authorized to apply the same, first to any amount which he may have found was agreed upon by the parties as the value of the personal property, and the remainder on the price of the farm. Since the evidence shows that the value of the real estate so conveyed was far in excess of the value of the personal property, such an application would have fully discharged any amount due therefor, and left the entire amount of the notes in suit as an unpaid balance on the farm.

[8] Appellants assert that the notes in suit are governed by the law merchant; that the giving of such notes, in the absence of an agreement to the contrary, is payment, and that by reason of such fact appellee is not entitled to a vendor's lien on their land. For the reason stated in the case of *Essig v. Porter* (1916) 63 Ind. App. 318, 112 N. E. 1005, this contention is not well taken.

We fail to find any sufficient ground on which to hold that the court erred in overruling appellant's motion for a new trial. The judgment, therefore, is affirmed.

(70 Ind. App. 85)

VANDALIA R. CO. v. FRY. (No. 9755.)

(Appellate Court of Indiana, Division No. 1, April 25, 1919.)

1. TRIAL \Leftrightarrow 260(1) — REQUESTED INSTRUCTIONS.

Court did not err in refusing to give requested instructions substantially covered by instructions given by court on its own motion.

2. TRIAL \Leftrightarrow 296(4, 5) — INSTRUCTIONS — CURE OF OMISSION.

Court did not err in giving instruction on its own motion, although such instruction omitted to inform jury as to certain facts bearing on plaintiff's contributory negligence, where jury was fully instructed in that regard by other instructions given.

3. NEGLIGENCE \Leftrightarrow 82 — CONTRIBUTORY NEGLIGENCE.

Negligence of an injured party defeating recovery must be a proximate and not a remote cause of the injury, though it is not necessary that it shall have been the sole cause, but it is sufficient if it forms part of the efficient cause thereof.

4. TRIAL \Leftrightarrow 295(1) — INSTRUCTIONS — CONSTRUCTION.

In order to determine whether the jury could have been misled by certain instructions, the instructions should be considered as a whole, and not in detached portions.

5. MASTER AND SERVANT \Leftrightarrow 179 — EMPLOYERS' LIABILITY ACT — FELLOW SERVANTS.

Under Employers' Liability Act of 1911, the failure of a fellow servant to exercise reasonable care is deemed to be a breach of duty on the part of the master.

6. MASTER AND SERVANT ⇨228(1)—EMPLOYERS' LIABILITY ACT—DEFECTIVE EQUIPMENT—CONTRIBUTORY NEGLIGENCE.

Under the Employers' Liability Act of 1911, the mere fact that an injured servant uses defective equipment, accompanied by an apparent danger in some degree, is not conclusive on the question of contributory negligence.

7. MASTER AND SERVANT ⇨289(15)—DEFECTIVE EQUIPMENT — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action under the Employers' Liability Act of 1911, whether plaintiff was guilty of contributory negligence when injured while placing drawbar in a railroad car by means of a chain held by carrying arm bolts *held* for the jury.

8. MASTER AND SERVANT ⇨179—EMPLOYERS' LIABILITY ACT—FELLOW SERVANTS—TRANSITORY DANGERS.

A master, sued under the Employers' Liability Act of 1911, is chargeable with the negligence of its servant in the discharge of a duty owing to his master, which creates a transitory danger resulting in an injury to a fellow servant.

9. APPEAL AND ERROR ⇨761—WAIVER OF ERRORS—BRIEF.

By failing to make any specific reference to reasons given for a new trial in its propositions or points, as required by rules governing the preparation of briefs, an appellant waives such reasons.

Appeal from Circuit Court, Greene County; Theo. E. Slinker, Judge.

Action by Lewis M. Fry against the Vandalia Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Samuel O. Pickens, Charles W. Moores, R. F. Davidson, and Owen Pickens, all of Indianapolis, D. P. Williams, of Pittsburgh, Pa., and W. V. Moffett, of Bloomfield, for appellant.

Jesse F. Weisman, of Linton, and Davis, Bogart, Royse & Moore, of Terre Haute, for appellee.

BATMAN, P. J. This is an action by appellee against appellant to recover damages for personal injuries alleged to have been received by reason of the negligence of a fellow servant while in the employ of appellant. The complaint is in a single paragraph, and alleges, among other things, that on April 15, 1914, appellant was a corporation engaged in the business of trade and commerce within the state of Indiana, and was employing in its said business at said time five or more persons; that on said date appellee was injured while in the employ of appellant in its said business by the negligence of one William Brashear, who was also an employé of appellant and a fellow servant of appellee at said time; that at the time appellee received his alleged injuries he and the said Brashear were engaged in placing a drawbar in one of

appellant's cars; that in performing said work it was customary and necessary for certain bolts, known as carrying arm bolts, to be driven through certain timbers on the end of the car in such manner as to hold the chain, used in moving or swinging said drawbar into its proper place, and to prevent said chain from slipping or rolling over said bolts; that on the occasion in question the said Brashear drove said bolts through said timbers on the end of said car for such purpose, and then placed the chain over said bolts and fastened the same around said drawbar while appellee raised and held one end of the same; that appellee then undertook to swing or push said drawbar around and into its proper place, when it fell and injured his foot, by reason of the carelessness and negligence of said Brashear in failing and refusing to drive said bolts through said timbers in such manner as to prevent said chain from slipping over the same. Issues were duly joined on the complaint, after which the cause was submitted to a jury for trial, resulting in a verdict and judgment in favor of appellee. Appellant filed a motion for a new trial which was overruled, and has assigned this action of the court as the sole error on which it relies for reversal.

[1] Appellant complains of the action of the court refusing to give certain instructions requested by it. Instruction No. 1 so requested, if given, would have directed the jury to return a verdict in favor of appellant. As there is some evidence to sustain every element essential to appellee's right of recovery, it would have been error to give said instruction. *Vandalia R. Co. v. Parker* (1915) 61 Ind. App. 146, 111 N. E. 637. As to the remaining instructions requested by appellant, we find that in so far as they state the law correctly, they are substantially covered by instructions given by the court on its own motion. Therefore the court did not err in refusing to give the same. *Chicago, etc., R. Co. v. Mitchell* (1915) 184 Ind. 383, 110 N. E. 215.

[2] Appellant contends that the court erred in giving instruction No. 5 on its own motion. It bases this contention on the fact that said instruction omits to inform the jury as to certain facts bearing on appellee's contributory negligence. This contention is not well taken as the jury was fully instructed in that regard by other instructions given. Under these circumstances there was no error in giving said instruction. *Home Telephone Co. v. Weir* (1913) 53 Ind. App. 466, 101 N. E. 1020.

[3, 4] Appellant predicates error on the action of the court in giving instructions Nos. 6 and 9 on its own motion. It claims that each of these instructions is erroneous, because they placed on appellant the burden of proving that appellee's negligence was the

proximate cause of his injury, while the rule is that there can be no recovery in an action based on negligence, if the negligence of the complaining party contributed in any way thereto. It is well settled that, in order for the negligence of an injured party to defeat his right of recovery, such negligence must be a proximate, and not a remote, cause of the injury. It is not necessary that it shall have been the sole cause, but it is sufficient if it enters into and forms part of the efficient cause thereof. 20 R. C. L. 136; 29 Cyc. 526; *Indiana Stone Co. v. Stewart* (1893) 7 Ind. App. 563, 34 N. E. 1019; *Indianapolis, etc., Co. v. Kidd* (1906) 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143, 10 Ann. Cas. 942. In order to determine whether the jury could have been misled by either of said instructions with reference to the effect of any negligence of appellee, which may have been only a concurring proximate cause of the injury, we must consider the instructions as a whole, and not in detached portions. *Cushman v. Terre Haute, etc., Co.* (1915) 60 Ind. App. 187, 109 N. E. 52. We observe that the jury was informed by another instruction, given by the court on its own motion, that contributory negligence on the part of appellee, which caused, or partly caused, his injuries, was a complete defense to the action. In view of this fact, it is apparent that the jury could not have been misled by the language used in either of said instructions, and hence there was no reversible error in giving the same.

[5] Appellant finally contends that the verdict is not sustained by sufficient evidence and is contrary to law. It urges, among other things, that the evidence fails to show that it was guilty of the acts, or either of the acts, of negligence charged in the complaint. One of the acts of negligence charged in the complaint is that appellant's servant, Brashear, who was a fellow servant of appellee, carelessly and negligently failed and refused to drive the carrying arm bolt through certain timbers of the car, in such manner as to prevent the chain, used in placing the drawbar in position, from slipping over said bolts, and thereby allowing the drawbar to fall and injure appellee. As this is an action under the Employers' Liability Act of 1911 (sections 8020a-8020k, Burns 1914), the failure of appellee's fellow servant, Brashear, to exercise reasonable care for appellee's safety, is deemed to be a breach of duty on the part of appellant. *J. Woolley Coal Co. v. Tevault* (Ind. Sup. 1918) 118 N. E. 921. There is some evidence tending to sustain this charge of negligence, which is sufficient in that regard.

[6, 7] It is further contended that the evidence shows that appellee's negligence materially and proximately contributed to his injury. This contention is based on the fact that the condition of the carrying arm bolts, holding the chain, was open and obvious to appellee. Admitting, without deciding, that

the condition of such carrying arm bolts was so open and obvious that appellee, in the exercise of ordinary care for his own safety under the circumstances disclosed by the evidence, ought to have observed the same, it does not necessarily follow that appellee was guilty of contributory negligence in proceeding with his work as he did. This court has held in a comparatively recent case, prosecuted under the said Employers' Liability Act of 1911, that the mere fact that an injured servant uses a defective equipment, accompanied by an apparent danger in some degree, is not conclusive on the question of contributory negligence, as the conditions may be such that reasonable minds might differ as to the feasibility of safety encountering such danger, or such that any person of reasonable prudence might believe that it could be safely encountered. *Standard Steel Car Co. v. Martinecz* (Ind. App. 1916) 114 N. E. 94. In the instant case there is evidence which tends to prove that the carrying arm bolt, which appellee drove through the car timber extended above the same six or seven inches; that the carrying arm bolt which the said Brashear drove through the car timber extended above the same about an inch and a half; that the chain placed over said bolts and under the drawbar was composed of links about an inch long, and a little larger than a pencil. Under these circumstances, and the rule stated supra, it cannot be said that the evidence shows conclusively that appellee was guilty of contributory negligence, even if it could be said that it was his duty to observe the condition of the bolts in the exercise of ordinary care for his own safety.

[8] It is also contended that the unsafe condition which caused appellee's injury was a transitory one, arising in the progress of the work, by the manner in which appellee and his fellow servant, Brashear, discharged duties owing by them to appellant. It may be conceded that the undisputed evidence shows that the condition which resulted in appellee's injury was a transitory one, but there is evidence which tends to show that such condition was produced solely by the negligence of the said Brashear. The question arises: Is a master, in an action prosecuted under the Employers' Liability Act of 1911, chargeable with the negligence of a servant in the discharge of a duty owing to his master, which creates a transitory danger, resulting in an injury to a fellow servant? Appellant has cited a number of decisions of this and the Supreme Court in support of its contention that the master is not liable under such circumstances. These decisions support the general rule, applicable to cases prosecuted under the common law, that where a master provides for his servants a safe place in which to work, and safe appliances with which to work, he is not liable for transitory dangers produced by the manner in which the work is done. It is apparent, how-

ever, that this rule can have no application in a case, prosecuted under an act abrogating the fellow-servant rule, where the complaint charges, and the evidence tends to prove, that the transitory danger was the result of the negligence of a fellow servant. Section 1 of the act under which this action is prosecuted abrogates the common-law defense based on the negligence of a fellow servant, in the class of cases to which this action belongs. Section 8020a, Burns' 1914. In such cases the negligence to the fellow servant is deemed to be a breach of duty on the part of the master. *J. Woolley Coal Co. v. Tevault*, supra; *Chicago, etc., R. Co. v. Mitchell* (1915) 184 Ind. 383, 110 N. E. 215; *Chicago, etc., R. Co. v. Mitchell* (1915) 184 Ind. 588, 110 N. E. 680. It follows that appellant cannot escape liability in this case by an application of the rule which it seeks to invoke.

[9] Appellant has waived all other reasons for a new trial, stated in its motion therefor, by failing to make any specific reference thereto in its propositions or points, as required by the rules governing the preparation of briefs. *Buffkin v. State* (1914) 182 Ind. 204, 106 N. E. 362; *Merchants' National Bank v. Nees* (1915) 62 Ind. App. 290, 110 N. E. 73, 112 N. E. 804. We find no reversible error in the record.

Judgment affirmed.

(70 Ind. App. 49)

HOME INS. CO. OF NEW YORK v. STRANGE. (No. 9794.)

(Appellate Court of Indiana, Division No. 2.
April 24, 1919.)

1. INSURANCE §89—AGENT—DELEGATION OF AUTHORITY.

Generally agents of insurance companies authorized to contract for risks, receive or collect premiums, and deliver policies may confer upon a clerk or subordinate authority to execute the same powers; the service not being of a personal nature.

2. INSURANCE §378(3)—NOTICE OF VACANCY.

Notice of vacancy was sufficient when given to confidential employe and bookkeeper of agency for the insurance company, upon her assurance that she would take note of the notice, that it would be just as good as if one of the agency firm were in, and that she would notify the latter when he did come in.

3. INSURANCE §95—NOTICE TO INSURED—COMMUNICATION TO COMPANY.

Notice to the insurer's agent is notice to the insurer, though not communicated to it.

4. INSURANCE §372—VACANCY—WAIVER.

The condition that vacancy without company's written consent shall avoid the policy is one which it can waive by express agreement or conduct, and such waiver can be by the promise,

failure, and conduct of the company's authorized agent.

5. INSURANCE §390 — FAILURE TO ASSERT FORFEITURE.

If, after company had notice of purpose of insured to change use of building from dwelling to storage purposes, it failed to assert its right of forfeiture, it waived such right.

6. APPEAL AND ERROR §1058(3)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of appellee's letter containing his admission of fault, if error, was harmless, where a witness for appellant testified to the same admission made by appellee to him, and such admission was not denied by appellee.

Appeal from Superior Court, Grant County; Robert M. Van Atta, Judge.

Action by James B. Strange against the Home Insurance Company of New York. From judgment for plaintiff, defendant appeals. Affirmed.

John H. Edwards, of Mitchell, and Condo & Browne, of Marion, for appellant.

Meade S. Hays, of Marion, for appellee.

NICHOLS, J. This action was commenced in the superior court of Grant county May 14, 1916, by the appellee against the appellant on a fire insurance policy, for damages for the loss of a building by fire; such building being a portion of the property covered by said policy. The policy contains the following provision:

"If the premises described shall be occupied for other than farm purposes or if any of the buildings described are now vacant, unoccupied, or uninhabited, or shall become vacant, unoccupied, or uninhabited, and so remain for a period exceeding ten days, without written consent herein, then * * * this policy shall be null and void. * * * This company reserves the right to cancel this policy or any part thereof, by tendering to the assured the unearned pro-rate premium, after due notice to that effect," etc. "The secretary or assistant secretary of the Western Farm Department, at Chicago, Ill., alone shall have authority to waive or alter any of the terms or conditions of this policy."

The amended complaint contains the following averment:

"That, at the time said building No. 3 was insured, the same was being used as a dwelling house; that said building continued to be used by this plaintiff as a dwelling house until the 27th day of February, 1913; that upon said last-named date this plaintiff informed the firm of Cushman & Presnall, who were the duly acting and authorized agents of said defendant company at that time, that from and after the said 27th day of February, 1913, he would cease to use said building as a dwelling, but would use said building for storage purposes only; that the defendant company, well knowing the purposes and intentions of this plaintiff, failed and neglected to cancel said policy, to return or offer

to return to said plaintiff the unearned premiums on said building, or any part thereof, and failed and neglected to notify said plaintiff that the insurance on the said building would not continue to be in force, or to inform him in any manner or form that said building was not fully protected by said policy; that no notice was ever given to this plaintiff that said policy was held to be null and void, or that said protection had been withdrawn by said defendant company, until after the said building had been consumed by fire on the 17th day of May, 1914; and that plaintiff avers and charges that by reason of said company failing and neglecting to so notify said plaintiff or to tender back to him the unearned premiums, or to cancel his policy, that said defendant company waived the provisions of the policy relating thereto."

The amended complaint was answered in two paragraphs, the first being a general denial, and the second averring in substance that:

"Plaintiff had not performed all of the conditions of said policy in that after said policy was executed and delivered said building became vacant, and that the plaintiff, by due request and application therefor, received two separate, distinct vacancy permits, the last of which expired December 9, 1912, prior to the alleged fire, and that no other permit had been applied for, and that the building was vacant at the time of the fire; that as soon as the defendant learned of the vacancy of the said building, which was after said fire, it promptly offered plaintiff to return to him the entire amount of premium paid by him covering said building, but that the plaintiff refused to accept the same."

The appellee filed a reply to the second paragraph of answer, and the cause, being at issue, was submitted to the jury for trial, and a verdict for \$1,200 was returned for appellee. The court, after overruling appellant's motion for a new trial, rendered judgment on the verdict in favor of the appellee and against appellant, from which judgment this appeal is prosecuted. Overruling appellant's motion for a new trial is the only error assigned.

[1] It appears by the evidence in this case that Cushwa & Presnall were the agents of the appellant insurance company at Marion, Ind., and had in their employ Miss Sue Wallace, who testifies that she was employed as "general office girl, bookkeeper and policy clerk, and general office work." She had been so employed with such agents for about 11 years. It does not appear by the evidence that these agents were the agents of any other companies than the appellant. The appellee was the holder of a policy issued to him by the appellant through the office of their said agents Cushwa & Presnall, which policy covered the period from June 7, 1910, to June 7, 1915, the amount of the insurance being \$10,000, and the consideration therefor being \$200, in installments as follows, to wit: \$50 cash; \$50 July 1, 1912; \$50 July 1, 1913; \$50 July 1, 1914. And all the installments

due had been paid at the time of the fire loss which is the occasion of this action. This insurance was upon three dwelling houses, upon other buildings such as barns, sheds, granaries, cribs, and other outbuildings, and upon personal property located in such buildings as appears by the policy and it does not appear that there was any difference in the rate of insurance upon the buildings whether the same were used as dwellings, or barns, or for storage purposes. On February 27, 1913, appellee went to the office of the said agents of the appellant and found Miss Wallace to be the only person in the office at that time. He made inquiry for either Mr. Cushwa or Mr. Presnall, and was informed by Miss Wallace that neither of the gentlemen were in the office, but that she was looking for them to return soon, and she invited him to wait. He did wait until he was compelled to leave before their return, and when leaving he informed her that he had come to notify the appellant company that he would not use building No. 3, known in the policy as the hotel building, as a dwelling any longer, and that it would be used for storage. She then informed him that she could take note of anything that he had, and it would be as good as if Mr. Cushwa were in, as she could notify him when he came in. She took a piece of paper and made a note of the matter and placed it on her desk. Before that time appellee had been granted two vacancy permits for this building, both of which had expired. After this date the building was used as storage for automobiles, tools, clover seeds, etc., and Dr. Mattson had stored some things in the building. The building was destroyed by fire May 17, 1914. It will be observed that after the conversation of February 27, 1913, between the appellee and Miss Wallace, and before the date of the destruction of the building by fire, the appellee paid another \$50 installment of the premiums. Appellant contends that it was error to admit in evidence, over the objection and exception of the appellant, the conversation between Miss Wallace and the appellee, James B. Strange, for the purpose of proving knowledge or notice to the appellant and waiver of the vacancy provision in the policy and the written consent by appellant, and contends that the position that Miss Wallace had with the firm was not such evidence of authority as would bind the appellant upon any matter affecting the policy in suit. It is not disputed that the firm of Cushwa & Presnall were the duly appointed agents of the appellant and that they were fully recognized as such. Generally agents of insurance companies authorized to contract for risks, receive and collect premiums, and deliver policies may confer upon a clerk or subordinate authority to execute the same powers. The service is not of such a personal character as to come under the maxim, "*Deligatus non potest delegare.*" May on Insurance, § 154; Interna-

tional Trust Co. v. Norwich Union Fire Ins. Co., 71 Fed. 81, 86, 17 C. C. A. 608; Hartford Fire Ins. Co. v. Josey, 6 Tex. Civ. App. 290, 25 S. W. 685; Steele v. Insurance Co., 93 Mich. 84, 85, 53 N. W. 514, 18 L. R. A. 85; Continental Insurance Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; Bodine v. Insurance Co., 51 N. Y. 117, 10 Am. Rep. 566; Pollock v. German Fire Ins. Co., 127 Mich. 460, 86 N. W. 1017; 22 Cyc. 1432; Cullinan v. Bowker, 40 Misc. Rep. 439, 82 N. Y. Supp. 707.

[2-5] The case of the International Trust Co. v. Norwich Union Fire Ins. Co., supra. was one similar in principle to the instant case. The court says:

"It does not follow that, because a person is employed by an agent of an insurance company rather than by the company itself, none of such person's acts or representations are binding on the company. It is customary for agents having charge of important agencies to employ persons to perform clerical and much other work in their office, and to assist them generally in the discharge of the various duties which such agents have to perform. The business of insurance could not well be transacted without such assistance, and all insurance companies are doubtless well aware of the practice of employing them. It results from this well-known business usage that acts done and information given by such subordinate employes in the line of their duties should be held binding upon the companies which they represent."

In that case one Shepard was the confidential employe and bookkeeper of the agency firm, and had been for some years serving apparently in the same capacity as Miss Wallace in the instant case. In response to appellee's inquiry as to what he should do in regard to the matter, after he had told her of his business, she was ready to assure him, and did assure him, that she could take a note of it, and that it would be just as good as if Presnall were in, and that she could notify him when he came in, and she took a piece of paper and made a note of it. This is such a common and accepted method of transacting business, particularly insurance business, that to question its validity would but begot a want of confidence in insurance business that the companies themselves could not afford to have exist. It not infrequently happens that insurance agencies are incorporated, or that their business is done through trust companies organized not only for that purpose, but for other purposes as well, and that such business is transacted altogether by the clerical force; the president, manager, or other responsible officers of such corporation being absent from the place of business much of the time. We hold that the notice given by the appellee to Miss Wallace was notice to the agents, and through them to the company, that the building at the time was being used as a storage house instead of a dwelling, and that it was thereafter

to be so used. It has been held in this state that notice to the agent is binding upon the company, though not communicated to it. German Fire Ins. Co. v. Greenwald, 51 Ind. App. 469, 99 N. E. 1011. Appellant insists that the provision in the policy that, if the building should become vacant, unoccupied, or uninhabited, and so remain exceeding a period of ten days without the written consent of the company on the policy, the same becomes null and void, is a condition that cannot be waived by the agent. But it has been held that such provisions are stipulations in favor of the company which it can waive by express agreement, or by its conduct, and such waiver can be by the promise, failure, and conduct of the appellant's authorized agent, and that the appellant is thereby estopped to deny such waiver. Continental Ins. Co. v. Bair, 116 N. E. 752. The appellant having had notice of the purpose of the appellee to change the use of the building so insured as aforesaid, it was then its duty to inform the appellee that it would not thereafter carry the risk, if it was its purpose not so to carry it, and, failing so to do, it cannot now escape its liability upon this ground. It knew the fact about the change of use and of its right to declare a forfeiture by reason thereof, and it failed to assert its right, and the law regards it as having waived the same. York v. Sun Ins. Office, 113 N. E. 1021; Havens v. Home Ins. Co., 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; Home Ins. Co. v. Marple, 1 Ind. App. 411, 27 N. E. 633. It does not appear by the policy that the company deemed the risk, when a building was used for storage purposes, greater than when it was used for a dwelling, as there seems to be no difference in the rate, the policy covering storage buildings as well as dwellings, so that the right of forfeiture seems to be technical rather than substantial. Claiming the right of forfeiture, it could have returned the unearned premium and elected to declare the policy forfeited, but, instead of doing this, it collected another premium after the notice aforesaid and before the fire. It could not wait until after the loss, and then claim exemption from the payment for such loss because of the forfeiture of conditions of the policy of which it had notice. Phenix Ins. Co. v. Boyer, 1 Ind. App. 329, 336, 27 N. E. 628.

[6] Appellant claims that the court erred in refusing to admit in evidence the appellant's Exhibit No. 8, which was a letter written by appellee to appellant company. This letter was written in negotiations for compromise, but contains the following statement: "Feeling that I also was in some sense to blame"—which appellant contends was a statement of an independent fact not necessary to the negotiations in compromise. Even if this were error, such error was made harmless by the evidence of H. L. Cushman,

witness for the appellant, who testified to the same admission made by the appellee to him, and this admission is not denied by appellee. An error in excluding evidence is harmless where such evidence is admitted at another time or in another form. *Boxell v. Bright National Bank*, 184 Ind. 631, 112 N. E. 3; *American, etc., Co. v. Widiger*, 114 N. E. 457; *Koehler v. Harmon*, 52 Ind. App. 315, 98 N. E. 1009; *Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762.

We find no available error.
Judgment is affirmed.

(73 Ind. App. 76)

**BOARD OF COM'RS OF LAKE COUNTY
et al. v. CITIZENS' TRUST & SAVINGS
BANK et al. (No. 9769).***

(Appellate Court of Indiana. April 24, 1919.)

1. BANKS AND BANKING — 63½ — INSOLVENCY OF BANK — DUTY OF STATE AUDITOR — ACTION OF OTHER BANK — STATUTE.

Burns' Ann. St. 1914, § 4959, as to duty of state auditor on discovering that it is unsafe or inexpedient for any banking corporation to continue business, or that it is insolvent, being mandatory, auditor had no right to disregard its command, and substitute his own judgment as to what should be done, instead of communicating facts to prosecuting attorney, and action of another bank, on his request, in taking charge of insolvent bank was illegal.

2. BANKS AND BANKING — 96, 260(1) — ASSUMPTION OF LIABILITY OF INSOLVENT BANK — STATUTES.

An agreement by two national and two state banks in a city to assume the liabilities of an insolvent state bank in such city, and to pay any deficiency in its assets, was illegal and ultra vires, under *Burns' Ann. St. 1914, §§ 4953, 4956*, as to powers of state banks, and *Rev. St. U. S. § 5136 (U. S. Comp. St. § 9661)*, relating to the powers of national banks.

3. BANKS AND BANKING — 101 — ASSUMPTION OF INDEBTEDNESS — CONSIDERATION.

Where one state bank illegally agreed to assume part of the liabilities of another insolvent state bank, there was no consideration legally sufficient to support a promise by the assuming bank to pay indebtedness due from insolvent bank to county, or to support check given as part performance.

Appeal from Superior Court, Lake County;
Virgil S. Reiter, Judge.

Action by the Board of Commissioners of Lake County, Ind., and others, against the Citizens' Trust & Savings Bank and others. From judgment for defendants, plaintiffs appeal. Affirmed.

C. B. Tinkham and A. E. Tinkham, both of Hammond, for appellants.

F. N. Gavit, John C. Hall, and Walter H. Smith, all of Whiting, for appellees.

ENLÖE, J. This action was begun in the Lake superior court, by the appellants, board of commissioners of Lake county, Ind., and board of finance of Lake county, Ind., against the appellees, to recover the sum of \$14,741.08, together with interest thereon. The amended complaint upon which the case was tried was in four paragraphs. The first paragraph being based upon a cashier's check for the sum of \$14,741.08 issued by appellee Citizens' Trust & Savings Bank, and payable to the order of A. J. Swanson, treasurer of Lake county. The other defendants were in said paragraph of complaint alleged to be claiming some interest in and to said check and the funds represented thereby, and were made parties, to answer to their interests. The second paragraph of complaint proceeds upon the theory that said Citizens' Trust & Savings Bank had and held as a deposit duly made by the treasurer of Lake county, Ind., the sum of \$14,741.08, and also alleged that the other appellees were claiming some interest in and to said deposit, and they were made parties to answer to what interest they had. The third paragraph of complaint is based upon an alleged promise made by Citizens' Trust & Savings Bank to the board of finance of Lake county, Ind., to pay to said board of finance the sum of \$14,741.08, which said sum had theretofore been deposited by the county treasurer of Lake county with the Indiana Trust & Savings Bank, which institution was at the time of the making of said promise alleged to be insolvent. This paragraph also alleged that the other appellees were claiming some interest in said money, and were made defendants to answer thereto. The fourth paragraph of amended complaint was based upon an alleged contract or agreement made between the appellants on the one part and the appellees, by and through appellee Citizens' Trust & Savings Bank as their agent, of the other part, in and by the terms of which said alleged agreement appellants alleged that the said appellees had undertaken and promised to pay to appellants the sum of \$14,741.08, being the amount of its deposit with the Indiana Trust & Savings Bank. Answers were filed by appellee Citizens' Trust & Savings Bank in four paragraphs. These answers included general denial, no consideration, failure of consideration, and that the alleged undertaking was ultra vires. The appellees, the Indiana Harbor National Bank, First National Bank of East Chicago, and First Calumet Trust & Savings Bank, filed similar answers. To which affirmative answers reply was made in general denial, and the issue thus closed. The case was submitted to the court for trial, with the request that the court make its special finding of facts and

state its conclusions of law thereon. The court stated its conclusions of law in favor of appellees, and that appellants were entitled to take nothing by their complaint. Judgment was rendered accordingly. The appellants thereupon filed their motion for a new trial, which was overruled, with the proper exceptions. They have brought the case to this court, and the only error assigned is: "The court erred in overruling appellants' motion for a new trial."

The essential facts of this case are, as found by the court: That on and prior to the 28th day of October, 1913, the Indiana Trust & Savings Bank was a banking corporation duly organized under the laws of the state of Indiana, and was transacting business as such bank at Indiana Harbor, in the city of East Chicago, Ind. That on said date said bank was, and for some time prior thereto had been, an insolvent corporation. That on October 29, 1913, the auditor of the state of Indiana did, at the request of the holders of a majority of stock of said bank, appoint the Citizens' Trust & Savings Bank to take charge of the assets of said insolvent bank and administer its affairs. That on said date the said auditor of state, through his deputy, did physically and personally take charge of the banking house and assets of said Indiana Trust & Savings Bank, and did, by and through its said deputy, place the Citizens' Trust & Savings Bank in charge thereof. That at said time said Indiana Trust & Savings Bank was a depository of public funds, and then had and held, as such depository, \$14,741.08 of the funds of Lake county, Ind. That on the 28th day of October, 1913, the appellees herein entered into the following agreement, to wit:

"East Chicago, Indiana, Oct. 28, 1913.

"Agreement.

"Whereas, information having come from the banking department of the state of Indiana that the Indiana Trust & Savings Bank (No. 106) of Indiana Harbor, Indiana, is in an unsound and insolvent condition and by reason of such information, we, the undersigned, as officers of the following banks, to wit: Indiana Harbor National Bank, Citizens' Trust & Savings Bank, First Calumet Trust & Savings Bank, First National Bank—all of East Chicago and Indiana Harbor, believing that it would be injurious, dangerous and detrimental to the banking interest of said city, and injure the standing and financial condition of the banks above mentioned to permit the same to be closed by the auditor of state and a receiver appointed, and in consideration of such reason and conditions: Therefore, this indenture witnesseth: That the following named banks: Indiana Harbor National Bank, Citizens' Trust & Savings Bank, First Calumet Trust & Savings Bank, First National Bank—have this day entered into the following agreement:

"1. The First Calumet Trust & Savings Bank agrees to and assumes ten per cent. (10%) of

the liabilities of said Indiana Trust & Savings Bank.

"2. The First National Bank of East Chicago, Indiana, hereby agrees to and assumes twenty per cent. (20%) of the liabilities of said Indiana Trust & Savings Bank.

"3. The Indiana Harbor National Bank of East Chicago, hereby agrees to and assumes fifty per cent. (50%) of the liabilities of said Indiana Trust & Savings Bank.

"4. The Citizens' Trust & Savings Bank of East Chicago agrees to and assumes twenty per cent. (20%) of the liabilities of said Indiana Trust & Savings Bank.

"Provided, however, that the assumption of said liabilities by the parties hereto, shall be exclusive of the capital stock and surplus of said Indiana Trust & Savings Bank.

"It is further agreed by and between the said banks and the Citizens' Trust & Savings Bank, that the last-named bank will pay the depositors, upon demand, and other liabilities of said Indiana Trust & Savings Bank, exclusive of the surplus and capital stock of the said Indiana Trust & Savings Bank.

"It is further agreed that the First National Bank, the First Calumet Trust & Savings Bank, and the Indiana Harbor National Bank, shall pay to said Citizens' Trust & Savings Bank cash in proportion, as hereinbefore set out to cover the loss, which will be entailed by reason of the liquidation of the said Indiana Trust & Savings Bank, when the amount of said loss shall have been fully ascertained.

"It is further agreed by and between the parties that the Citizens' Trust & Savings Bank shall act and be the liquidating agent for all of the banks, parties to this agreement, in liquidating the Indiana Trust & Savings Bank.

"It is further provided that each of the above-named banks, who are parties to this agreement, shall designate some person whose duty it shall be, at all times to keep each of said banks advised as to the proceedings, as they are being carried forward in the liquidation of the said Indiana Trust & Savings Bank by the Citizens' Trust & Savings Bank, and to advise with the said Citizens' Trust & Savings Bank, relating to the liquidation of the said Indiana Trust & Savings Bank.

"It is further agreed that said person, so named by the different banks, parties to this agreement, shall be consulted on any and all compromises that may be effected on the sales, continuances and renewals of any of the assets of said Indiana Trust & Savings Bank.

"Provided, further that the execution of this agreement shall not in any way relieve any corporation, person or persons, who may in any manner be obligated to any person, corporation, municipality or said bank itself to make good any loss occasioned by any acts of said Indiana Trust & Savings Bank.

"In witness whereof, the said several banks above named, by the authority of their said several boards of directors, duly given, have this day by their proper officials, executed this agreement. Indiana Harbor National Bank, by G. J. Bader, Pres. First National Bank, by G. J. Bader, Pres. Citizens' Trust & Savings Bank, by John R. Farvid, Pres. First Calumet Trust & Savings Bank, by Walter J. Riley, Vice Pres."

That the appellees Indiana Harbor National Bank and First National Bank of East Chicago, Ind., were each on said date national banks, duly organized as such under the federal statutes. That the appellees Citizens' Trust & Savings Bank and First Calumet Trust & Savings Bank were each on said date banking corporations duly organized under the laws of the state of Indiana to do a banking business. That on the 6th day of November, 1913, the Citizens' Trust & Savings Bank by its representative appeared before the board of finance of Lake county, Ind., and announced to said board that it would pay said county said deposit, and that it desired and requested that said deposit, when paid, should be redeposited with it, and also at said time delivered to said board of finance the following letter, to wit:

"Indiana Harbor, Ind., November 6th, 1913.

"Board of Finance of Lake County, Indiana, Crown Point, Indiana—Gentlemen: The affairs of the Indiana Trust & Savings Bank are being liquidated. It is desired to pay off depositors as early as possible. We request that the fund now deposited to your credit, amounting to \$14,741.08 and interest, be withdrawn.

"We would be glad to have you turn this account over to us as liquidating agent. Yours very truly, Citizens' Trust & Savings Bank, Liquidating Agents, by John R. Farvid."

That on the 7th day of November, 1913, the appellee Citizens' Trust & Savings Bank issued to A. J. Swanson, county treasurer of said Lake county, its cashier's check for the sum of \$14,741.08. That said Swanson duly received said check, indorsed the same for deposit in said Citizens' Trust & Savings Bank, and duly forwarded same by mail, with deposit slip to said Citizens' Trust & Savings Bank for deposit. That thereafter said Citizens' Trust & Savings Bank refused to honor and pay said check, and disclaimed all liability on account thereof, and this suit was brought to enforce payment of said amount named in said check with interest thereon.

The controlling questions arising upon this record are: First, the legal effect, if any, of the action of the auditor of state, by his deputy, in placing appellee Citizens' Trust & Savings Bank in charge of the business and assets of Indiana Trust & Savings Bank; and second, the legal effect, if any, of the agreement, supra, among the four appellee banks; and third, the legal effect, if any, of the oral statements made by, and contained in the letter written by appellee, on November 7th, supra.

[1] That the Indiana Trust & Savings Bank was on the 23d day of October, 1913, insolvent, as found by the court, is admitted by all the parties hereto. The statute in force at that time provided, among other things (section 4959, Burns R. S. 1914):

"If it shall appear to the said auditor of state, from any examination made, * * * that it is unsafe or inexpedient for any such corporation to continue to transact business, or that it is insolvent, he shall communicate the facts to the prosecuting attorney of the district within which such corporation had its chief office, who shall thereupon be authorized to institute such proceedings against any such corporations as are now or may hereafter be provided by law in case of insolvent corporations, or such other proceedings as the case may require."

This statute being designed for the protection of the public, and to safeguard their interest, was, as to the action taken by the state auditor, mandatory, and he had no right to disregard its command, and substitute his judgment as to what should be done in the premises therefor. Lewis' Sutherland Statutory Construction (2d Ed.) § 627, citing *Hudson et al. v. Jefferson Co. Court*, 28 Ark. 359; *Campbell v. Brackett*, 45 Ind. App. 293, 90 N. E. 777.

It therefore follows that the action of the Citizens' Trust & Savings Bank, in taking possession of property of Indiana Trust & Savings Bank at the request of the representative of the auditor of state, was without warrant of law. Legally it did not, and under the circumstances of this case could not, represent any one in the capacity which it attempted to assume.

[2] The act under which appellee Citizens' Trust & Savings Bank was organized prohibited said bank from engaging in any business, "except such as is hereby expressly authorized" (section 4956, Burns R. S. 1914), and it is nowhere in said act authorized to use and pay out its fund, in settlement and discharge of the debts of another, for which it was in no way legally liable (Burns R. S. 1914, § 4953).

In this agreement, these appellee banks voluntarily undertook to supply funds, whatever might be necessary, to pay the deficiency of the Indiana Trust & Savings Bank. There is no showing as to the amount of such deficiency, and for aught that appears in this record, the accomplishing of such object might have required the use of every dollar of the surplus of said appellee banks, or even have wrought their insolvency. They were agreeing to spend money, not their own, but belonging to the stockholders and depositors. This they could not legally do.

As to the agreement among the four appellee banks, two of them were national banks, and two were organized under state law. They and each of them derived all their corporate rights and powers from the statutes under which they were organized. The managing officers were, in effect, trustees of the funds and property of each of said banking institutions, to husband and protect the same.

In *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567, it is said:

"The power to make contracts must, by general principles of law, be limited to the purposes for which a national bank is organized."

As relating to the powers of national banks, section 5136, Revised Statutes of U. S. (U. S. Comp. St. § 9661) provides that such banks have power:

"Seventh, To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

McGee, *Banks and Banking* (2d Ed.) p. 21, says:

"A banking corporation comes severely within the rule that all acts not authorized by its charter, and the law under which it was incorporated are ultra vires. The very nature of its business requires a strict enforcement of the law, that its stockholders may not become liable and that the earnings and savings of depositors may be safely preserved."

In *Com. Nat. Bank et al. v. Pirie*, 82 Fed. 799, 27 C. C. A. 171, it is said:

"The first of these assumptions—that the bank had power, under its charter, to guaranty the payment of the indebtedness contracted by Webb for merchandise—was due to a mistake of law, for which Webb is not legally responsible. The act of Congress under which the bank was organized confers no authority upon national banks to guaranty the payment of debts contracted by third parties, and acts of that nature, whether performed by the cashier of his own motion or by direction of the board of directors, are necessarily ultra vires."

In McGee, *Banks and Banking* (2d Ed.) 92, it is said:

"It has been held that the directors have no authority directly or indirectly to use any of the funds or property of the bank for purposes other than those properly belonging to the legitimate business of banking. They can make no

gifts of the corporate property unless duly authorized by all the stockholders.

"No appropriation in any manner of the funds or property of the bank can be made by them unless it is clearly beneficial and for the material well-being of the bank. They are the guardians of the stockholders, if they accept the trust it is implied that they will use their best efforts to advance and protect the interest of the stockholders. The position being a trust, they are enjoined by law not to use the same in any manner to the injury and detriment of the stockholders or the bank."

And on page 94, same author, it is said:

"They cannot in any manner appropriate any portion of the property of the corporation for any purpose other than that duly authorized by law."

See, also, *Larabee v. Dolley Nat. Bank et al.* (C. C.) 175 Fed. 365; *Bowen v. Needles Nat. Bank* (C. C.) 87 Fed. 430; *Willett v. Farmers, etc., Bank*, 107 Iowa, 69, 77 N. W. 519; *Bank of Ottawa v. Converse*, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537; *Cal. Nat. Bank v. Kennedy*, 167 U. S. 365, 17 Sup. Ct. 833, 42 L. Ed. 198.

In the case of *California Nat. Bank v. Kennedy*, supra, it is said:

"It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established"—citing authorities.

[3] Counsel urges that as to appellee Citizens' Trust & Savings Bank there was a sufficient consideration to support the giving of the check in question. The record fails to disclose any consideration therefor which was legally sufficient to support a promise by said appellee to pay said indebtedness, due from Indiana Trust & Savings Bank to said county, or to support the check given, as part performance of said promise.

Other propositions discussed become of no controlling influence, under the above disposition of questions therein involved, and we need not discuss them.

It follows that the trial court did not err in its conclusion of law.

The judgment is affirmed.

(71 Ind. App. 77)

ROOT DRY GOODS CO. v. GIBSON et al.*
(No. 10493.)(Appellate Court of Indiana, Division No. 1.
April 25, 1919.)**1. MASTER AND SERVANT — 417(7)—WORKMEN'S COMPENSATION — APPEAL FROM AWARD.**

The objection to insufficiency of evidence to support finding of Industrial Board will not be sustained on appeal, where there is some competent evidence to support each ultimate fact upon which the award is based.

2. MASTER AND SERVANT — 416—WORKMEN'S COMPENSATION — AWARD — MAJORITY OF BOARD.

Under Workmen's Compensation Act, §§ 59-61, as amended by Acts 1917, c. 63, as to hearing and award by full board, after hearing before the full board an award made and signed by only a majority of the board is binding.

Appeal from Industrial Board.

Claim under the Workmen's Compensation Act by H. Claire Gibson and others for death of Samuel H. Gibson, employé, opposed by the Root Dry Goods Company, employer. From an award by the Industrial Board, the employer appeals. Affirmed.

Chas. S. Batt and Walter S. Danner, both of Terre Haute, and P. G. Henderson, of Indianapolis, for appellant.

F. S. Hamilton, of Greencastle, and Miller & Kelley, of Terre Haute, for appellee.

REMY, J. The findings of the Industrial Board which are material in determining the questions presented in this appeal are: That on February 15, 1918, appellant company was, and prior thereto had been, engaged in the conduct of a department store; that one Samuel H. Gibson was in the employment of appellant as a salesman, his work consisting chiefly in selling pianos and other musical instruments outside of the store; his only compensation being a specified commission on sales made by him, which commissions during the time of his employment averaged \$18.53 per week; that under his employment he was subject to the direction of appellant, and was required, when requested so to do, to work inside the store; that on February 15, 1918, he was directed by appellant to take charge of the music department while the representative in charge of that department went to lunch, and by that representative was directed to remain in the store during the afternoon of that day; that while in the store in compliance with such directions, a call came from another department to lower an elevator which at times had been used by employés for the moving of merchandise from one floor of the store to another; that

in response to the call the said Gibson reached in to the controller of said elevator, started it, and in doing so was accidentally caught by the elevator as it was descending, and was killed. It is further found by the board that the death of said Gibson was not due to intentional self-inflicted injury, and was not due to his use of intoxicants, to willful misconduct, nor to his refusal to use safety appliances. On this finding the board awarded his dependents, the appellees herein, compensation for 300 weeks at the rate of \$10.19 per week, and ordered that appellant pay burial expenses, not exceeding \$100.

Under proper assignments of error, appellant urges: (1) The insufficiency of the evidence to sustain the finding of the Industrial Board; and (2) that the award of the board is not valid, because made by but two members thereof.

[1] Keeping in mind the rules of law governing this court in passing upon the evidence in cases of this character (*Haskell & Barker Car Co. v. Brown*, 117 N. E. 555), we have carefully examined the evidence, and find that there is some competent evidence to support each ultimate fact upon which the award is based.

[2] Section 59 of the Workmen's Compensation Act (Laws 1915, c. 106), as amended by the act of 1917 (Acts 1917, p. 154), provides that the board, by any or all of its members, may hear and determine applications for compensation, and make awards. Section 60 of said act provides that, where an award is made by fewer than all the members of the board, the party dissatisfied, if he make application within seven days, may have a hearing "before the full board." Section 61 of the act contains the provision that an "award by the full board shall be conclusive and binding as to all questions of fact, but either party to the dispute may within thirty days from the date of such award, appeal to the Appellate Court for errors of law." The record shows that in the case at bar the evidence was first heard, and the award made, by one of the three members of the Industrial Board; that upon application duly filed a later hearing was held before the full board resulting in the finding and award from which this appeal is taken, which finding and award is signed by but two members of the board. It is the contention of appellant that the statute does not authorize a finding and award except by the full board, and that an award made and signed by only a majority of the board has no binding force. In this appellant is in error. The statute does provide that the hearing shall be before the full board, and the record shows that the hearing was so held. The statute does not provide that all members

of the board must concur in a finding and award. If a hearing is before the full board, an award made and concurred in by a majority thereof is valid. There is no reversible error.

Judgment affirmed, and, by virtue of the statute the amount of the award is increased 5 per cent.

(236 N. Y. 114)

CARRIER v. CARRIER et al.

(Court of Appeals of New York. April 8, 1919.)

1. PERPETUITIES ⚡3 — SUSPENSION OF OWNERSHIP—PUBLIC POLICY.

Personal Property Law, § 11, limiting suspension of absolute ownership, is an expression of the public policy of the state.

2. PERPETUITIES ⚡6(1) — INVALIDITY — CONSENT TO ENFORCEMENT.

Consent of parties to void agreement suspending absolute ownership for more than two lives in being does not authorize court to enforce agreement.

3. PERPETUITIES ⚡7(2) — SUSPENSION OF OWNERSHIP—TRUST FUND.

Agreement between husband, wife, and trust company creating trust fund for maintenance of family, the income to go to wife and daughters upon husband's death and one-half to each daughter upon death of husband and wife, with the principal upon her reaching age of 35 years or to her issue upon death prior thereto, or if no issue to other party or her issue, or if no other party or issue to heirs of husband, is void as to support of daughters upon parent's death, being suspension of absolute ownership for more than two lives in being, in violation of Personal Property Law, § 11; but such invalidity does not affect primary purpose of trust, that of maintaining family prior to parents' death.

4. TRUSTS ⚡165 — REMOVAL OF TRUSTEE — DISCRETION OF COURT.

Under Real Property Law, § 112, subd. 2, the question of the removal of trustee is largely discretionary with court.

5. APPEAL AND ERROR ⚡949 — REVIEW — DISCRETION—REMOVAL OF TRUSTEE.

Court's exercise of its discretion as to removal of a trustee is not subject to revision on appeal unless the discretion has been abused.

6. TRUSTS ⚡231(1)—LOAN BY TRUSTEE TO HIMSELF—"INVEST."

Trustee's power to "invest" moneys committed to his care does not authorize him, under cover of an investment, to loan them to himself.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invest.]

7. TRUSTS ⚡217(1) — MANAGEMENT OF TRUST—INVESTMENT OF FUNDS—DISCRETION.

That trustee was given "absolute and uncontrolled" discretion in the investment of trust funds does not relieve him from obedience to

the great principles of equity which are the life of every trust.

8. TRUSTS ⚡177—PRESERVATION OF FUNDS —CONTROL BY COURTS—INVESTMENTS.

Where husband, wife, and trust company entered into agreement establishing trust fund to be managed and invested by husband with absolute and uncontrolled discretion and the income to be used for support of the family, and husband and wife thereafter separated, the wife obtaining divorce with alimony payable annually, and the husband leaving for another state, leaving no property to be sequestered for alimony under Code Civ. Proc. § 1772, and threatening to use trust funds in speculative enterprise, court did not abuse its discretion, in wife's action to preserve trust, in requiring husband to give 30 days' notice of his intention to invest funds in other securities than those in which trustees are authorized by law to invest, with privilege to wife to apply for injunction, and prohibiting him from loaning money to himself except upon security and at proper return.

Chase, Collin, and Cuddeback, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Aimie O. Carrier against Cassius M. Carrier, the Fidelity Trust Company, and Frances Ellis Carrier. From judgment of the Appellate Division (167 App. Div. 405, 153 N. Y. Supp. 509) reversing judgment of Special Term for plaintiff and dismissing complaint, plaintiff and defendant Frances Ellis Carrier appeal. Judgment of Appellate Division reversed, and judgment of Special Term affirmed as modified.

Adelbert Moot, of Buffalo, for appellant Annie O. Carrier.

Thomas R. Wheeler, guardian ad litem, of Buffalo, for appellant Frances Ellis Carrier.

Louis L. Babcock, of Buffalo, for respondents.

CARDOZO, J. This action was brought by the beneficiary of a trust for an accounting by trustees, and for the preservation of the trust estate.

On July 31, 1903, Cassius M. Carrier, Annie O. Carrier, his wife, and the Fidelity Trust Company of Buffalo, became parties to a written agreement. The agreement recites the desire of the parties of the first and second parts "to provide against the contingencies of business, and to provide further for the welfare of their two daughters," Olive, then of the age of 23 years, and Frances, then of the age of 5. It recites the readiness of Mr. Carrier, the party of the first part, "to create a fund for that purpose," and his desire "to retain a power of investment and management of the fund so erected as long as he shall live." It recites

his ownership of the residence 789 West Ferry street, Buffalo, "occupied by himself and his family as a home." Following these recitals, a transfer is made to the trust company of four promissory notes, amounting in the aggregate to \$155,000, then held by the creator of the trust. A transfer is also made of the family residence. The house "shall continue to be used as a home for the family precisely as if the conveyance thereof had not been made." No sale is to be permitted unless the parties of the first and second parts shall jointly direct. The proceeds are to be used either in the purchase of a new home, or to be added to the general fund. The fund itself "shall at all times be managed and controlled by the party of the first part. He shall attend to the collection of the notes," and, "the same having been converted into money, he shall attend to the investment thereof, and in the matter of investment his discretion shall be absolute and uncontrolled." He shall not be limited by the "rules governing investments by executors or trustees, and the trustee shall follow his directions with regard to investments without question or demur." In case the income falls below 6 per cent. of the principal, he undertakes from his own means to make up the difference.

The fund thus created and managed is to be held upon the following trusts: The income "is to be used for the maintenance of the family which consists of the parties of the first and second parts and their two daughters, and out of the income the expenses of maintaining the family establishment are to be defrayed." On the death of the party of the first part, the income is to be paid to the use of the party of the second part for her support and the support of the two daughters. After both parents are dead, the fund is to be divided into two parts, one for the benefit of each daughter. The principal is to be paid to each daughter as she attains the age of 35. In the event of her death before that age, it is to go to her issue. If there are no issue, it is to go to the other daughter or to the issue of the other; and, if there are none of these, to the heirs of the party of the first part. If both daughters die before the party of the first part, he shall have a power of appointment, and, after the death of the party of the second part, the money shall then be distributed as he shall direct. The party of the third part, the trust company, "shall not be responsible to anybody or in any manner for the execution of the trust," except for the safe preservation of any money or securities in its hands, until the death of the party of the first part. On his death, "it shall assume active management of the trust," but in making any investments it shall follow the directions of the party of the second part. "After the death of both the parties of the first and second parts, then the party

of the third part shall be subject to the ordinary duties of a trustee."

On February 29, 1904, the daughter Olive died. Soon afterwards, Mr. Carrier abandoned his wife, and since then has refused to live with her. The family home was sold in 1905. The proceeds were placed in the trust company, and are still there with the accrued interest. Interest at the rate of 6 per cent. per annum has been paid also upon the four promissory notes. The income thus earned has been in part accumulated and in part devoted to the purposes of the trust. The personal and living expenses of the husband do not exceed \$2,000 a year. He has a yearly income of about \$4,700 from other sources. The payments made to his wife for the support of herself and her child have ranged from \$3,600 to \$5,000 a year. A large surplus of income, amounting to about \$19,000, has been accumulated. Almost the entire principal of the estate has been reduced to cash. The promissory notes have been collected to the extent of \$144,045.39. Only one note, for \$10,868.92, is outstanding. The estate is thus in a form in which it may readily be withdrawn from the jurisdiction of the court. Since 1909 the husband has been a resident of Florida. He has substantially no property in New York. He is engaged in highly speculative ventures. In 1912 he made a contract to buy over 128,000 acres of timber land in Florida. The total price was \$867,000. Most of it is still unpaid. The profitable development of the land requires the construction of a railroad and other improvements at a cost of about \$1,200,000. The finding is that Mr. Carrier "claims that he has the right under said trust agreement to use said trust fund as his own money in paying for said Florida lands, and intends to use all of said trust fund to make said payments if the same is needed for that purpose." The wife is fearful that this use may dissipate the fund. In 1911 she sued her husband in two actions. One was an action for separation. It was tried immediately before this one, and was decided by the same judge. Separation was decreed, and an award of alimony was made for the support of the plaintiff and her child at the rate of \$6,000 a year. Payments from the income of the trust were to be credited on the award. The second action is the one before us. The plaintiff alleges that the trust fund is in peril, and likely to be lost to her and her daughter or removed beyond the jurisdiction of the court. The court is asked to preserve it.

Upon these facts the trial court has granted a judgment restricting the powers of the trustees in the administration of the trust. Mr. Carrier and the trust company are enjoined from investing the principal fund or any part of it in securities other than those in which trustees are authorized by law to invest trust funds, unless thirty days' no-

tice of intention to invest in other securities is given to the plaintiff. Upon receipt of such notice the plaintiff may apply to the court for an order restraining the defendants from making any such investment on the ground that the safety of the trust may be imperiled thereby, unless a bond is given by Mr. Carrier with prescribed conditions. Out of the income of the trust the sum of \$6,000 is to be paid to the plaintiff for herself and her daughter. The rest of the income is to be paid to the husband for his own use. Limitations are imposed upon his power to borrow the principal. The trust company may loan the principal to him for his life or for a shorter period, but only upon his executing a surety company bond for its return when due, and for the payment of \$6,000 of income to the plaintiff annually during her life. On his death the fund is directed to be held in trust for the plaintiff and her daughter, and thereafter it is to be held and distributed as provided in the trust agreement.

An appeal to the Appellate Division followed. That court of its own motion raised the objection that the trusts were void. Upon the trial Mr. Carrier had admitted that they were valid. The Appellate Division found an illegal suspension of the absolute ownership Personal Prop. Law, § 11; Consol. Laws, c. 41. There was first a trust for the joint lives of husband and wife. Then there were other trusts for the benefit of the daughters with contingent remainders to their issue. The valid and invalid limitations were held to be inseparable. On that ground the judgment was reversed and the complaint dismissed.

[1] At the threshold stands the question of the validity of the trusts. The grantor no longer concedes that his conveyance is valid. If he did, his concession could not coerce us. The statute limiting the suspension of the absolute ownership is an expression of the public policy of the state. *Matter of Walkerly*, 108 Cal. 627, 659, 41 Pac. 772, 49 Am. St. Rep. 97. In that respect it is like the rule that governs accumulations of income and restraints on alienation. *Matter of Wilcox*, 194 N. Y. 288, 289, 297, 87 N. E. 497. These are the "modes adopted by the common law for forwarding the circulation of property, which it is its policy to promote." Gray on the Rule of Perpetuities, § 2a. The welfare of society, it is thought, does not tolerate limitations that will last throughout the ages. The living may not dictate, without restriction, the forms of ownership for posterity. *Stanley v. Leigh*, 2 P. Wms. 636; *Marlborough v. Godolphin*, 1 Eden, 404, 416; *Taylor I. Atkyns v. Horde*, 1 Burr. 60, 115; *Bascom v. Albertson*, 84 N. Y. 584, 614; *Coster v. Lorillard*, 14 Wend. 356, 373; *Church v. Wilson*, 152 App. Div. 852, 137 N. Y. Supp. 1002, affirmed 209 N. Y. 553, 103 N. E. 1122; *Barton v. Thaw*,

246 Pa. 348, 364, 92 Atl. 312, Ann. Cas. 1916D, 570. "The interests of society require that the power of the owner to effect the alienation and suspension of ownership of an estate by future limitations shall be confined within certain limits." Notes of the Commissioners to revise the Statutes, 1 R. S. 723, §§ 14 to 22.

[2] By the judgment of the trial court a trustee has been in effect commanded to do what the statute says he shall not do. There was, of course, no such purpose; but this does not change the effect. The limitations of the trust deed have been restated. The court has instructed the trustee to follow them in his disposition of the property. It has not merely held aloof, and permitted the trusts to stand. It has given active aid in confirming and enforcing them. No consent of the parties can charge a court with such a duty. *Matter of Walkerly*, 108 Cal. 627, 659, 41 Pac. 772, 49 Am. St. Rep. 97; *Bailey v. Buffalo L. T. & S. D. Co.*, 213 N. Y. 525, 107 N. E. 1043; *Church v. Wilson*, supra; *Schley v. Andrews*, 225 N. Y. 110, 121 N. E. 812; *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. We must be on our guard against confusing situations that may, at first sight, appear similar, but are in truth diverse. Sometimes the right to avoid a conveyance belongs to persons whose deed would be effective to confirm it. The controversy may arise after changes have been wrought by time. One of the trusts may have expired. A new conveyance may then validate the trusts that remain. In these and like circumstances the same effect that will be given to the conveyance may be given to consent. There may be times also when a court will refuse to act at all, and will leave the parties where it finds them. *Woodbridge v. Bockes*, 170 N. Y. 596, 601, 63 N. E. 362. This judgment does more. It furthers the illegal scheme. The creator of the trust could not nullify the statute by his conveyance. He could not compel the court to nullify it by his consent. We are not discussing now the effect as *res adjudicata* of a judgment rendered without collusion or fraud. We are still in the original action. We are dealing with the duty of the trial court to adjudge, and of an appellate court to approve. Their path of duty, we think, is clear. They will not stir a step in aid of an illegal scheme. *Cont. Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486.

[3] We agree with the Appellate Division that the trusts for the two daughters after the death of father and mother involve an illegal suspension of the absolute ownership for more than two lives in being. We do not concur, however, in the conclusion that the deed of trust is therefore void in its entirety. We think there is no reason why these ultimate trusts may not be rejected, and the primary trust retained. *Kalish v.*

Kallish, 166 N. Y. 368, 59 N. E. 917; Harrison v. Harrison, 36 N. Y. 543; Van Schuyver v. Mulford, 59 N. Y. 426; Tiers v. Tiers, 98 N. Y. 568; Kennedy v. Hoy, 105 N. Y. 134, 11 N. E. 390. The grantor's purpose is not doubtful. He wished to maintain the family as a unit while he and his wife or either of them lived. During that time there was to be a single trust. Its income was to be devoted to the support of the family and the maintenance of the family establishment. No one of the beneficiaries during that period had the right, irrespective of his or her needs, to any determinate proportion. For two lives and two only, this unified trust was to endure. Then there was to be a change. The parents' death would disrupt the family life. The single trust was therefore to be broken up into two separate trusts, one for each daughter. The duties of the trust company were thenceforth to be "the ordinary duties of a trustee." Each beneficiary was to receive her own share. The individual was to supplant the family. We think there is a line of cleavage here which the court may safely follow in decreeing a severance of the trusts. The primary purpose, the maintenance of the family, the preservation of its communal life, while the head of the family survives to preserve its unity and cohesion, that purpose is maintained. The secondary purpose, support of the daughters separately, when the family shall be disrupted and its members scattered, that purpose and that only fails. We can see no ground for the belief that the grantor would have sacrificed the one because unable to attain the other.

[4] The plaintiff comes before the court, then, as the beneficiary of a valid trust. The question remains whether good cause has been shown for curbing the powers of her trustee. When we speak of her trustee, we mean her husband, for the duties of the trust company are merely formal. The Supreme Court has jurisdiction "to remove a trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended, or who for any other cause shall be deemed to be an unsuitable person to execute the trust." Real Prop. Law, § 112, subd. 2; Consol. Laws, c. 50. "This gives a broad power to the court, and leaves the question of the removal of the trustee very largely to its discretion." *Wilson v. Wilson*, 145 Mass. 490, 492, 14 N. E. 521, 524 (1 Am. St. Rep. 477); *May v. May*, 167 U. S. 310, 320, 17 Sup. Ct. 824, 42 L. Ed. 179; *Quackenboss v. Southwick*, 41 N. Y. 117; *Latterstedt v. Boers*, L. R. 9 App. Cas. 371.

[5-7] Unless the discretion has been abused, it is not subject to revision here. The Supreme Court did not remove this trustee, but it took measures designed to hold him to the performance of his duty. The power to remove includes the power to im-

pose the terms upon which removal will be refused. There had been a threat to violate the trust. There had been a change of conditions, by force of which the husband had become an unsuitable trustee without some restraint upon his powers. At least, some evidence is in the record from which those conclusions might be drawn. It is true that the creator of this trust had reserved to himself the broadest rights of management. His discretion was to be "absolute and uncontrolled." That does not mean, however, that it might be recklessly or willfully abused. He had made himself a trustee: and in so doing he had subjected himself to those obligations of fidelity and diligence that attach to the office of trustee. He had power to "invest" the moneys committed to his care. He had no power, under cover of an investment, to loan them to himself. His discretion, however broad, did not relieve him from obedience to the great principles of equity which are the life of every trust. *Globe Woolen Co. v. Utica G. & El. Co.*, 224 N. Y. 483, 121 N. E. 378; *Munson v. Syracuse, G. & C. R. Co.*, 103 N. Y. 58, 8 N. E. 355. But the finding is that he had threatened to borrow the principal of the fund, and use it in the payment of his debts. He did not say that he would use it. He said, however, that he would use it if he wished. That was a threat to abuse his power. The threat made some remedy appropriate. The form and extent of the remedy were to be determined by the trial court in the exercise of a sound discretion. The least that could reasonably be done was to restrain the threatened loan. In determining, however, whether there was need of something more, the court was not to view the threat as an isolated fact. It was to give heed to all the circumstances of a peculiar situation. *Latterstedt v. Boers*, supra, p. 389. Only thus could it determine whether the trustee was "an unsuitable person to execute the trust." There had been a complete change of conditions since the deed of trust was made. Husband and wife were separated. The old unity of interest was gone. The husband had the temptation, if not the purpose, to put his own welfare ahead of that of the wife who had challenged him to litigation. There was a condition of dissension and estrangement that went far, of itself, to impair his capacity for disinterested and faithful service. *Quackenboss v. Southwick*, supra. But this is not the whole story. The trustee had changed his residence, had left no property, or none of any substance, in this state, and had risked enormous sums in a speculative enterprise in Florida. An award of alimony had been made, but there was nothing here to be sequestered. Code Civ. Proc. § 1772. Nothing except the trust fund was available to the wife if it became necessary to enforce in this jurisdiction the duty of support.

[8] We cannot say that this combination of circumstances did not call for some preventive measures. The question is not whether the husband was a suitable trustee at the beginning. The question is whether, by reason of changed conditions, he is suitable to-day. Some persons might conclude that no one more unsuitable could readily be found. He had not emancipated himself from removal for incapacity or unfitness because, in addition to being a trustee, he was also the creator of the trust. Some measures of protection were therefore proper. Those that the court adopted are not unreasonable. The trustee is required to give notice to the beneficiary if he puts the money in investments not commonly permitted to trustees. The only effect of notice is to give the beneficiary the opportunity to protect herself if she finds that waste is imminent. The judgment does not say that she shall be entitled to an injunction as of course. She is to have the opportunity to apply for one. The court that hears the application will determine the gravity of the peril. Even then, the trustee may do as he pleases if he is willing to give security. Finally, the trustee is prohibited from loaning the principal to himself, except upon the condition that he give security for its return, and for a proper yield of income. He could have been restrained from loaning the money to himself at all. He is not aggrieved because a privilege which might have been withheld altogether is burdened with conditions. He is no longer bound by the covenant that the income shall equal 6 per cent. of the value of the principal. The guaranty is one that there can no longer be an occasion to enforce. His duty to his wife is fulfilled by the payment yearly of \$6,000, a sum due, in any event, by reason of the award of alimony. Any surplus income he retains for himself. These are the only restrictions that have been laid upon his powers. We cannot say that, in imposing them, discretion has been abused. They will not bear oppressively on one who is acting in good faith.

The judgment of the Appellate Division should be reversed, and the judgment of the Special Term should be modified by striking out those provisions regulating or affecting the disposition of the trust fund after the death of the plaintiff and her husband, and, as so modified, affirmed, with costs to the appellants in this court and in the Appellate Division payable out of the estate.

HISCOCK, C. J., and HOGAN and ANDREWS, JJ., concur.

CHASE, COLLIN, and CUDDERBACK, JJ., dissent on the ground that the agreement was not divisible and illegally suspended the absolute ownership.

Judgment reversed, etc.

(226 N. Y. 125)

MARKS v. COWDIN et al.

(Court of Appeals of New York. April 8, 1919.)

1. FRAUDS, STATUTE OF §158(3)—CONTRACT NOT TO BE PERFORMED WITHIN YEAR—MEMORANDUM—PAROL EVIDENCE.

Under Personal Property Law, § 31, the memorandum evidencing a contract not to be performed within a year is not insufficient because extrinsic evidence is necessary to fit the facts to the description.

2. FRAUDS, STATUTE OF §118(2)—MEMORANDUM—SUFFICIENCY—SEPARATE WRITINGS—PARTIES TO WHOM ADDRESSED.

The memorandum exacted by the statute of frauds may be pieced together from separate writings, connected by express reference or internal evidence of subject-matter and occasion, and the writings need not be from promisor to promisee, but may be from the promisor to his own agent.

3. FRAUDS, STATUTE OF §118(5)—CONTRACTS NOT TO BE PERFORMED WITHIN YEAR—SUFFICIENCY OF MEMORANDUM.

Where plaintiff might show from the facts that his former employment by defendants was as sales manager and that he served in that capacity for the term stated and continued thereafter in the same position, a later writing continuing his employment for definite period for stipulated compensation without defining his capacity was not insufficient.

4. MASTER AND SERVANT §43—WRONGFUL DISCHARGE—QUESTIONS FOR JURY.

Whether a change in duties of one employed as sales manager was in effect a removal from that position held a question for the jury.

5. APPEAL AND ERROR §1177(1)—REVERSAL—NECESSITY OF NEW TRIAL—INTERMEDIATE COURT'S DECISION.

Where the Appellate Division in reversing the trial court's decision for plaintiff dismissed the complaint and also reversed on the facts, on further appeal and reversal by the Court of Appeals, a new trial is necessary.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Leon Marks against John E. Cowdin and another. From a judgment of the Appellate Division (175 App. Div. 700, 162 N. Y. Supp. 567) reversing a judgment in favor of the plaintiff and dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

See, also, 166 App. Div. 911, 151 N. Y. Supp. 1128.

Nathan L. Miller, of Syracuse, for appellant.

John G. Milburn, of New York City, for respondents.

CARDOZO, J. The action is one by employee against employer for wrongful discharge.

The plaintiff entered the defendants' serv-

ice in 1910. The defendants wrote him that his employment was to continue for two years from January 1, 1911, at an annual salary of \$15,000. The hope was expressed that at the end of the term he might be accepted as a partner. He was given the privilege of starting his employment earlier if he pleased. In point of fact, he did start it in July, 1910. He took the place of another man, then leaving the defendants, who had acted as general manager. At once, the defendants gave written notice to their salesman. They wrote that the plaintiff was about to join their staff. "He will become our sales manager." And again:

"We feel confident that with him in command, we will not only keep up our business, but will increase it to the largest dimensions."

The plaintiff's position is thus described in letters signed by the defendants. Its range is sketched in outline. The picture is completed when we view the course of dealing. The defendants were manufacturers, importers, and sellers of ribbons. The plaintiff took charge of the selling department. He supervised and directed the salesmen. He helped the defendants themselves in selecting designs and fixing prices. He made trips abroad, inspected the foreign styles, and purchased the foreign merchandise. His position was one of general supervision. The partners were his sole superiors.

At the beginning of 1913 there was a renewal of the employment for three years, but at a larger compensation. The new contract was made by word of mouth. Nearly a year later its terms were put in writing. Some of the defendant's salesmen had expressed hostility toward the plaintiff. The defendants reproved him, and said that he would have to leave. The disagreement, though amicably adjusted, seems to have been a warning to the plaintiff that his tenure was insecure. Thus warned, he requested and received the following memorandum:

"New York, December 22, 1913.

"It is understood between Johnson Cowdin & Co. and Leon Marks that the arrangements made for employment of Leon Marks in our business on January first, 1913, for a period of three years from that date at a salary of \$15,000.00 (fifteen thousand) per year plus five (5%) per cent. of the gross profits earned in our business which we agree shall be not less than \$5,000 00/100 per year—continues in force until Jan. 1st, 1916.

"Johnson Cowdin & Co.
"John E. Cowdin.
"E. N. Herzog."

For a time the plaintiff's services continued unchanged. The trouble began in the summer of 1914. Some of the events of that season are in dispute. We state the plaintiff's version, for it was accepted by the jury. One of the defendants said to the plaintiff:

"I am going to put Mr. McLaren, who has been assisting you, in your position."

The plaintiff was notified in writing:

"The selling department will be in the hands of Mr. McLaren, and you will naturally report to him."

The title of sales manager, which had once been his, was thenceforth to be another's. In the past the chief business had been the sales to dealers in ribbons. One of the minor incidents had been the sales to manufacturers of dresses, underwear, and other articles, who used ribbons incidentally in making up their products. The plaintiff was directed in the future to attend to this trade exclusively. According to his testimony, he was to do the work of salesmen who had formerly been paid at the rate of \$25 a week. According to the testimony of the defendants, he was to have salesmen under him, and was to develop a new branch of trade. Over him, however, was to be McLaren, with general power of control. The plaintiff protested that the defendants in thus changing his duties were changing his position. His refusal to submit to the change was followed by his discharge, and the discharge by this lawsuit. The plaintiff had a verdict of \$24,794.52. The Appellate Division reversed the judgment and dismissed the complaint.

[1] The chief question in the case grows out of the statute of frauds. The contract of employment was not to be performed within a year. There is need, therefore, of a note or memorandum of its terms, subscribed by the parties to be charged. Personal Property Law, § 31; Consol. Laws, c. 41. The defendants signed a memorandum which continued an existing employment, but which did not describe its duties. The question is whether the position may be identified by proof of the surrounding circumstances. The employment under the new contract began in January. The memorandum was not signed till the following December. It assumes the existence of a position which the plaintiff is then filling. It says that the employment shall be continued for a term and at a salary prescribed. A position then held is carried forward and preserved. The tests to be applied in order to identify the employment are thus embodied in the writing. We are not left to gather the relation between the parties from executory promises. We are informed that the relation then existing is the one to be maintained. If A. agrees to sell to B. "the house and lot now occupied by the seller," the description is not void because the bounds of occupation must be established by parol. *Doherty v. Hill*, 144 Mass. 465, 467, 11 N. E. 581; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110; *Shadlow v. Cottrell*, L. R. 20 Ch. D. 90; *Plant v. Bourne*, 1897, 2 Ch. 281; *Cave v. Hastings*,

7 Q. B. D. 125; *Carr v. Lynch*, 1900, 1 Ch. 613; *Catling v. King*, 5 Ch. D. 660; *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; *Richards v. Edick*, 17 Barb. 260, 269. It is not otherwise where A. agrees with B. that a position in A.'s service then held shall be continued. "I will keep you until January 1, 1913, at so much a year, in your present place." By necessary implication, by inevitable construction, that is what this memorandum says. It makes no difference whether the place is land to be occupied or a relation of employment to be filled. Whether it is the one or the other, we do not violate the statute when we fit the description to the facts. In thus identifying the position we are not importing into the contract a new element of promise. We are turning signs and symbols into their equivalent realities. This must always be done to some extent, no matter how many are the identifying tokens. "In every case, the words used must be translated into things and facts by parol evidence." *Holmes, J.*, in *Doherty v. Hill*, supra, 144 Mass. 468, 11 N. E. 583; *Mead v. Parker*, supra, 115 Mass. 415, 15 Am. Rep. 110; 4 *Wigmore on Evidence*, § 2454. How far the process may be extended is a question of degree. *Doherty v. Hill*, supra, 144 Mass. 469, 11 N. E. 581. We exclude the writing that refers us to spoken words of promise. We admit the one that bids us ascertain a place or a relation by comparison of the description with some "manifest, external, and continuing fact." *Doherty v. Hill*, supra, 144 Mass. 469, 11 N. E. 584. The statute must not be pressed to the extreme of a literal and rigid logic. Some compromise is inevitable if words are to fulfill their function as symbols of things and of ideas. How many identifying tokens we are to exact, the reason and common sense of the situation must tell us. "What, then, is a sufficient description in writing? No one can say beforehand." *Jessel, M. R.*, in *Shadlow v. Cottrell*, supra. "You cannot have a description in writing that will shut out all controversy, even with the help of a map." *Id.* "In every case it must be considered what is a sufficient description with reference to the surrounding circumstances and the facts." *Jessel, M. R.*, in *Catlin v. King*, supra, p. 664. Some description there must be. Its adequacy depends upon the degree of certainty attained when the words are applied to things. From correspondence we infer identity. *Beckwith v. Talbot*, 95 U. S. 289, 292, 24 L. Ed. 496. A. has been employed by B. as a bookkeeper and accountant. He receives a writing to the effect that his employment, which is stated to have begun some years before, is continued, for a given term. We shall make a farce of the statute if we say that oral evidence is incompetent to show that A. is not expected to do the work of a porter. "There is no mystery

about the statute of frauds." *Chitty, L. J.*, in *Plant v. Bourne*, supra. The memorandum which it requires, like any other memorandum, must be read in the light of reason. *Id.*

[2] In this case the plaintiff does not need the aid of one spoken word of promise to identify his place. His first contract was for two years, from January 1, 1911, to January 1, 1913. During that period, writings subscribed by the defendants attest the nature of his position. The memorandum exacted by the statute does not have to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion. *Ridgway v. Wharton*, L. R. 6 H. L. O. 238; *Cave v. Hastings*, L. R. 7 Q. B. D. 125; *Oliver v. Hunting*, L. R. 44 Ch. D. 205; *Bibb v. Allen*, 149 U. S. 481, 496, 13 Sup. Ct. 950, 37 L. Ed. 819; *Peck v. Vandemark*, 99 N. Y. 29, 34, 1 N. E. 41; *Coe v. Tough*, 116 N. Y. 273, 22 N. E. 550; *Levin v. Dietz*, 106 App. Div. 208, 211, 94 N. Y. Supp. 419; *Title G. & T. Co. v. Lippincott*, 252 Pa. 112, 97 Atl. 201; *Pollock, Contracts* (8th Ed.) p. 171. It is not even necessary that they be writings from the promisor to the promisee. They may be from the promisor to his own agent. *Gibson v. Holland*, L. R. 1 C. P. 1; *Townsend v. Hargraves*, 118 Mass. 325, 335; *Argus Co. v. Mayor, etc.*, of Albany, 55 N. Y. 495, 505, 14 Am. Rep. 296; *Peabody v. Speyers*, 56 N. Y. 230, 237; *Browne, Statute of Frauds*, § 354a.

[3] Tested by these rules, the first contract is plainly valid. The second must be interpreted in the light of what had gone before. The circumstances are persuasive in their collective force. We see this when we put them together. There is a note or memorandum in writing that the plaintiff was employed in 1911 to act for two years as the defendants' sales manager. There is evidence, not contradicted, that for two years he did occupy that position. There is evidence, again uncontradicted, that after the expiration of his first contract, he occupied the same position! And there is a note or memorandum in writing that in December, 1913, the position then filled was continued for a term of years. To give heed to these things is not to ignore the rule that the writing must contain all the material terms of the agreement. It is to explain the memorandum without changing or enlarging it. We think the process is one that is justified by precedent. *Beckwith v. Talbot*, 95 U. S. 289, 291, 292, 24 L. Ed. 496; *Hagan v. Domestic Sewing Machine Co.*, 9 Hun. 73; *Davis v. Dodge*, 126 App. Div. 469, 476, 110 N. Y. Supp. 787; *Carr v. Lynch*, supra; *Plant v. Bourne*, supra; *Title G. & T. Co. v. Lippincott*, supra.

[4] The plaintiff, then, was employed as sales manager, or at least a jury might so

find. Finding that, they might also say that the defendants removed him from that position when they changed his powers and his duties. It is true that in the past he had visited the manufacturers and solicited their trade. But that had been a mere incident to the work of management and supervision. The defendants did not fail to appreciate the significance of the change. They told the plaintiff, if we may credit his testimony, that they were giving his position to another. He had been sales manager before. He was to be sales manager no longer. We do not mean to say that he was at liberty to show, by evidence dehors the writing, that under his contract of employment special rights had become his by force of special promises. To do that would be to do more than identify a position with known and established attributes. It would be to surround the position with peculiar privileges and exemptions. The defendants were free to change the plaintiff's duties at their pleasure as long as the position was unchanged in the things that determine its identity. Beyond that they could not go. It is no answer to say that, even then, the definition of the duties is left open to extrinsic evidence. That would be just as true if the description of the position as that of "superintendent" or "manager" had been embodied in the writing. *Hagan v. Domestic Sewing Machine Co.*, supra. There would still be lacking a catalogue of the things that a superintendent or a manager does. Yet it would hardly be contended by any one that such a writing would be inadequate. The difficulty, if there is any, is the usual one that we met in passing from the particular to the general. There are certain common properties that characterize a class and mark it off from others. These must remain constant, or class identity is lost. There are certain other qualities that characterize the individual. These may be changed, and a place within the class retained. The plaintiff makes no complaint of changes in those qualities that are merely accidental. He does not complain that the defendants subtracted one incident from his position, or added another to it. He says that they changed it altogether; they took the position from one man, and gave it to another. Whether that was in truth the effect of their conduct was a question for the jury.

[5] The Appellate Division dismissed the complaint, but also reversed upon the facts. A new trial is therefore necessary. *Gressing v. Musical Instrument Sales Co.*, 222 N. Y. 215, 221, 118 N. E. 627; *Maguire v. Barrett*, 223 N. Y. 49, 56, 119 N. E. 79; *Melsie v. N. Y. C. & H. R. R. Co.*, 219 N. Y. 317, 322, 114 N. E. 347, Ann. Cas. 1918E, 1081.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

COLLIN, POUND, CRANE, and ANDREWS, JJ., concur.

HISCOCK, C. J., and CUDEBACK, J., not voting.

Judgment reversed, etc.

(226 N. Y. 171)

TUZZEO v. AMERICAN BONDING CO. OF BALTIMORE.

(Court of Appeals of New York. April 8, 1919.)

1. INTEREST §19(2)—INTEREST ON AMOUNT RECOVERED.

In any form of contract where the amount to be paid thereby is subject to computation and the time of payment and the person or persons to whom payments are to be made are certain and definite, interest is chargeable upon the amount found due thereon.

2. BANKS AND BANKING §15 — BONDS — STATUTE—ACTIONS — PERSONS ENTITLED TO INDEMNITY.

Under Code Civ. Proc. § 1915, and Laws 1907, c. 185, relating to giving of bonds by steamship ticket sellers receiving deposits, it is contemplated that in case of default a suit to recover on the bond may have to be instituted by or upon relation of the party or parties aggrieved.

3. BANKS AND BANKING §15 — JUDGMENT AGAINST SURETY ON BOND—INTEREST—DEFAULT.

The default from which interest on a bond given under Laws 1907, c. 185, is to be computed as against the surety is surety's own default or failure to pay the amount when it should and could have been safely paid, and not the date of the default of the principal.

4. BANKS AND BANKING §15—BOND—SURETY'S LIABILITY.

Where surety on bond given under Laws 1907, c. 185, could not, upon principal's default, pay creditors the amount of the bond since the creditors and amounts due them could not be safely determined prior to suit, indemnitor could have deposited the amount due under the bond with the court at the beginning of the action by creditors to collect, and indemnitor was chargeable with interest from the beginning of the action.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Giuseppe Tuzzeo, suing on behalf of himself and all other creditors of Pasquale Pati, etc., against the American Bonding Company of Baltimore. From a judgment of the Appellate Division (175 App. Div. 129, 161 N. Y. Supp. 906) modifying and as modified affirming a judgment entered on a report of a referee, the plaintiff appeals. Judgment modified as to interest and affirmed.

See, also, 173 App. Div. 971, 159 N. Y. Supp. 1146, 176 App. Div. 907, 162 N. Y. Supp. 1147.

Pasquale Pati and Salvatore Pati were engaged in business as partners under the firm name of Pasquale Pati & Son in selling steamship and railroad tickets for transportation to and from foreign countries and in conjunction with said business carried on the business of receiving deposits of money for the purpose of transmitting the same or the equivalent thereof to foreign countries.

On August 8, 1907, they gave a bond of \$15,000, pursuant to the provisions of chapter 185 of the Laws of 1907, and the defendant became surety thereon. The bond provides:

"That if the above bounden Pasquale Pati and Salvatore Pati shall faithfully and diligently hold and transmit any and all moneys or the equivalent thereof which shall be delivered to it or them for transmission to a foreign country or countries as provided by said chapter 185 of the Laws of 1907, and duly account for and properly pay over all moneys or the equivalent thereof received by him as aforesaid, then the obligation to be void, otherwise to remain in full force and virtue. In default thereof the parties hereto will pay all damages, costs and expenses resulting from such default not exceeding the sum above specified."

The plaintiff and others delivered to said Pasquale Pati & Son sums of money for the sole and express purpose of transmitting the same or the equivalent thereof to various persons or corporations in the kingdom of Italy. Said Pasquale Pati & Son did not forward such sums of money or the equivalent thereof to the persons or corporations named in the kingdom of Italy, but appropriated the same to their own personal use. On or about the 23d day of March, 1908, the said Pasquale Pati and his son absconded and disappeared, and their whereabouts have not since been known or discoverable. On that day they were adjudged involuntary bankrupts. The amount so misappropriated by the said Pasquale Pati & Son exceeds \$70,000.

This action was brought on July 9, 1913 (over five years after said bankruptcy), to have the plaintiff's claim adjudged valid against the defendant and to have it adjudged to pay the same. It was also brought to require all other creditors similarly situated to come into the action and to prove their claims, that the defendant may pay \$15,000, the amount of said bond, and the interest thereon, ratably to the plaintiff and such other creditors.

A referee was duly appointed in the action, and a notice was duly published as provided by section 786 of the Code of Civil Procedure, requiring all persons having claims against the said bankrupts and upon the bond of the defendant to present the same to the referee. Judgment was entered herein on the 15th day of May, 1916, adjudging the amount due and unpaid by the said Pasquale Pati & Son, for money appropriated as aforesaid, to the

plaintiff and others as specifically set forth in said judgment, and the defendant was adjudged to pay the amount of its bond, with interest thereon from the date of the bankruptcy of Pasquale Pati & Son to the plaintiff and others pro rata in accordance with the amounts of their claims respectively. On appeal by the defendant from said judgment to the Appellate Division it was modified by striking therefrom the amount of interest included therein, and as so modified affirmed.

Samuel F. Frank, of New York City, for appellant.

George B. Covington, of New York City, for respondent.

CHASE, J. The Code of Civil Procedure (section 1915) provides:

"A bond in a penal sum, executed within or without the state, and containing a condition to the effect, that it is to be void, upon performance of any act, has the same effect, for the purpose of maintaining an action or special proceeding, or two or more successive actions or special proceedings thereupon, as if it contained a covenant to pay the sum, or to perform the act specified in the condition thereof. But the damages to be recovered for a breach, or successive breaches, of the condition, cannot, in the aggregate, exceed the penal sum, except where the condition is for the payment of money; in which case, they cannot exceed the penal sum, with interest thereupon, from the time when the defendant made default in the performance of the condition."

The bond in this case is expressly limited to the payment of all damages, costs, and expenses resulting from the default of the principals therein, not exceeding the sum of \$15,000. It is expressly provided in said act of 1907 (section 4) that:

"A suit to recover on a bond required to be filed under the provisions of this act may be brought by or upon the relation of any party aggrieved in a court of competent jurisdiction."

In *Guffanti v. National Surety Co.*, 196 N. Y. 452, 456, 90 N. E. 174, 175 (34 Am. St. Rep. 848), this court say:

"The condition of the bond read in connection with section 4 of the act would seem to give a person who has deposited money, which is subsequently embezzled, a right of action upon the bond in his individual capacity, but the bond is for the benefit of every person who deposits money with a corporation, firm or person named in the act, and where the facts require it the court will exercise its equitable powers to prevent the amount of the penalty thereof being paid to some of the persons defrauded to the exclusion of others equally entitled to payment therefrom."

[T] In any form of contract where the amount to be paid thereby is subject to computation and the time of payment and the person or persons to whom the payments are to be made are certain and definite, interest,

is chargeable upon the amount found due thereon. *Bradley v. McDonald*, 218 N. Y. 351, 389, 113 N. E. 340.

[2] Under the statute, pursuant to which the bond in question was given, it is contemplated, in a case of a default that a suit to recover on the bond may have to be instituted by or upon the relation of the party or parties aggrieved. In practical affairs, a suit similar in form to that considered in the *Guffanti Case* is necessary in nearly every case to determine the persons to whom the amount of the bond shall be paid and the amount to be paid to each.

[3] When the principal makers of the bond in this case absconded, they were in default in their contract with the several persons who had deposited money with them for transmission to a foreign country. The default, however, from which interest is to be computed on the bond, as against the defendant, is its own default or failure to pay the amount of the bond when it should have paid it. It does not appear that prior to the commencement of this action there was any person or persons to whom the defendant could have paid the amount of the bond in bulk. The liability of the surety arising from the default of the principals did not permit it to pay one or more of the persons defrauded to the exclusion of others equally entitled to payment from it. There are in this case a large number of claims and a limited fund out of which the aggregate recovery must be sought. Without a judgment of a court of equity the defendant was not obligated or even permitted, except at its peril, to divide and pay the amount of the bond among the persons named on or in the proportions shown by the books of the defaulters, even if such books were accessible to it. To insist upon such a division would neither be fair to the defendant nor to the creditors of the defaulters. Many persons asserted claims against the defaulters, and insisted that the defendant was liable therefor as surety on the bond. Some of such claims were rejected by the referee in this action, and others to the number of 488 were accepted. The valid claims and the amount of each were unascertainable with certainty sufficient to compel or reasonably justify payment by the defendant as surety to the limited amount of the bond, except through the machinery of a court of equity.

In *United States v. United States Fidelity & Guaranty Co.*, 236 U. S. 512, 530, 35 Sup. Ct. 298, 304 (59 L. Ed. 696), the court say:

"Sureties, if answerable at all for interest beyond the amount of the penalty of the bond given by their principal, can only be held for such an amount as accrued from their own default in unjustly withholding payment after being notified of the default of the principal."

The words quoted were the words of Justice Clifford used at circuit, but they were repeated and approved by Justice Pitney in

the *Fidelity & Guaranty Co. Case*. In this state a surety on a bond given pursuant to statute, like the bond under consideration, is chargeable with interest, not from the default of the principal, but from the time when he could have safely paid the same providing he then unjustly withholds it.

When the time has come for a surety to discharge his liability and he neglects or refuses to do so, it is reasonable and altogether just that he should compensate the creditors for the delay which he has interposed. *Brainard v. Jones*, 18 N. Y. 35.

In *Hurley v. Tucker*, 128 App. Div. 580, 112 N. Y. Supp. 980, affirmed 198 N. Y. 534, 92 N. E. 1087, it was held that an owner of real property who retained in his hands about \$10,000, the amount unpaid on a contract for work done and material furnished thereon, and against which real property mechanics' liens had been filed by various subcontractors, is not chargeable with interest thereon while the amount remains in his hands awaiting the decision of the court as to whom it should be paid, if at no time he could have safely paid it over to the lienors. *American Surety Co. v. Lawrenceville Cement Co.* (C. C.) 110 Fed. 717; *Laughlin Co. v. American Surety Co.*, 114 Fed. 627, 51 C. C. A. 247.

In the more recent case of *Faber v. City of New York*, 222 N. Y. 255, 262, 118 N. E. 609, 610, this court say:

"The question of the allowance of interest on unliquidated damages has been a difficult one. The rule on this subject has been in evolution. To-day, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computations alone or by computation in connection with established market values, or other generally recognized standards?"

We do not think that the defendant in this case could have safely determined by any investigation and computation what distribution to have made of the amount of the bond without the aid of a decree of the court. When, however, this action was brought in equity to determine and apportion the liability of the defendant among the several creditors of the defaulters for the benefit of whom the bond herein was given, it was a demand for the payment thereof for such creditors, and, there being no dispute about the default of the bankrupts in the transmission of money deposited with them and no substantial dispute that the amount of the default was in excess of the penalty of the bond, the defendant could properly and safely have paid the amount of the bond into court, to be there distributed among those entitled thereto, and thus be relieved from all further lia-

bility thereon. The allowance of interest is sometimes determined upon considerations of equity and natural justice. *Woerz v. Schumacher*, 161 N. Y. 530, 56 N. E. 72; *Brainard v. Jones*, 18 N. Y. 35; *Blum v. Mayer*, 189 N. Y. 153, 158, 81 N. E. 780; *Forschirm v. Mechanics' & Traders' Bank of N. Y.*, 206 N. Y. 745, 100 N. E. 1127, reversing a judgment on the dissenting opinion in s. c., 137 App. Div. 149, 122 N. Y. Supp. 168. As the defendant could have safely paid the amount of the bond into court as soon as this action was brought, considerations of equity and natural justice would seem to require that it should have done so, or on failure so to do pay interest upon the amount of the bond from that time.

[4] We are of the opinion that the defendant should be deemed in default on the bond for the purpose of charging it with interest as of the date of the commencement of this action. See *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206.

The judgment should be modified so as to include interest on the \$15,000 from July 9, 1913, the day of the commencement of this action to the day of the entry of judgment, and, as thus modified, affirmed, without costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Judgment accordingly.

(226 N. Y. 109)

TOWN OF LERAY v. NEW YORK CENT. R. CO.

(Court of Appeals of New York. March 21, 1919.)

1. HIGHWAYS ⇐79(2,3) — ABANDONMENT — NONUSER.

Under the Highway Law, § 234, providing that "every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway," where a highway crossing a railroad track had been blocked at one end for more than six years by a building, and there had been no travel thereon by vehicles during such time, and the travel by pedestrians over the same had not proceeded along a defined path, such highway had ceased to exist.

2. HIGHWAYS ⇐79(2,3) — ABANDONMENT — NONUSER EXCEPT BY TRESPASSERS UPON RAILWAY TRACK.

Under Highway Law, § 234, where a highway crossing a railroad track had not been used for over six years except by pedestrians who, instead of crossing, walked upon the track in violation of Railroad Law, § 83, and in no well-defined path, the highway was abandoned.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Town of Leray against the New York Central Railroad Company. From a judgment of the Appellate Division (177 App. Div. 944, 164 N. Y. Supp. 234) affirming by a divided court a judgment of the Special Term for plaintiff, defendant appeals. Reversed, and new trial granted.

Francis E. Cullen, of Watertown, for appellant.

F. B. Pitcher, of Watertown, for respondent.

CARDOZO, J. This is an action for an injunction to restrain the obstruction of a highway.

Early in the nineteenth century, Pearl street in the village of Evans Mills was opened to public travel. Its course lay east and west. The right of way of the Potsdam & Watertown Railroad Company, the defendant's predecessor, was acquired in 1854, and the tracks, running north and south, crossed Pearl street at right angles. At first, there was no interference with public travel. The railroad, in building its roadbed, lowered the grade two or three feet, but planks were laid between the rails, and a wooden bridge supplied a means of descent from the roadway to the grade. In 1870, there was a change. On the west side of the tracks, the defendant built a freight house, which spanned the street from side to side, and barred travel to the west. The crossing remained, but there was no highway beyond. In 1891, there was another change. The defendant tore up the planks between the rails, and demolished the bridge. Since then, the crossing has been impassable or substantially impassable for vehicles or teams. If any use continued, it was by pedestrians only. A few feet north of the freight house is the railroad station, and back of the station are stores and a hotel. Pedestrians passing through Pearl street continued to cut across the tracks to reach those points of destination. In doing so they made a beaten pathway down the bank. After descending to the tracks, they followed no defined course. Some went straight across, and then along the tracks to the side. Others, and probably most, crossed the tracks diagonally, and thus to the station or beyond. All exposed themselves to the risk of injury from passing trains. In 1909, the defendant, anxious to avert this danger, built a wire fence across Pearl street along the easterly side of its right of way. The plaintiff complains of that obstruction. The trial judge permitted the defendant to bar the approach of vehicles, but required it to construct a gate or opening for the convenience of pedestrians. The Appellate Division affirmed by a divided court.

[1] We think that Pearl street has been discontinued as a highway between the lines of the defendant's roadway. Section 234

of the Highway Law (Consol. Laws, c. 25) provides that—

"Every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right of way that shall not have been used for said period shall be deemed abandoned as a right of way."

There has been no travel to the west of the tracks since 1870. That has been made impossible by the construction of the freight house. Indeed, the trial judge has found that, from that point to the west, the highway has been extinguished. The only question is whether there has been any use as a highway of the space between the tracks. It is admitted that since 1891 there has been no such use by teams or vehicles. The planks between the rails, and the bridge that supplied a means of descent from the street to the lowered grade, have been removed, and all the visible tokens of a highway crossing have been destroyed. Pedestrians, it is true, have continued to cross the tracks at times; but we think they have done nothing that will keep the highway alive. They have not followed the lines of the ancient street. They have climbed down the bank and then scattered in all directions. We have held that an unobstructed sidewalk may preserve a highway, though vehicles are barred. *Mangan v. Village of Sing Sing*, 26 App. Div. 464, 467, 50 N. Y. Supp. 647, affirmed on opinion below, 164 N. Y. 560, 58 N. E. 1089. But travel in such cases proceeded along defined and constant lines. The pathway was narrowed, but it was used as streets are used. That is not the situation here. There may have been a use, but not a use "as a highway." If a pole or a fence had been placed across the road, pedestrians might have clambered under or over, and made their way to the tracks. Use "as a highway" involves something more. Travel must proceed, in forms reasonably normal, along the lines of an existing street. *City of New Rochelle v. New Rochelle Coal & Lumber Co.*, 224 N. Y. 696, 121 N. E. 270; *Barnes v. Midland R. R. Terminal Co.*, 218 N. Y. 91, 98, 112 N. E. 928, and cases there cited.

[2] That there was no such travel here is plain. It becomes still plainer when we recall the provisions of section 83 of the Railroad Law (Consol. Laws, c. 49). That section provides that—

"No person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same."

It could not be necessary to cross these tracks, for after crossing them the traveler could not go anywhere without walking along the tracks, and thereby breaking the law.

That situation has continued since 1891. Since that time at least, travel at the crossing has been irrespective of highway lines and for purposes that have no relation to legitimate highway uses. With the wisdom of the rule laid down in section 224 of the Highway Law we have no concern. The rule is there, and we must enforce it sensibly and fairly.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, C. J., and COLLIN, CUDDEBACK, POUND, CRANE, and ANDREWS, JJ., concur.

Judgment reversed, etc.

(226 N. Y. 94)
MORGAN MUNITIONS SUPPLY CO., Inc., v.
STUDEBAKER CORPORATION
OF AMERICA.

(Court of Appeals of New York. March 21, 1919.)

1. NAMES \S 10—USING FALSE NAME.

Where one falsely assumed name of another and entered into a contract in the name of such other person, there was no valid contract.

2. PLEADING \S 87 — DEFENSES — MODE OF PLEADING.

Matter which would be sufficient under a general denial loses none of its efficacy by being pleaded as a defense.

3. NAMES \S 10—USING FALSE NAME—EFFECT OF ILLEGALITY.

One who obtains employment in violation of Pen. Law, \S 939, by falsely giving name of a third person, cannot recover on the contract for services rendered.

4. CONTRACTS \S 138(1) — BREACH OF PENAL LAW.

The law of contracts is no more vital than the Penal Law, there being no degrees in legal obligations, and the courts will not enforce a contract where in doing so they would uphold violation of a Penal Law.

5. PLEADING \S 194(4) — DEFENSES—DEMUR-
RER.

In an action on a contract for commissions for obtaining business, where defendant in one defense pleaded that there was no contract in that plaintiff had falsely assumed the name and honors of a third person when entering into the contract, a demurrer to a second defense praying for a rescission of the contract should be sustained; the facts pleaded being the same as in the first defense.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Morgan Munitions Supply Company, Incorporated, against the Stude-

baker Corporation of America. From an order of the Appellate Division (180 App. Div. 530, 168 N. Y. Supp. 37) affirming an order of the Special Term overruling demurrer to the first defense in the answer and reversing that part of the order which sustained demurrer to a second defense, the plaintiff appeals. Affirmed in part, and reversed in part.

See, also, 182 App. Div. 890, 168 N. Y. Supp. 1120; 183 App. Div. 928, 169 N. Y. Supp. 1105.

James A. O'Gorman, of New York City, for appellant.

Alfred Gregory, of New York City, for respondent.

CRANE, J. The appeal is from an order overruling demurrers to the new matter set up as defenses to the cause of action set forth in the complaint.

The plaintiff in its pleading alleges that in the month of September, 1914, at New York City, the defendant entered into an agreement with one Hill G. Morgan authorizing and requesting him to negotiate sales with and obtain orders from the governments engaged in the war, and promised to pay him a commission of 5 per cent. upon the purchase price of all the goods sold by the defendant as the result of his efforts. It further alleges that on or about the 15th day of November, 1914, as the result of the efforts of said Hill G. Morgan, the defendant sold to the government of Great Britain artillery harness and saddles, and received the sum of \$16,500,000 in payment, of which Hill G. Morgan's share according to his contract was \$825,000. Demand is made for the amount. This action is brought by the plaintiff as the assignee of the said Hill G. Morgan.

The supplemental answer sets up two defenses, the first showing that no contract was made, or else that the contract made cannot be enforced for illegality, and the second alleging facts as and for a rescission of any contract of employment.

As to the first defense: This states that Hill G. Morgan was a retired colonel in the English army, of known and distinguished reputation, having served with Lord Kitchen in Egypt and South Africa, and at the time in question was the administrative member of the British war office for the supply of forage to the troops over sea and home. Francis Curtis Morgan, it is alleged, was a brother of Hill G. Morgan, and illegally impersonated him, by representing in writing to the defendant that he was Hill G. Morgan, and could by his connections stated secure the contracts for the purchase of supplies. The answer then states that these representations were made by Francis Curtis Morgan to obtain employment from the defendant; that the defendant relied upon

them in employing Francis Curtis Morgan in the name of and as Hill G. Morgan. In substance the answer is that the contract set forth in the pleading was not made with Hill G. Morgan, but with one Francis Curtis Morgan, posing and impersonating Hill G. Morgan.

Two legal conclusions follow from this defense:

[1] 1. That no such contract was made as the plaintiff alleges; for, if the facts of the defense be true, the plaintiff could not recover upon a contract made apparently and supposedly, but not in fact, with Hill G. Morgan. If the defendant in form contracted with Hill G. Morgan when there was no Hill G. Morgan in the transaction, but somebody else who falsely assumed his name and honors, there would be no contract. This is not a matter of mere name; it embodies the identity of a living person whom the defendant was led to believe it was negotiating with. Any other name and person will not do. We say nothing about quantum meruit, as it is not here before us.

It will be noted also that there is no agency express or implied in the answer.

[2] Some of my Associates are of the opinion that this defense was unnecessary, as under the general denial the defendant could prove that there was no contract with Hill G. Morgan as stated in the complaint. Even if this be so, the matter set forth is a good defense and does not submit to demurrer. Matter which would be sufficient under a general denial loses none of its efficacy by being pleaded as a defense.

[3, 4] 2. The facts pleaded in this defense would bar Francis Curtis Morgan from recovering upon the contract in his own name or the name of Hill G. Morgan, because of his violation of section 939 of the Penal Law (Consol. Laws, c. 40), which reads:

"A person who obtains employment * * * by * * * any false statement in writing, as to his name, residence, previous employment or qualification, * * * is guilty of a misdemeanor."

As held by the Appellate Division in this case, a contract procured by the commission of a crime is unenforceable even if executed (citing *Sirkin v. Fourteenth Street Store*, 124 App. Div. 384, 108 N. Y. Supp. 830). The illegality does not consist in the approach to the contract, as stated in *Cody v. Dempsey*, 86 App. Div. 335, 83 N. Y. Supp. 899, as Morgan could not establish his case upon the contract without proving its illegal nature. No person can maintain an action to which he must trace his title through his own breach of the law. *Hall v. Corcoran*, 107 Mass. 251, 260, 9 Am. Rep. 80.

The leading case upon this subject is *Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, where it was held that a vendor could not

recover for the price of wall paper sold and delivered, as to enforce the claim would be to aid in the execution of an agreement in restraint of trade.

In proving the contract it would be necessary for the plaintiff, if the matter set forth in this defense be true, to show that its assignor violated the Penal Law, and the courts in enforcing the contract would be using the violation of one law to sustain another. The law of contracts is no more vital than the Penal Law, as there are no degrees in legal obligations.

[6] As to the second defense, however, we think the demurrer should have been sustained, as the matter is neither necessary nor sufficient for a rescission. The facts pleaded are the same as those set forth in the first defense, with the additional statement that the services of Francis Curtis Morgan were of no value to the defendant, and that the defense is interposed "as and for a rescission of any contract of employment made between it and said Francis Curtis Morgan."

What has been said above may be here repeated as to this defense. The complaint alleges no contract with Francis Curtis Morgan. The only ground for rescission is that the person the defendant contracted with falsely represented himself to be Col. Morgan of the British army; that the agreement was intended for the colonel, not an imposter. If this be so, there was no contract, as heretofore stated. The facts pleaded for a rescission go further, and show that there could be no contract to be rescinded.

The pleading, therefore, was demurrable in this respect.

This conclusion renders it unnecessary for us to consider whether the defendant under these circumstances should have pleaded the rescission as a defense as matter of law or have set it forth as a counterclaim in equity, asking for rescission. *Gould v. Cayuga County National Bank*, 86 N. Y. 75, 79, 81, 84.

It might be well, however, to mention that in the case of *Schank v. Schuchman*, 212 N. Y. 352, 106 N. E. 127, the plaintiff was suing for a sum of money—excessive and illegal charges—whereas in a case where the plaintiff asks for a rescission and desires to return the value of services which cannot be determined without judicial aid he generally must resort to a court of equity for relief.

For the reasons above stated, we affirm so much of the Appellate Division's order as overrules the demurrer to the first defense, with leave to withdraw said demurrer, and reverse so much of the order as overrules the demurrer to the second defense. We sustain the demurrer to the second defense, without costs in this court or in the Appellate Division to either party. The first question certified should be answered in the affirmative, and the second in the negative.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, and McLAUGHLIN, JJ., concur.

Ordered accordingly.

(236 N. Y. 185)

KAVANAUGH v. KAVANAUGH KNITTING CO., Inc., et al.

(Court of Appeals of New York. April 8, 1919.)

1. CORPORATIONS §610(2) — DISSOLUTION—RESOLUTION OF BOARD.

Gen. Corporation Law, § 221, contemplates that corporate directors shall proceed at a meeting in good faith and through honest belief that calling for stockholders' meeting to vote on dissolution is "advisable" and will be beneficial and profitable to the corporation and stockholders, and they cannot consider their personal wishes, comfort, or advantage.

2. CORPORATIONS §620—ACTION TO ENJOIN DISSOLUTION—COMPLAINT—TIME LIMIT OF CORPORATION.

Though a complaint by a minority stockholder of defendant corporation seeking to enjoin individual defendants as directors and majority stockholders from continuing proceeding for dissolution does not allege its duration as limited in certificate of incorporation pursuant to the Business Corporation Law, § 2, it is sufficient if its allegations clearly support the inference and the briefs and arguments of the counsel assume that its time limit had not expired.

3. CORPORATIONS §307 — DIRECTORS—RELATION TO STOCKHOLDERS—RELATION OF TRUST—GOOD FAITH.

The relation of corporate directors to stockholders is essentially that of trustee and cestui que trust, and the directors are bound to conscientious fairness, morality, and honesty in purpose, and held, in official action, to the extreme measure of candor, unselfishness, and good faith.

4. CORPORATIONS §610(1) — DISSOLUTION—BOARD OF DIRECTORS — GOOD FAITH — UNLAWFUL AND OPPRESSIVE ACTS.

The law, ordinary justice, and sound business policy require that the existence of a corporation should not be attacked, within the period fixed by its charter, by its board of directors acting in bad faith, fraudulently or through intent to punish or oppress a stockholder because he defends himself in the courts or otherwise against their illegal and unfair acts.

5. CORPORATIONS §610(2) — DISSOLUTION—STOCKHOLDERS—GOOD FAITH.

Equity recognizes that the stockholders are the proprietors of the corporate interests, and are ultimately the only beneficiaries thereof, and managing stockholders are bound to determine and control the question of corporate dissolution under Gen. Corp. Law, § 221, in regard to which

they occupy a relation of trust as between themselves and the corporation, and are burdened and restricted by fiduciary obligations.

6. CORPORATIONS §610(2) — DISSOLUTION—DUTIES OF STOCKHOLDERS—BAD FAITH—INDIVIDUAL ADVANTAGE.

In taking corporate action under Gen. Corporation Law, § 221, to dissolve a corporation, the stockholders are acting for the corporation and for each other, and they cannot use their corporate power in bad faith or for their individual advantage or purpose.

7. CORPORATIONS §610(2) — DISSOLUTION—DUTY OF STOCKHOLDERS AND DIRECTORS—BAD FAITH.

While the consent of those who constitute the board of directors, expressed at a meeting of stockholders held under the statute, in favor of dissolution, will effect it, they being majority of stockholders, the trust relation will rest upon them in the stockholders' meeting, and will be violated in the absence of restraint by bad faith, self-interests, and wrongful intent.

8. CORPORATIONS §620 — DISSOLUTION — FRAUD OF MAJORITY STOCKHOLDERS—EQUITABLE RELIEF TO MINORITY STOCKHOLDERS.

Courts cannot pass upon the question of expediency of the dissolution of a corporation, which is a matter for the board of directors and stockholders to decide, but they will, when the facts presented in an appropriate action demand, adjudge whether the directors and majority stockholders have acted in good faith, and grant equitable relief where they were acting in bad faith, fraud, or in breach of trust.

9. CORPORATIONS §620—DISSOLUTION—ENJOINING DISSOLUTION—COMPLAINT—SUFFICIENCY.

A complaint by a minority stockholder alleging that directors composing the majority of stockholders were proceeding for dissolution of the corporation through bad faith, and for personal ends and in violation of trust, held sufficient to state a cause of action to prevent the dissolution by injunction.

Appeal from Supreme Court, Appellate Division, Third Department.

Suit by George W. Kavanaugh against the Kavanaugh Knitting Company, Incorporated, and others. From an order of the Appellate Division (184 App. Div. 650, 172 N. Y. Supp. 576) which affirmed an order of the Special Term granting defendants' motion that judgment be rendered in their favor upon the pleadings, and dismissing the complaint, the plaintiff appeals by permission. Orders reversed, motion denied, and questions certified answered in affirmative.

See, also, 172 N. Y. Supp. 900; 173 N. Y. Supp. 911.

A. S. Gilbert, of New York City, for appellant.

Edgar T. Brackett, of Saratoga Springs, for respondents.

COLLIN, J. The plaintiff a minority stockholder in the defendant corporation, seeks a judgment enjoining the individual defendants, as directors of and majority stockholders in the corporation, from continuing the proceeding instituted, by the resolution of the directors, under section 221 of the General Corporation Law (Consol. Laws, c. 23) to dissolve the corporation and declaring void the resolution. The Special Term, upon the application of the defendants, made upon the pleadings by its order, which the Appellate Division has affirmed, dismissed his complaint. The question certified to this court by the order of the Appellate Division permitting the appeal is: "Does the complaint state facts sufficient to constitute a cause of action?"

The facts alleged in their substance and effect are: In December, 1912, the plaintiff and the defendants Kavanaugh organized, under the laws of this state, the defendant corporation, as a business corporation, with themselves as equal owners of the authorized 3,000 shares of its capital stock, and its sole directors. Such ownership of the stock shares has remained except the defendant Frederick W. Kavanaugh transferred on February 28, 1918, 5 shares to the defendant Button, qualifying him for directorship. The corporation has been exceedingly prosperous. Charles H. Kavanaugh has continuously been its president, Frederick W. Kavanaugh its secretary and treasurer until February, 1918, and, until May, 1917, the plaintiff its vice president. In May, 1917, at a special meeting of the stockholders, caused by the defendants Kavanaugh to be called for the purpose, the by-laws were so amended as to provide that a majority, instead of all, as originally provided, of the directors should constitute a quorum at any meeting of the directors, and the board of directors by a majority vote could remove any officer of the company, either with or without cause, at any regular or special meeting of the board. The last provision was adopted by the votes of the defendants Kavanaugh with the avowed purpose of forcing the plaintiff to resign, under threat of removal, from the office of vice president. The plaintiff thereupon resigned as vice president. At a regular meeting of the board of directors in June, 1917, the defendants Kavanaugh adopted a resolution whereby the compensation of each of the president and the secretary and treasurer was fixed at 20 per cent. of the corporate net earnings to date from January 1, 1917, before charging of any sum for depreciation of corporate property, that is, for the year 1917 at \$89,528.20. The plaintiff had no knowledge or notice of the adoption of this resolution until about January 30, 1918. At the annual meeting of the stockholders in January, 1918, the defendants Kavanaugh elected the individual defendants directors. The defendant

Button then was not a stockholder in, and for some years previous had been a book-keeper for, the corporation. Thereupon Frederick W. Kavanaugh was elected vice president and treasurer and Button secretary of the corporation, and the compensation to the president, Charles H. Kavanaugh, and to the treasurer, Frederick W. Kavanaugh, of the year 1917 was continued for the year 1918. Upon the demand of the plaintiff that the resolutions so fixing the compensation be rescinded, the defendants Kavanaugh caused a resolution to be adopted at a special meeting of the stockholders approving the resolutions fixing the compensation to Frederick W. Kavanaugh, except the compensation for 1917 should be calculated from June 11, 1917, instead of from January 1, 1917. Frederick W. Kavanaugh did not vote the 995 shares owned by him. The 5 shares transferred by him to Button and the 1,000 shares owned by Charles H. Kavanaugh were voted in favor of the resolution. The shares of the plaintiff were voted against it. No action was taken concerning the compensation of Charles H. Kavanaugh. The compensation so voted is unfair and unreasonable, and enormously greater than is paid for similar services by similar or greater corporations. On April 15, 1918, the plaintiff began an action in the Supreme Court against those who are the defendants in this action to secure a judgment which, among other things, would declare void the resolutions fixing, and enjoin the payment of, the compensation so voted, or any compensation in excess of such sum as represented the reasonable and fair value of the services rendered by Charles H. Kavanaugh and Frederick W. Kavanaugh respectively. On April 26, 1918, the individual defendants, at a meeting of the board of directors, instituted the proceedings provided by section 221 of the General Corporation Law to dissolve the corporation. The directors then well knew the corporation was exceedingly prosperous and making enormous net profits. The corporation had contracts on hand for the year 1918, the performance of which would call for practically the entire output of its plant, and the net profit would in all likelihood be equal to, if not in excess of, the net profit for the year 1917. The board of directors did not adopt the resolution instituting the dissolution proceeding as the result of or through a bona fide and honest consideration of the facts affecting the general interests of the corporation and its stockholders, but in affirmative bad faith and for the sole purpose of permitting the defendants Charles H. Kavanaugh and Frederick W. Kavanaugh to dissolve the same against the will and desire of the plaintiff and for the purpose of depreciating the value of the corporate property and of the plaintiff's proportional interest therein.

[1, 2] The provisions of section 221 of the

General Corporation Law, under which the board of directors of the defendant corporation have acted, are:

"Any stock corporation, except a moneyed or a railroad corporation, may be dissolved before the expiration of the time limited in its certificate of incorporation or in its charter as follows: 1. The board of directors of any such corporation may at a meeting called for that purpose, upon at least three days' notice to each director, by a vote of a majority of the whole board, adopt a resolution that it is in their opinion advisable to dissolve such corporation forthwith, and thereupon shall call a meeting of the stockholders for the purpose of voting upon a proposition that such corporation be forthwith dissolved."

The other parts of the section provide elaborately for the meeting of the stockholders; the filing in the office of the secretary of state the consent that such dissolution shall take place, "if at any such meeting the holders of two-thirds in amount of the stock of the corporation, then outstanding, shall, in person or by attorney, consent that such dissolution shall take place and signify such consent, in writing," and the effecting of the dissolution and the complete winding up of the corporate affairs. The complaint does not allege the duration in time of the corporation as limited in its certificate of incorporation, pursuant to the statute. Business Corp. Law (Consol. Laws, c. 4) § 2. The allegations, however, clearly support the inference, and the briefs and argument of counsel assume, that the time thus limited had not expired. The plaintiff does not complain concerning the regularity in form of the proceeding and the resolution of April 26, 1918. He avers that the resolution was adopted by the board of directors in bad faith and with and because of the intention to free the corporation of the plaintiff and of all right on his part in the business in which the corporation was engaged. We are therefore to consider at the outset whether or not the Legislature, in enacting the statute, intended that the directors shall proceed at the meeting of the board in good faith and in or through the honest belief that the action of the board is and will be beneficial and profitable to the corporation and stockholders.

[3, 4] The language of the statute, in connection with thoroughly established and familiar principles of law, begets the belief that the Legislature did so intend and enact. We do not deem it susceptible of the opposite meaning. It contemplates and enacts that the majority of the whole board shall be of the opinion, or in equivalent other words, shall believe upon the evidence within the range of their official duties, that it is advisable to dissolve the corporation forthwith. The meaning and effect of the word "advisable" in this statute is not uncertain. The dissolution of the corporation was not advisable unless

it was wise and prudent. That is "advisable" which is expedient, prudent, and proper to be done, and therefore proper to be advised to be done. Its synonyms, according to Webster, Worcester, and the Century Dictionary, are "expedient," "proper," "desirable," "prudent," "wise," "best." *Barrett v. Bloomfield Savings Institution*, 64 N. J. Eq. 425, 441, 54 Atl. 543. The directors, in reaching their belief, cannot consider or give weight to their personal wishes, comfort, or advantage. Whether or not the dissolution is wise or expedient for themselves as apart from the corporation or any or all of the other stockholders they can neither question nor determine. Their action must be based upon the belief that the interests and welfare of the corporation and the stockholders generally will be promoted by the dissolution. The belief may be erroneous or ill-founded, but it must be formed in good faith. These conclusions spring, through necessary implication, from the language and purpose of the statute, and are upheld by the established principles. It is inconceivable that the Legislature intended that the directors, in considering and adjudging the advisability of the dissolution, might consider and hold as a basis in whole or in part for their judgment their own individual desires or interests or the mere unfriendliness or antagonism between themselves and others of the stockholders. The prerogatives and functions of the directors of a private business corporation are sufficiently defined and established. The affairs of the corporation shall be managed by its board of directors. The relation of the directors to the stockholders is essentially that of trustee and *cuius est* trust. The directors are bound by all those rules of conscientious fairness, morality, and honesty in purpose which the law imposes as the guides for those who are under the fiduciary obligations and responsibilities. They are held, in official action, to the extreme measure of candor, unselfishness, and good faith. Those principles are rigid, essential, and salutary. *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113, 124, 100 N. E. 721. There is not in the language or context of, or in the conditions and circumstances surrounding, the enactment or purpose of the section 221 a word or fact which suggests that the Legislature intended the withdrawal of its provisions or the pursuant acts of the directors from those principles. Rather is it true that the language of the section clearly indicates, as we have already intimated, that the powers of the directors must be submissive to, and controlled by, them. The resolution of the board of directors, in order that it be legal, must be the embodiment in language of the opinion or judgment of the board, attained in good faith and through honest intention and endeavor, that, having in view the welfare and advantage of the corporation and the stockholders generally, it is wise and

expedient that the corporation be forthwith dissolved. The unwisdom or incorrectness of the opinion or judgment does not affect its validity or integrity. The fact that the dissolution may not be beneficial or may be injurious to a stockholder or stockholders because of reasons or facts not common to the stockholders generally need not be considered by the directors. The law, as well as ordinary justice and sound business policy, requires that the existence of the corporation should not be attacked, within the period fixed by its charter, by its board of directors acting in bad faith, fraudulently, or through the intent to punish or oppress a stockholder because he defends himself in the courts or otherwise against their illegal and unfair acts relative to the corporation or because of any other reason.

[5-7] In the case at bar the persons whose votes as directors adopted the resolution advising the dissolution of the corporation are stockholders holding two-thirds of the stock of the corporation. Undoubtedly no trust relation ordinarily exists between the stockholders themselves or between the stockholders and the corporation, because the stockholders ordinarily are strangers to the management and control of the corporation business and affairs. The directors, generally speaking, are the exclusive executive representatives of the corporation, and are charged with the administration of its internal affairs and the management and use of its assets. The ordinary trust relation of the directors to the corporation and stockholders is not a matter of statutory law, or of technical law. It springs from the fact that the directors have the control and guidance of the corporate business, affairs, and property, and hence of the property interests of the stockholders. Equity, at least, recognizes the truth that the stockholders are the proprietors of the corporate interests and are ultimately the only beneficiaries thereof. Those interests are, in virtue of the law, intrusted, through the corporation, to the directors, and from that condition arises the trusteeship of the directors with the concomitant fiduciary obligations. The section 221 imposes upon the stockholders the ultimate determination of the important question whether or not the corporation shall be dissolved forthwith. The stockholders are bound to determine and control this particular part of the corporate affairs, in regard to which they occupy a relation of trust as between themselves and the corporation, and are burdened and restricted by fiduciary obligations. When a number of stockholders constitute themselves, or are by the law constituted, the managers of corporate affairs or interests, they stand in much the same attitude towards the other or minority stockholders that the directors sustain generally towards all the stockholders, and the law requires of them the utmost

good faith. *Farmers' Loan & Trust Co. v. New York & Northern Railway Co.*, 150 N. Y. 410, 430, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; *White v. Kincaid*, 149 N. C. 415, 63 S. E. 109, 23 L. R. A. (N. S.) 1177, 128 Am. St. Rep. 663; *Ervin v. Oregon Ry. & Nav. Co. (C. C.)* 27 Fed. 625. In taking corporate action under the statute, the stockholders are acting for the corporation and for each other, and they cannot use their corporate power in bad faith or for their individual advantage or purpose. *J. H. Lane & Co. v. Maple Cotton Mills*, 226 Fed. 692, 141 O. C. A. 448. In the instant case the consent of those who constitute the board of directors, expressed at the meeting of the stockholders held under the statute in favor of the dissolution will effect it. Ordinary intelligence does not permit the presumption that they hold two contradicting and mutually destructive opinions or that they as stockholders would destroy the proceeding which they as directors had instituted. The trust relation will rest upon them in the meeting of the stockholders and will be violated, in the absence of restraint, by the bad faith, the self-interests, and wrongful intent which the complaint avers induced their action as directors.

[8] A court of equity will protect a minority stockholder against the acts or threatened acts of the board of directors or of the managing stockholders of the corporation, which violate the fiduciary relation and are directly injurious to the stockholders. The statute empowers the directors and stockholders, under the prescribed procedure, to dissolve the corporation. The plaintiff took his stock subject to the provisions of the statute. Judicial authority does not extend to enjoining the exercise of a right conferred by legislative authority. The courts cannot pass upon the question of the expediency of the dissolution; for that is the very question which the Legislature has authorized the board of directors and the stockholders to decide. They can, however, and will, whenever the facts presented to them in the appropriate action demand, inflexibly uphold and enforce, in accordance with established equitable principles, the obligations of the fiduciary relation. The good faith of the individual defendants is a proper and fundamental subject to be adjudged. Bad faith, fraud, or other breach of trust constitutes a foundation for equitable relief. *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113, 100 N. E. 721; *Schwab v. Potter Co.*, 194 N. Y. 409, 87 N. E. 670; *J. H. Lane & Co. v. Maple Cotton Mills*, 226 Fed. 692, 141 O. C. A. 448; *White v. Kincaid*, 149 N. C. 415 63 S. E. 109, 23 L. R. A. (N. S.) 1177, 128 Am. St. Rep. 663; *Cantwell v. Columbia Lead Co.*, 199 Mo. 1, 42, 97 S. W. 167; *Glenn v. Kittanning Brewing Co.*, 259 Pa. 510, 103 Atl. 340, L. R. A. 1918D, 738, Ann. Cas. 1918D, 769; *Gamble v. Queens County*

Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527.

In *Hawes v. Oakland*, 104 U. S. 450, 453 (28 L. Ed. 827), it is said:

"That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed."

[9] The respondents argue that the complaint fails to state a cause of action because it fails to state facts composing fraud on the part of the directors. In this they err. It is apparent that the cause of action sought to be alleged has not as a constituent deceit or actual fraud practiced and effected by the board of directors in regard to the corporation by which the plaintiff is to be wronged. The plaintiff's complaint is that the individual defendants who were the board of directors did not form the opinion that it was advisable to dissolve the corporation forthwith in good faith and through, honest intention and endeavor. We need not state a detailed analysis of the contents of the complaint. Obviously, facts are alleged which permit, if they do not compel, the inference that the directors conceived and progressed the scheme of dissolving the corporation, irrespective of the welfare or advantage of the corporation and of any cause or reason related to its condition or future, through the desire and determination to take from the corporation and to secure to themselves the corporate business freed from interference or participation on the part of the plaintiff. Moreover, allegations of the complaint are, in effect, that the judgment or opinion of the directors was not honest, their action was not the result of good faith, the exercise of an honest judgment, and an honest and unbiased consideration of any fact or circumstances affecting the general interests of the corporation and of all of its stockholders, and was in bad faith and for the sole purpose of permitting the individual defendants Kavanaugh to dissolve the corporation for the purpose of depreciating the value of the corporate property and the plaintiff's proportionate interest therein. Those allegations are matters of fact. Good faith or bad faith as the guide or the test of fiduciary conduct is a state or condition of mind—a fact—which can be proved or judged only through evidence. The intent or unconscientious indifference is the vitality of each.

Motive and intent are not in law synonymous. As was said by Judge Werner in *People v. Molinex*, 168 N. Y. 264, 297, 61 N. E. 286, 296 (62 L. R. A. 193):

"In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result."

See *People ex rel. Hegeman v. Corrigan*, 195 N. Y. 1, 12, 87 N. E. 792; *Baker v. State*, 120 Wis. 135, 97 N. W. 566.

Good faith or bad faith or intent when constituent and essential in a cause of action or defense is a fact and may be alleged and proved as such. *Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9; *Clift v. White*, 12 N. Y. 519, 538; *Fisk v. Inhabitants of Chester*, 74 Mass. (8 Gray) 506.

The orders should be reversed, with costs in all courts, and motion denied, with costs, and the questions certified answered in the affirmative.

HISCOCK, O. J., and CHASE, OUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

Orders reversed, etc.

(228 N. Y. 165)

PELLEGRINO v. CLARENCE L. SMITH CO.

(Court of Appeals of New York. April 8, 1919.)

1. MASTER AND SERVANT §190(14) — INJURIES TO SERVANT—FELLOW SERVANTS—FOREMAN'S ERROR OF JUDGMENT.

Where an employe engaged in excavating was injured by a falling stone, the foreman's act in assuring him there was no danger, without making any tests to ascertain its security, was evidence of negligence, although such act showed an error of judgment on the foreman's part.

2. MASTER AND SERVANT §190(16)—INJURIES TO SERVANT—FELLOW SERVANTS—MASTER'S DUTY OF INSPECTION.

Where an employe engaged in excavating was injured by a falling stone and it appeared that he notified the foreman that there were cracks about the stone, but the foreman without making any test told him there was no danger, the foreman failed in his duty of reasonable inspection.

3. MASTER AND SERVANT §289(4)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—RELiance ON SUPERIOR—QUESTIONS FOR JURY.

Where an employe engaged in excavating was injured by a falling stone which the foreman had assured him was safe, he was not guilty

of contributory negligence as a matter of law in relying on the judgment of his superior, who had been engaged in the business for 16 years.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Cesidio Pellegrino against the Clarence L. Smith Company under the Labor Law. From an order of the Appellate Division reversing a judgment for plaintiff and granting a new trial (178 App. Div. 930, 162 N. Y. Supp. 1135), plaintiff appeals. Order of Appellate Division reversed, and judgment of Trial Term affirmed.

See, also, 172 App. Div. 922, 156 N. Y. Supp. 1138; 173 App. Div. 900, 157 N. Y. Supp. 1139.

Charles Oishei, of Buffalo, for appellant. Arthur K. Wing, of New York City, for respondent.

CARDOZO, J. This is an action under the Labor Law (Consol. Laws, c. 31) by workman against employer.

On September 22, 1913, the plaintiff was engaged in excavating for the foundations of a building. His hand was crushed by a stone which fell out of the wall as he worked. He had noticed cracks about the stone, and had called them to the attention of his foreman. They were 2½ or 3 inches wide. The foreman told him that there was no danger, and to go on with the work. Simple tests would have shown the insecurity of the stone. The foreman made none. A half hour after the assurance of safety the stone fell.

[1, 2] Those are the facts according to the plaintiff's evidence. Many of them are disputed, but the jury accepted the plaintiff's version. The Appellate Division reversed upon the ground that the foreman's conduct was evidence, not of negligence, but at the utmost of error of judgment. We do not share that view. Error of judgment there may have been, but error is not inconsistent with fault. The standard of diligence exacted is that of the typical prudent man. The individual must answer for the consequences when he falls below that norm *Maguire v. Barrett*, 223 N. Y. 49, 54, 55, 119 N. E. 79; *Mertz v. Conn. Co.*, 217 N. Y. 475, 477, 112 N. E. 166; *Williams v. Hays*, 143 N. Y. 442, 454, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743. A jury might fairly find that this foreman, however honest his error, had failed in his duty of reasonable inspection. Liability has heretofore been adjudged in other cases upon facts substantially the same. *Bitollo v. Bradley Contracting Co.*, 222 N. Y. 553, 118 N. E. 1052; *Campullu v. Bradley Contracting Co.*, 222 N. Y. 634, 118 N. E. 1053; *O'Rourke v. McMul-*

len-Snare & Triest, Inc., 222 N. Y. 719, 119 N. E. 1063; Mullahey v. Dravo Contracting Co., 211 N. Y. 583, 105 N. E. 1091.

[3] We cannot say that the plaintiff is chargeable as a matter of law with contributory negligence. He tells us that he relied upon the judgment of his superior, who had been engaged in the business for upwards of 16 years. Whether reliance was reasonable was a question for the jury. Rice v. Eureka Paper Co., 174 N. Y. 385, 66 N. E. 979, 62 L. R. A. 611, 95 Am. St. Rep. 585; Daley v. Schaaf, 28 Hun, 314; Seaboard Air Line Railway v. Horton, 239 U. S. 595, 600, 36 Sup. Ct. 180, 60 L. Ed. 458; McCabe & Steen Constr. Co. v. Wilson, 209 U. S. 275, 282, 28 Sup. Ct. 558, 52 L. Ed. 788.

The order of the Appellate Division should be reversed, and the judgment of the Trial Term affirmed, with costs in the Appellate Division and in this court.

HISCOCK, C. J., and CHASE, HOGAN, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order reversed, etc.

(226 N. Y. 61)

AMERICAN WOOLEN CO. OF NEW YORK
v. SAMUELSON et al.

(Court of Appeals of New York. March 18, 1919.)

1. ELECTION OF REMEDIES §1, 14—CHOICE BETWEEN CLAIMS OF RIGHT.

An election of remedies takes place when a choice is exercised between remedies which proceed upon irreconcilable claims of right, and when an election is made between such claims with full knowledge of the facts an action may not be maintained thereafter on the inconsistent claim.

2. ELECTION OF REMEDIES §3(3)—ACTION FOR FRAUD—ACTION ON CONTRACT.

An action to rescind a contract of sale on the ground of fraud and to recover goods alleged to have been sold in reliance upon fraudulent representations is inconsistent with an action on the contract of sale, and after disaffirming a contract of sale, and bringing a suit in replevin for the goods sold, the seller has no remedy on the contract of sale.

3. SALES §111—RESCISSION—RECOVERY FOR GOODS ACTUALLY USED.

Where a seller by its formal and unequivocal statement elected to rescind each sale made within a certain period, and to reclaim the goods, it elected to rescind the contract of sale, and cannot subsequently sue thereon for the price, though the rescission does not prevent it from recovering as on an implied promise to pay the value of goods delivered and used.

4. SALES §111—RESCISSION—TERMS OF CREDIT.

Rescission of a contract of sale included rescission of the terms of credit, which were a part thereof.

5. LIMITATION OF ACTIONS §46(9)—STATUTE OF LIMITATIONS—SALES.

As against a seller's claim, not based upon express contract, the statute of limitations commenced to run from each and every delivery and acceptance of merchandise.

6. LIMITATION OF ACTIONS §155(7)—PAYMENT BY ASSIGNEE OR BANKRUPTCY TRUSTEE.

Payment of a dividend by the assignee for creditors or the trustee in bankruptcy of the buyers of goods does not take the seller's right of action out of the statute of limitations as being in effect an acknowledgment of the debt by the buyers and a promise to pay it.

7. BANKRUPTCY §246—POWER OF ASSIGNEE OR TRUSTEE.

An assignee or trustee in bankruptcy has no power to represent the bankrupts except for the purposes of the Bankruptcy Act.

8. LIMITATION OF ACTIONS §110—BANKRUPTCY PROCEEDINGS AS TOLLING STATUTE.

Commencement of bankruptcy proceedings against the buyers of goods under the Bankruptcy Act of 1898 does not stop or toll the running of the statute of limitations against the seller's cause of action for the price.

9. BANKRUPTCY §363—ALLOWANCE OF CLAIM—EFFECT AS ADJUDICATION.

Where it does not appear that buyers of goods or either of them in any way examined claim filed by seller against their bankrupt estate, allowance of claim by bankruptcy court, though sufficient as a judgment for purposes of bankruptcy proceeding, was not an adjudication binding buyers and rendering them liable to seller.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the American Woolen Company of New York against Abraham J. Samuelsohn, otherwise known as Abram J. Samuelsohn, and Henry Samuelsohn, impleaded with others. From a unanimous judgment of the Appellate Division (176 App. Div. 946, 162 N. Y. Supp. 1110) on an order of that court overruling defendants' exceptions ordered to be heard in the Appellate Division in the first instance, denying their motion for new trial, and directing judgment for plaintiff for the amount of the verdict directed at the Trial Term, defendants appeal. Judgment reversed, and complaint dismissed.

This action was commenced March 29, 1915. The summons was served upon the defendants Abram J. Samuelsohn and Henry Samuelsohn, but not upon the other defendants. The complaint alleges:

"That between the 23d day of January, 1908, and the 20th day of February, 1909, the plaintiff

sold and delivered to the defendants certain goods, wares, and merchandise * * * of the agreed price and reasonable value of \$15,921.80, and that the defendants agreed to pay said sum therefor."

It further alleges a payment on account of \$6,607.55. The defendants for a defense allege that the plaintiff with full knowledge of all the facts relating to the sale and delivery of the goods, wares, and merchandise set forth in the complaint, elected to rescind and did rescind said sales. The defendants also allege that the cause of action set forth in the complaint did not accrue, nor did any part thereof accrue, within six years next preceding the commencement of the action.

The record shows that purchases of goods and merchandise were made from time to time during the time mentioned in the complaint, and that they were each made on four month's credit. The defendants were adjudged bankrupts February 25, 1909. Thereafter the plaintiff, by a proceeding commenced May 26, 1909, in the United States District Court, reclaimed certain specified goods and merchandise, a part of those so purchased by the defendants of the plaintiff. The value of the goods and merchandise so reclaimed was \$1,412.47.

Plaintiff in the petition in that proceeding alleged that it is the owner and lawfully entitled to the immediate possession of the goods and merchandise therein specifically described. It further alleged that on or about February 13, 1908, the defendants, "being then desirous of purchasing goods on credit from time to time from the American Woolen Company of New York, did thereupon make a statement in writing of the financial condition of said copartnership for the purpose of inducing the said American Woolen Company of New York to sell to the said bankrupts merchandise upon credit."

It further alleged that, in reliance upon said statement, it "did thereafter from time to time sell to said bankrupts cloth upon credit including the cloth sought to be recovered in this proceeding."

It further alleged that said statement was false, fraudulent, and deceitful in the particulars alleged, and that "upon the discovery of the fraud * * * which had been practiced upon it, and upon the 3d day of April, 1909, did elect to rescind the said sales made by it by reason of such fraud, and did demand possession of the said chattels" from the trustee in bankruptcy. The petition was denied by the defendants, but a decree was obtained by the plaintiff that the said goods described in the petition were its property, and that "title thereto never passed from the petitioners to the bankrupt, and that the said trustee has no interest therein or title thereto."

On February 21, 1910, the plaintiff made proof in the bankruptcy proceeding of a claim against the bankrupt of \$18,108.02,

"subject to reduction for any goods that may be reclaimed, returned, or stopped in transitu, details of which are not known to this creditor at this time." The amount was, by stipulation, reduced by the sum of \$773.75, and the value of the goods reclaimed, viz \$1,412.47, was credited thereon. The claim was thereupon duly allowed by the trustee in bankruptcy at \$15,921.80. On March 31, 1911, dividends were paid on the claim in the bankruptcy proceeding amounting to \$6,607.55.

On the trial of this action both parties moved for judgment. The action was commenced more than six years after the last alleged purchase and delivery of goods and merchandise mentioned in the complaint, but the court found, in substance, that goods and merchandise of the alleged value of \$4,501.29 were purchased and received by the defendants of the plaintiff within six years and four months (four months being the alleged credit given on each sale) prior to the commencement of this action, and deducted therefrom all of the amount of \$773.75, which by stipulation was deducted from the claim presented in the bankruptcy proceeding, and also all of the \$1,412.47, the value of the goods and merchandise reclaimed, and directed judgment against defendants for \$2,315.07.

From the judgment entered thereon the plaintiff did not appeal. The defendants appealed to the Appellate Division, where the judgment was unanimously affirmed.

Isaac Adler, of Rochester, for appellants.
Glenn L. Buck, of Rochester, for respondent.

CHASE, J. (after stating the facts as above). [1] An election of remedies takes place when a choice is exercised between remedies which proceed upon irreconcilable claims of right.

When an election is made between such claims, with full knowledge of all the facts, an action may not thereafter be maintained upon the inconsistent claim. *George v. Texas Co.*, 225 N. Y. 410, 122 N. E. 238; *Mills v. Parkhurst*, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472; *Droege v. Ahrens & Ott Mfg. Co.*, 163 N. Y. 466, 57 N. E. 747.

[2] An action to rescind a contract of sale on the ground of fraud and to recover goods alleged to have been sold in reliance upon fraudulent representations is inconsistent with an action on the contract of sale. *Reed v. McConnell*, 133 N. Y. 425, 435, 31 N. E. 22.

After disaffirming a contract and bringing a suit in replevin for the goods sold, a party has no remedy on the contract of sale. *Wallace v. O'Gorman*, and cases cited; s. c., 53 Hun, 638, 6 N. Y. Supp. 890, affirmed on opinion below, 126 N. Y. 638, 27 N. E. 411.

The petition of the plaintiff in the proceeding described in the record by which it sought to reclaim certain goods delivered to the

trustee in bankruptcy expressly asserts that there were fraudulent representations made to induce the sales by the plaintiff to the defendants, and that, commencing on or about the 6th of August, 1908, and continuously to the 6th of February, 1909, the plaintiff, in reliance upon such fraudulent representations, sold to the bankrupts goods and merchandise consisting of cloth, including the particular pieces thereof sought to be reclaimed. It thus appears that the goods reclaimed were not purchased pursuant to an alleged separate and independent fraudulent contract relating only to the goods so sought to be reclaimed, but that such goods and merchandise were included in the sales from time to time during the time mentioned. The goods reclaimed were that part of the goods and merchandise sold during the time mentioned which remained in the hands of the bankrupts unused when the bankruptcy proceeding was commenced.

The court, in connection with directing judgment for the plaintiff, expressly found "that the goods which were subject to reclamation proceedings were a portion of the goods covered by the contracts of sale of which the goods mentioned in the complaint were also a part."

[3, 4] The plaintiff by its formal and unequivocal statement elected to rescind each and every sale made to the defendants within the time mentioned. The plaintiff succeeded in its claim that title to the goods did not pass to the defendants. It having elected to rescind the contract by which the sales were made, it must abide the consequences. The rescission of the contract of sale does not prevent the plaintiff from recovering as upon an implied promise to pay the value of the goods delivered to the defendants and actually used by them. The plaintiff cannot, however, recover therefor upon the express contract of sale which it has rescinded. The rescission of the contract of sale includes a rescission of the terms of credit which were a part thereof.

In the Wallace Case that we have mentioned the court refused, after a replevin action had been commenced to recover possession of a portion of goods remaining unsold of purchases made from time to time in reliance upon a fraudulent representation as to the purchaser's financial responsibility, to enforce an agreement for security, a part of the original contract, even as to the value of goods which the plaintiff was unable to recover in the replevin action. It was held that the agreement to sell and the agreement to give a mortgage to secure the purchase price of the goods sold were part of a single contract or transaction. So in this case the agreement to sell and the agreement to give a credit to the purchasers were part of one contract or transaction. The plaintiff cannot rescind the contract and act thereon and subsequently assert any right or advantage

from the provisions of the contract as if in full force and effect.

[5] There is no claim in the complaint that the time when the purchase price of the goods or any of them mentioned therein became due was extended by a credit given on the sales alleged therein. Assuming that the plaintiff on the proof herein could have recovered on its complaint for any sales within six years and four months prior to the commencement of the action, its rescission of the contract of sale made it necessary for it to stand upon a claim for the value of the goods had and received by the defendants from it, and prevents its recovery upon the express contract which it has repudiated. As against a claim not based upon the express contract, the statute of limitations commenced to run from each and every delivery and acceptance of merchandise.

More than six years had expired prior to the commencement of this action since each and every delivery by the plaintiff and acceptance by the defendants of merchandise. The plaintiff cannot recover, therefore, unless:

(1) The payment of dividends on the plaintiff's claim by the trustee in bankruptcy is in effect an acknowledgement of the debt by the defendants and a promise to pay it.

(2) The institution of the bankruptcy proceeding stopped or tolled the running of the statute of limitations.

(3) The allowance of the claim by the trustee in bankruptcy at \$15,921.80 in 1910 was an adjudication binding upon the defendants as parties in the bankruptcy proceeding.

[6] Payment by a trustee in bankruptcy, like a payment by an assignee pursuant to a general assignment, is a duty pointed out by law. Neither his duty nor power includes authority to promise that the bankrupts or assignors will pay the residue of the debt. Such a payment by an assignee under a voluntary assignment for the benefit of creditors on account of a claim against the bankrupts does not take the case out of the statute of limitations. *Pickett v. Leonard*, 34 N. Y. 175. The same rule applies in the case of a payment by a trustee in bankruptcy.

[7] The assignee or trustee in bankruptcy has no power to represent the bankrupts except for the purpose of the Bankruptcy Act. *Moller v. Tuska*, 87 N. Y. 166, 170.

[8] The Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544), unlike that of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), does not contain a provision restraining a creditor from pursuing his claim against a bankrupt debtor until the question of his discharge has been determined. The commencement of the bankruptcy proceeding does not, therefore, stop or toll the running of the statute of limitations.

[9] A bankrupt is not required to examine claims presented in the bankruptcy court except when they are presented to him or unless ordered by the court or a judge thereof

for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town or village of his residence. Bankruptcy Law, § 7 (U. S. Comp. St. § 9591). It does not appear in the record before us that the defendants or either of them ever in any way examined the claim filed by the plaintiff against the bankrupt estate of the defendants. Upon such record the allowance of the claim, although sufficient and controlling as a judgment for the purpose of the bankruptcy proceeding (*Matter of John Osborn's Sons & Co., Inc.*, 177 Fed. 184, 100 C. C. A. 392, 29 L. R. A. [N. S.] 887; *National Bank of Commonwealth v. Mechanics' National Bank*, 94 U. S. 437, 24 L. Ed. 179), does not affect the question before us relating to the statute of limitations.

The judgment should be reversed, and the complaint dismissed, with costs in all courts.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, and ANDREWS, JJ., concur. CARDOZO, J., not voting.

Judgment reversed, etc.

(226 N. Y. 76)

FLAHERTY v. CRAIG, City Comptroller.

(Court of Appeals of New York. March 18, 1919.)

1. COUNTIES ⇐137—COURT ATTENDANTS—SALARIES—"OFFICER."

The justices of the Supreme Court in Kings county could not, under Judiciary Law, § 168, raise salary of a court attendant after it had been fixed by them for the ensuing year in accordance with Greater New York Charter, § 226 (as amended by Laws 1917, c. 258), and sections 230, 1542, 1583; the judges being "officers," within section 1542, charged with duty of incurring obligations, payable out of money raised by taxation in a county within the territorial limits of the city.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

2. COUNTIES ⇐137—COURT ATTENDANTS—SALARIES—"COUNTY CHARGE."

Judiciary Law, § 168, giving the justices of the Supreme Court the right to appoint an attendant and fix his salary, makes that salary by implication a "county charge" to be raised and paid in accordance with the provisions of the city charter; direct authority for making salaries of appointees county charges being found in sections 351, 352, 354.

Appeal from Supreme Court, Appellate Division, First Department.

Application by James Flaherty for a writ of mandamus against Charles L. Craig, as Comptroller of the City of New York. From

an order of the Appellate Division (184 App. Div. 428, 171 N. Y. Supp. 624), affirming an order of the Special Term, granting a motion for a peremptory writ requiring the Comptroller to audit the pay roll of relator containing an increase in his salary as Supreme Court attendant, the Comptroller appeals. Orders reversed.

See, also, 172 N. Y. Supp. 891.

The question presented is whether, under section 168 of the Judiciary Law, the justices in Kings county can raise an attendant's salary after it has been fixed by them for the ensuing year according to the methods detailed in the Greater New York charter for the raising and paying of county charges.

William P. Burr, Corp. Counsel, of New York City (Terence Farley, of New York City, of counsel), for appellant.

Meler Steinbrink and Hunter L. Delatour, both of Brooklyn, for respondent.

CRANE, J. [1] Section 168 of the Judiciary Law (Cons. Laws, c. 30) gives to the justices of the Supreme Court for the Second Judicial District, residing in Kings county, the power to appoint, and at pleasure remove, all clerks, attendants, messengers, and court officers in the Supreme Court in said county and the right to fix their compensation except where such compensation is fixed by law.

In accordance with the provisions of the New York City charter, the justices on July 13, 1917, submitted to the board of estimate and apportionment an estimate of the amount of expenditure required for 1918, including a statement of the salaries of the clerks, attendants, and other employes of the Supreme Court, Kings County. The relator's salary for the year 1918 was fixed therein at \$1,800.

On the 13th of December, 1917, the justices residing in Kings county, by resolution, increased the salary of the relator, as court attendant, from \$1,800 to \$2,000 per annum to take effect on the 1st day of January, 1918.

The board of estimate and apportionment on January 15, 1918, by resolution, recommended that a letter be directed to the justices asking them to rearrange their salary schedules so as to keep within the budgetary allowance and not make necessary the issuance of special revenue bonds to meet this and other salary increases. To the letter thus sent, a reply was received which stated in substance that it was impossible to rearrange the salary schedule of the court for the year 1918 so as to keep within the budgetary allowance as now fixed, and the justices therefore renewed their application for additional funds. No action having been taken, this proceeding was commenced on the 9th day of April, 1918, for a mandamus

compelling the comptroller to audit and allow the increase in relator's salary from January 1, 1918.

That the Supreme Court justices, under the Judiciary Law, had the right to fix the relator's salary without the acquiescence or approval, and beyond the control of the board of estimate or the board of aldermen, is not disputed. If the amount of increase had been included in the estimate for the year 1918, the board of estimate would have been required to include it in the budget for that year and the board of aldermen to adopt it. *People ex rel. O'Loughlin v. Prendergast*, 219 N. Y. 377, 114 N. E. 860.

It is claimed, however, on behalf of the city that as this increase of \$200 in the relator's salary was not included in the estimate and in the budget for the year 1918, and no appropriation made therefor, the comptroller cannot be compelled by mandamus to audit and allow the amount. On behalf of the relator, it is stated that the power to fix his salary also included the right to fix the time when an increase should take effect, and that this was not controlled or regulated in any way or limited by the provisions of the New York City charter (Laws 1901, c. 466).

No doubt the Supreme Court, as has been intimated in the opinion below, has certain inherent rights which it could use if necessary. If no provision were made for a courtroom, attendants, or equipment, no doubt the justices of the courts could procure these things by some appropriate measure; but the necessity has never arisen. The Legislature has always provided a means whereby the courts could exercise their functions, and it is well recognized that within reasonable limitations the Legislature may regulate these matters. There are various laws, commencing at an early day, providing for rooms, attendants, fuel, light, and stationery for the transaction of court business. Laws of 1848, c. 379. As to Kings county, attendants, messengers, and court officers were provided for by chapter 648 of the Laws of 1870; chapter 165 of the Laws of 1873; chapter 448, § 95, of the Laws of 1876; chapter 946, § 95, of the Laws of 1895; and by section 168 of the Judiciary Law (chapter 35 of the Laws of 1909, as amended by chapter 182 of the Laws of 1911, and chapter 826 of the Laws of 1913). In fact, the attendants and clerks have always been appointed in accordance with some statute relating to the matter, and the relator in this instance is dependent for his position upon the power conferred by the Judiciary Law.

The salaries of all these various appointees have generally been made county charges, and direct authority for this is found in the Judiciary Law (sections 351, 352, 354) as applicable to the counties of Queens and Richmond and for the County Court of Kings

County, all within the city of New York. The corporation counsel says that no such provision is made regarding the salaries of court clerks and attendants for the Supreme Court, Kings County, and that therefore these amounts are chargeable to the state and not to the city. All prior legislation has made these salaries county charges, and they have been recognized as such ever since the incorporation of the greater city. Considering the long-established practice, it will be assumed that the Legislature intended by section 168 of the Judiciary Law to charge the salaries as fixed by the justices of Kings county under that provision, to the county, the same as the salaries in Queens and Richmond were charged respectively to those counties and as previous acts had provided. Any radical change would have been distinctly stated.

But the question still remains whether or not the provisions of the charter, prescribing the method by which the salaries as county charges shall be raised and paid, applies to these clerks and attendants of the Supreme Court. We think that such is the intention of the Legislature. There is no question but that the Legislature, in giving the power to appoint the attendants, fix their salaries, and make the same a county charge, could also prescribe the method of payment. This has been done with reference to the attendant of the county of Richmond. His salary, fixed by the justices, residing in Richmond county, is subject to the approval of the board of estimate and apportionment of the city of New York in its discretion and shall be a county charge. The Legislature could have specifically directed that these salaries, which were county charges, should be treated like any other county or city charge and follow the procedure enacted in the charter of the city of New York. This is what we think must be the law when the charter is read in connection with the Judiciary Law.

[2] Section 168 of the Judiciary Law, giving the justices the right to appoint an attendant and fix his salary, makes that salary by implication a county charge to be raised and paid in accordance with the provisions of the city charter. The salaries of the clerks and attendants of the Supreme Court in Kings county, the County Court, and the Surrogate's Court, are all included in the city budget and paid out of the funds raised by taxation. How does the city proceed to determine the amount necessary to be raised to meet these various items? Section 226 of the charter (L. 1901, c. 466, amd. L. 1917, c. 258) provides as follows: Referring to the board of estimate and apportionment, it says:

"The said board shall annually between the first day of October and the first day of November meet, and make a budget of the amounts estimated to be required to pay the expenses of conducting the public business of the city of

New York, as constituted by this act and of the counties of New York, Kings, Bronx, Queens and Richmond for the then next ensuing year.

* * * In order to enable said board to make such budget, the presidents of the several boroughs, the heads of departments, bureaus, offices, boards and commissions shall, not later than August first, send to the board of estimate and apportionment an estimate in writing, herein called a departmental estimate, of the amount of expenditure, specifying in detail the objects thereof, required in their respective departments, bureaus, offices, boards and commissions, including a statement of each of the salaries of their officers, clerks, employees and subordinates."

Section 230 requires the board of estimate annually to include in its final estimate:

"Such sum as may be necessary to pay the salaries of county officers within the counties of New York, Kings, Queens and Richmond, and likewise all other expenses within said counties and each of them which are county as distinguished from city charges and expenses."

On or before the 20th day of October the board shall prepare and file with its secretary its proposed budget for the ensuing year. The budget must be sent to the board of aldermen, which may reduce the several items fixed by the board of estimate and apportionment, except such amounts as are fixed by law. Prior to December 25th in each year, the budget, as finally adopted, shall be certified to the mayor, and the several sums shall be and become appropriated to the several purposes therein named.

By section 1542 of the charter, it is provided that the expenses shall not exceed these appropriations. It reads:

"It shall be the duty of the heads of all departments and of all officers of said city, and of all boards and officers charged with the duty of expending or incurring obligations payable out of the moneys raised by tax in said city, or any of the counties contained within its territorial limits, so to regulate such expenditures for any purpose or object, that the same shall not in any one year exceed the amount appropriated by the board of estimate and apportionment for such purpose or object; and no charge, claim or liability shall exist or arise against said city, or any of the counties contained within its territorial limits, for any sum in excess of the amount appropriated for the several purposes."

Section 1583 also provides for auditing by the department of finance and paying, out of the funds applicable thereto, all county charges, expenses and salaries of county officers.

While it is true that the justices of the Supreme Court, Kings County, are not a part of the city government and are not the head of any city department, yet, within the meaning of section 1542, we think they are officers charged with the duty of incurring obligations payable out of the money raised by taxation in a county contained within the territorial limits of the city.

They have, in this very instance under section 168 of the Judiciary Law, attempted to create a county liability by fixing and increasing the relator's salary. The practical construction, which has been given to these charter provisions, has been to treat court clerks, and attendants, whose salaries were county charges, like other county employees so far as the method of their payment is concerned. The justices, like the heads of a department, have always made up from year to year an estimate in July in accordance with the provisions of section 226 above referred to. No reason exists, which we can appreciate, why these county salaries should not conform to a practice established by law for the raising of funds for all county charges of like nature and which is certainly reasonable and an avoidance of confusion. The money to meet all these fixed charges has to be raised by the city from year to year, and reason dictates that as far as possible there should be uniformity in the matter of payment.

We conclude therefore that the estimate made up in July of 1917, in the absence of some special legislation to the contrary, governed the salaries of court clerks and attendants for the year 1918, so that the comptroller cannot be compelled by mandamus to audit an increase in salary not included in the budget and for which no appropriation has been made.

The orders appealed from must be reversed, and the application dismissed, with costs in all courts.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, and McLAUGHLIN, JJ., concur.

Orders reversed, etc.

(226 N. Y. 163)

EDELSTEIN v. CONEY ISLAND & B. R. CO.

(Court of Appeals of New York. April 8, 1919.)

1. STREET RAILROADS \Leftrightarrow 117(29)—OPERATION—COLLISION WITH WAGON—CONTRIBUTORY NEGLIGENCE OF DRIVER.

Wagon driver who attempts to cross street car track while turning around in street with a car 200 feet away approaching at what seems to be a reasonable rate of speed and under reasonable control is not as a matter of law negligent because of failure to observe car as it approaches him from behind.

2. STREET RAILROADS \Leftrightarrow 114(15)—COLLISION WITH WAGON—ACTION FOR DAMAGES—EVIDENCE.

In wagon driver's action against street railroad for injuries upon being struck by car, driver's evidence that car was a distance of 200 feet when he first saw it and attempted to cross track is not so incredible as to be disregarded.

3. STREET RAILROADS \Leftrightarrow 117(11)—COLLISION WITH WAGON—NEGLIGENCE OF MOTORMAN.

Motorman who, upon seeing wagon truck entering upon track 200 feet ahead of him, continued to approach at a speed of 18 or 20 miles an hour and run down truck without attempting to check car, is not as a matter of law free from negligence.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Frederick Edelstein against the Coney Island & Brooklyn Railroad Company. From judgment of the Appellate Division (173 App. Div. 937, 158 N. Y. Supp. 1115) affirming judgment of the Trial Term dismissing complaint, plaintiff appeals. Reversed, and new trial ordered.

Barnett E. Kopelman, of New York City, for appellant.

Harold L. Warner, of New York City, for respondent.

ANDREWS, J. On the evening of December 31, 1913, the plaintiff was driving a one-horse covered truck, loaded with furniture, west along the north curb of De Kalb avenue, Brooklyn. To his left through the center of the street was the double-track trolley road of the defendant. Daylight had gone, but the street was lighted.

The building at which delivery of the furniture was to be made was on the south side of the avenue. When opposite it the plain-

tiff made a long turn so that he might draw up to the south curb facing the east. As he began this turn he saw a car approaching from the west on the south track. It was lighted and 400 feet away. How fast it was running plaintiff could not observe. Again he looked and saw it when the horse reached the south track. It was then 200 feet distant. In view of the plaintiff's offer to prove certain facts, we must now assume that, when the wagon itself or a part of it was on the south rail, the car was 60 feet away and running at a speed of 18 or 20 miles an hour.

[1-3] No attempt was made to stop the car. When the horse had partly cleared the south rail, it struck the right rear wheel of the truck, then the front wheel. The truck was pushed to the north of the track, and the plaintiff was thrown out and injured. Obviously, when struck, the truck must have been headed toward the southeast. This would be the effect of the "long turn" described by the plaintiff. Under such circumstances the dismissal of the complaint by the trial court and the affirmance of this action by the Appellate Division was erroneous. We cannot say that a driver attempting to cross a track with an approaching car 200 feet away, coming, as he has a right to assume, at a reasonable speed and under reasonable control, is negligent as a matter of law, because he again fails to observe it as it approaches him from behind. We cannot say that plaintiff's evidence as to seeing the car at that distance is so incredible that it may be disregarded. At the rate of 20 miles an hour the car would cover the space in six or seven seconds. Nor can we say that as a matter of law there was here no negligence on the part of the motorman; that, seeing a truck entering upon his track 200 feet ahead of him, he may approach it at a speed of 18 or 20 miles an hour and run it down without any attempt to check his car. As the result shows, it could have been stopped within 50 feet.

The judgment of the Appellate Division and of the Trial Term must be reversed, and a new trial ordered, with costs to abide the event.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, and POUND, JJ., concur.
McLAUGHLIN, J., not sitting.

Judgment reversed, etc.

\Leftrightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(123 Ind. 276)

SHARP v. STATE. (No. 23469.)

(Supreme Court of Indiana. May 8, 1919.)

1. CRIMINAL LAW §211(4) — AFFIDAVIT — RAPE—DENIAL OF RELATION OF HUSBAND AND WIFE.

An affidavit charging rape upon a child under the age of consent was not defective because not stating that child was not then the wife of the accused, though the statute on which affidavit was based makes no such exception.

2. CRIMINAL LAW §561(1) — REASONABLE DOUBT—SUBSIDIARY EVIDENCE.

The rule requiring state to prove the guilt of defendant beyond a reasonable doubt applies only to essential facts constituting the crime charged in the affidavit, and does not apply to proof of subsidiary facts which are not essential elements of crime, but which, if shown, tend to prove or disprove one or more of such essential elements.

3. CRIMINAL LAW §561(1) — REASONABLE DOUBT—EVIDENCE.

In determining whether the essential facts constituting the offense are established beyond a reasonable doubt, the jury may consider the whole of the evidence, as well as the want or absence of evidence, including evidence in support of the subsidiary facts.

4. CRIMINAL LAW §1172(2)—ERRONEOUS INSTRUCTION—REVERSIBLE ERROR.

In prosecution on an affidavit for rape upon a child under the age of consent, erroneous charge that reasonable doubt could not spring from mere evidentiary evidence was reversible error, where defendant's guilt was not so conclusively shown by the evidence that no other verdict than a conviction could have been rightfully rendered.

5. CRIMINAL LAW §561(2)—RAPE—PROOF—REASONABLE DOUBT.

In prosecution for rape upon a child under the age of consent, it was necessary to sustain a conviction that the state show beyond a reasonable doubt that prosecuting witness was under 16 at time of offense alleged.

Appeal from Circuit Court, Hamilton County; Ernest E. Cloe, Judge.

John Sharp was convicted of rape committed upon a child under the age of consent. His motion for new trial was denied, and he appeals. Reversed, with instructions to sustain motion for a new trial.

Albert C. Pearson, of Indianapolis, and Christian, Christian & Waltz, of Noblesville, for appellant.

Ele Stansbury and Dale F. Stansbury, both of Indianapolis, for the State.

LAIRY, J. Appellant was charged with the crime of rape committed against the person of a child under the age of consent. A trial by jury resulted in a judgment of

conviction, to reverse which this appeal is prosecuted.

It is asserted that the amended affidavit on which the judgment rests does not state facts sufficient to constitute a public offense, and that, for the reason stated, the trial court erred in overruling appellant's motion to quash the affidavit, and also in overruling his motion in arrest of judgment. This question is presented by the first and fourth assignments of error.

[1] The only particular in which it is claimed that the affidavit is defective is that it does not state that the child against whom the offense was committed was not at the time the wife of the accused. It is true that a husband cannot be guilty of the crime of rape by having carnal knowledge of his wife without her consent and against her will or on account of her being under the age of consent, or on account of her being insane, epileptic, or imbecile. In the definition of the offense as applicable to women who are insane, or who are idiotic or otherwise imbecile, the statute of this state expressly excepts the husband of such a woman from its operation; but as to other women against whom the offense may be committed it makes no such express exception with regard to the husband. The statute, however, cannot apply to the husband of the injured party in any case.

The question here presented relates to the manner in which the offense must be charged. Wharton states that the indictment need not allege that the female outraged was not the wife of the defendant, citing a number of decisions which sustain the text. Wharton's Crim. Law (11th Ed.) § 741. In the case of Commonwealth v. Fogarty, 8 Gray (Mass.) 489, 69 Am. Dec. 264, the court says:

"Nor was it necessary to allege that the prosecutrix was not the wife of the defendant. Such an averment has never been deemed essential in indictments for rape, either in this country or in England. The precedents contain no such allegations."

It may be shown as a defense that the woman against whom the offense is alleged to have been committed is the wife of the person who is charged with committing the rape, but it is not necessary to negative this fact in the indictment. Curtis v. State (1909) 89 Ark. 394, 117 S. W. 521; State v. Morrison (1912) 46 Mont. 84, 125 Pac. 649; State v. Williamson (1900) 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780; State v. White (1890) 44 Kan. 514, 25 Pac. 33. If the statute under which the indictment is drawn excludes from its operation the husband of a female against whom the offense may be committed, the indictment must conform to the statute in that particular. People v. Burk (1868) 34 Cal. 661; Cutler v. State (1914) 15 Ariz. 343, 138 Pac. 1048; People v. Stow-

ers (1912) 254 Ill. 588, 98 N. E. 986. The portion of the statute on which the affidavit in this case is based makes no such exception. The affidavit is sufficient.

[2, 3] Under his motion for a new trial which is assigned as error appellant presents objections to several instructions. The part of instruction No. 18 to which objection is made reads as follows:

"And by reasonable doubt is not meant a whim or capricious or speculative doubt; it is properly termed a reasonable doubt as distinguished from an unreasonable or speculative doubt, and it must arise from all the evidence relating to some material fact or facts charged in the affidavit, and not spring from mere subsidiary evidence. Such doubt may also arise from the absence of evidence as to material matters."

The objection is specifically directed to that part of the instruction which tells the jury that a reasonable doubt cannot spring from mere subsidiary evidence.

The rule which requires the state to prove the guilt of the defendant beyond a reasonable doubt applies only to the essential facts constituting the crime charged; but, the rule does not apply to the proof of subsidiary facts which are not essential elements of the crime, but which, if shown to exist, have a tendency to prove or disprove one or more of the constituent elements of the crime. *Wade v. State* (1880) 71 Ind. 535; *Hinshaw v. State* (1896) 147 Ind. 334, 47 N. E. 157. While it is not necessary to a conviction that such subsidiary facts be proven beyond a reasonable doubt, it is still the law that the essential facts which constitute the offense must be established by that degree of proof before a conviction is justified; and, in determining whether such essential facts are established beyond a reasonable doubt, the jury may consider the whole of the evidence as well as the want or absence of evidence. Can it be truly said that the jury cannot consider evidence adduced to prove a subsidiary fact in determining whether an essential fact is established beyond a reasonable doubt? If, after considering all the evidence in the case, the jury entertains a reasonable doubt as to any essential fact constituting an element of the offense, the defendant is entitled to an acquittal, whether such doubt arises from the evidence or the lack of evidence. In determining whether such a doubt arises from the evidence, the jury has a right to consider the whole evidence, and the defendant has a right to have the entire evidence so considered. The court cannot correctly exclude from the consideration of the jury, on such questions, the evidence adduced in support of subsidiary facts. If, after considering the entire evidence, the jury entertains a reasonable doubt as to the fact essential to constitute the offense, the defendant is entitled to the benefit of such doubt, even

though it arises from the consideration of evidence adduced in support of a subsidiary fact. The language to which the specific objection is made renders the instruction erroneous.

The trial court, in giving the instruction in question probably followed *Hauk v. State* (1897) 148 Ind. 238, 46 N. E. 127, 47 N. E. 465, where a similar instruction was approved by this court. The court in that case approved the language of the instruction on the authority of *Wade v. State* (1880) 71 Ind. 535, saying that the law as declared in the instruction was in accord with the law as stated in the case cited. The case cited goes only to the extent of holding that the rule requiring proof beyond a reasonable doubt in a criminal case applies to essential facts constituting the offense, and that the rule does not apply to proof of subsidiary facts. In this regard, the case was followed in *Hinshaw v. State*, supra. In the case of *Hauk v. State*, supra, the learned court failed to observe the distinction which clearly exists between the rule of law as stated in *Wade v. State*, supra, and the rule stated in the instruction under consideration.

Subsidiary facts need not be proved beyond a reasonable doubt to justify a conviction; it is the facts essentially necessary to constitute the crime which must be so proven; but a reasonable doubt as to such essential facts may arise from a consideration of evidence adduced in support of subsidiary facts. The court declines to follow the ruling in the case of *Hauk v. State*, supra, in so far as it approves the language of the instruction which is held in this case to constitute error. No authority is found to sustain the instruction other than that of *Hauk v. State*, supra, and that case has not been cited to the direct point under consideration in any later decision. A part of the evidence bearing on the question of reasonable doubt is excluded from the consideration of the jury by the statement that a reasonable doubt cannot spring from subsidiary evidence. It is true that by other instructions the jury was told that the entire evidence should be considered on the question of reasonable doubt, but these instructions are in conflict with that part of instruction 18 held to be erroneous. When the instructions are considered together, the jury was given a choice between truth and error, and this court has no means of knowing whether it followed the erroneous rule stated in instruction 18 or the correct rule stated in other instructions. *Burrows v. State* (1893) 137 Ind. 474, 37 N. E. 271, 45 Am. St. Rep. 210; *Hampton v. State* (1902) 160 Ind. 575, 67 N. E. 442.

[4, 5] The state contends that, even though the instruction in question be erroneous, the judgment should not be reversed, for the reason, as stated, that the guilt of appellant is shown so conclusively by the evidence that

no other verdict could have been rightfully rendered. The court is of the opinion that the evidence in this case is not of a character to justify the application of the rule which the state seeks to invoke. It is true that the evidence shows without dispute that the appellant had sexual intercourse with the prosecuting witness, but there is conflict in the evidence as to the date on which the first act of intercourse occurred. The prosecuting witness fixed the time as the 31st day of August, 1915, stating that it took place on a night when Mr. James Beam and his wife stayed all night at the house of defendant. Mr. Beam and his wife both testified that they stayed all night at the home of defendant only once while the prosecuting witness lived in his home, and that the time when this occurred was in the first part of April, 1916. The evidence shows without dispute that the prosecuting witness was born on the 10th day of January, 1900. It thus appears that, if the first act of intercourse occurred when the Beams stayed all night at defendant's house, and if that was in April, 1916, the prosecuting witness was not under 16 years of age at the time. To sustain a conviction, it was necessary for the state to prove beyond a reasonable doubt that the prosecuting witness was under 16 years of age at the time the act of intercourse relied on occurred. This was an essential fact constituting an element of the offense. As bearing on this fact, the jury had a right to consider the evidence of James Beam and his wife in connection with the other evidence in the case; and the defendant should have been acquitted, if the jury entertained a reasonable doubt as to whether the prosecuting witness was under or over the age of 16 years at the time the act was committed. The date on which James Beam and his wife stayed overnight in the home of appellant was a subsidiary fact, and the evidence bearing thereon was subsidiary evidence which, under the instruction held to be erroneous, the jury might well have excluded from consideration in so far as it had any bearing on the question of reasonable doubt. In view of the evidence, it cannot be said that appellant was so clearly guilty as to render the instruction harmless.

The judgment of the trial court is reversed, with instructions to sustain appellant's motion for a new trial.

(188 Ind. 697)

NATION et al. v. GREEN et ux. (No. 23329.)

(Supreme Court of Indiana. April 17, 1919.)

1. APPEAL AND ERROR §335 — IMPROPER DESIGNATION OF PARTIES—APPEAL STATUTE.

Under Acts 1917, c. 143, § 1, the erroneous designation of a party as appellant, instead

of appellee, did not justify the dismissal of the appeal for want of jurisdiction.

2. EXECUTORS AND ADMINISTRATORS §111(1) — COSTS OF ADMINISTRATION — RESIDUARY ESTATE.

The residuary estate is chargeable only with the ordinary and usual costs and expenses incident to the administration of decedent's estate.

3. TAXATION §890—INHERITANCE TAX—LIABILITY OF RESIDUARY ESTATE.

In view of Burns' Ann. St. 1914, §§ 10143e, 10143g, making inheritance taxes a lien on property taken by transferees and providing for collections from transferees by administrator, executor, or trustee, the residuary estate is not chargeable generally with the inheritance tax upon other transfers unless expressly so charged by the will.

4. TAXATION §905(1)—INHERITANCE TAX—COLLECTION—AGENCY OF EXECUTOR, ADMINISTRATOR, OR TRUSTEE—LIABILITY.

In the collection of the inheritance tax under Burns' Ann. St. 1914, § 10143e, the executor, administrator, or trustee does not necessarily act in his capacity as such, but as an agent named by the state to act for the state in making such collection, and is made personally responsible therefor.

5. TAXATION §80 — TAXES ON LAND — LIFE ESTATE—LIABILITY OF RESIDUARY ESTATE.

Where testatrix by will placed a deed described therein in which her minor foster daughter was grantee in the hands of her executors, reserving a life estate and providing that the land be held in trust after her death for the benefit of such grantee until she reached the age of 21, when the deed was to be delivered to grantee and convey the fee, the deed gave the child no present interest, so that taxes assessed on the land during deceased's life were chargeable to the residuary estate therein.

6. WILLS §677 — DEVISE TO EXECUTORS IN TRUST TO CHILD—DEED—VESTING OF PROPERTY.

Testatrix's deed to her minor foster daughter deposited with the trustees and her will describing the deed construed to create a trust taking effect after testatrix's death in favor of such daughter, such title vesting in executors in trust upon testatrix's death to go to the child from executors by delivery of deed to child on her attaining majority.

7. ESCROWS §1, 4—DEPOSIT—RELEASE OR RELINQUISHMENT OF DEED—DELIVERY.

The statement of the grantor, that a deed to devisee placing the property in trust with executors is released and relinquished, is only one element of an irrevocable escrow or deposit, but is not controlling when other facts show the absence of such a delivery as is another and necessary element of such deposit or escrow.

8. LIFE ESTATES §18—DUTY OF LIFE TENANT TO PAY TAXES — FAILURE TO RECEIVE INCOME — LIABILITY OF LAND FOR TAXES LEVIED DURING LIFE ESTATE.

A deed delivered to grantee during grantor's life containing no covenants of warranty

nor agreement as to taxes, and by which grantor retained a life estate and possession of land, merely required that the life tenant pay taxes assessed during her life provided she derived income therefrom sufficient, and, where there was no showing that she received any such income, the land was liable for taxes so assessed.

**9. EXECUTORS AND ADMINISTRATORS ¶11(1)
—EXPENSES—COSTS—TRUST ESTATE—MINOR
LEGATEE.**

Where the executors of a will, as such, were trustees holding the legal title to real estate to pass to testatrix's minor foster child upon her attaining 21 years, and in their capacity of executors and trustees incurred expenses in defending a petition of testatrix's divorced husband for appointment as guardian of such minor and for modification of the divorce decree, the costs are chargeable to the trust estate and not to the residuary legatees.

10. GUARDIAN AND WARD ¶11—APPOINTMENT OF GUARDIAN NOMINATED BY WILL.

A guardian nominated by will is entitled by statute to appointment over all others, but his appointment, duties, and powers are governed by the law regulating guardians not so nominated. Burns' Ann. St. 1914, § 3066.

Harvey, C. J., and Willoughby, J., dissenting in part.

Appeal from Circuit Court, Howard County; Joseph Combs, Special Judge.

Proceedings by William B. Green and wife, as executor and executrix of the last will of Lucinda E. Foreman, deceased, against Barbara Nation and others for the sale of real estate of testatrix to pay debts. From a judgment directing the sale for the payment of certain claims of the trustees, Barbara Nation and other defendants, residuary devisees, appealed to the Appellate Court, and the cause was transferred to the Supreme Court on petition. Judgment reversed, with directions.

Harness & Moon and W. C. Overton, all of Kokomo, for appellants.

Richard L. Ewbank, of Indianapolis, and Blackledge, Wolf & Barnes, of Kokomo, for appellees.

HARVEY, C. J. This cause was transferred to this court by the Appellate Court for want of jurisdiction in the latter. See opinion 116 N. E. 840.

[1] We concur in said opinion wherein it holds that the making of Mrs. Scherer an appellant, rather than an appellee, did not, and does not, justify the dismissal of this appeal.

Primarily, the question presented to the trial court was whether the sale of the real estate of decedent, Lucinda E. Foreman, to pay her debts, should be ordered.

As an element of this question, the court was called upon to determine whether certain obligations were debts of the decedent; whether others were incidental costs and expenses of administration; and whether the inheritance tax involved was chargeable to the residuary estate.

The facts specially found by the court are, in substance, that Lucinda E. Foreman, the decedent and testatrix, was the wife of and procured a divorce from William E. Wright; that the decree of divorce restored her name by a former marriage, Foreman, and granted her the care and custody of Wilma N. Wright, a child who had been adopted by Lucinda E. Wright and her then husband, William E. Wright. She was the only child of either, or both, and was when adopted 18 months of age, and was less than 6 years of age when this litigation took place.

Mrs. Foreman on the 30th day of March, 1914, executed a deed to her niece, Della Green, and her niece's husband, for 100 acres of land. This deed reserved to Mrs. Foreman the income from and possession of said land during her life; was conditioned for the support and care, if physical or mental disability of the grantor required, of the grantor and child until the latter became of age. This provision, so far as the child's interests were concerned, required all attention and care that parents would properly give such a child until she became of age, or earlier married.

Mrs. Foreman on the same day executed a deed to the child for another farm of 100 acres, and a will reciting the execution of both deeds, and the conditions of the deed to the Greens. The deed to the child and the will were delivered to the attorney who drew the same, the deed to be delivered to the executors of grantor's will, to be held by them and by them delivered to the child when she became of age, or destroyed in the event of the death of the child before coming of age.

The will contained a residuary bequest to the sister of the testatrix, Barbara Nation, appellant here, for life, and then to said sister's children.

The mentioned residuary property was another farm of 26½ acres and a residence in Greentown, all of said property being in Howard county, this state.

The will named the niece and husband as executors; directed that the real estate conveyed and devised to said child "be held by my executors until said Wilma N. Wright becomes twenty-one years of age; or if she dies before said age, then until her death, in trust for said Wilma N. Wright; and that all rents and profits and income of said one hundred acres of land * * * be used in

the care and support, maintenance and education of said Wilma N. Wright."

The will appointed said niece and her husband "as guardian of my foster-daughter, who shall have the control and management of her until she reaches" said age.

The will nominated and appointed said niece and her husband "as executor and executrix," and charged "them with the duty of carrying out and seeing that the provisions of" the will "are complied with."

The testatrix died within the following 20 days.

The will was probated and not questioned, except that an effort was made by said adopting father to prevent the provisions of the will from being carried into effect, as hereinafter stated.

The nominated executors qualified as such. They also applied for letters of guardianship. This application was resisted by the adopting father and divorced husband, Wright. He applied for letters of guardianship, and petitioned that the decree of divorce be so modified as to grant him the custody of his adopted child. This application and petition are resisted by the executors.

This appeal involves nothing pertaining to the rulings on the other petitions and proceedings. The only questions presented relate to the petition to sell real estate. Appellants' counsel say in their brief that—

"The whole litigation in this action arises out of the effort of these executors to unload upon the residuary legatees debts and expenses which should be borne by Green and Green as individuals, or as guardians of Wilma N. Wright."

Consistent with this statement we find the only errors and cross-errors assigned are upon exceptions to conclusions of law as to such matters.

[2] No. 1 of the court's conclusions charges the residuary estate with "costs and expenses incident to the administration of decedent's estate." This is correct when construed to cover only ordinary and usual costs and expenses.

That the court did not intend to cover more is evident from the court's sixth conclusion, which deals with extraordinary and unusual expense, which may or may not be expense of administration. Of this sixth conclusion we shall treat later.

The exception to the first conclusion was properly overruled.

[3, 4] The second stated by the court requires the residuary estate to pay all the inheritance taxes involved. The manner in which and the circumstances under which each transfer was made, whether by deed or will, are fully disclosed by the facts found; the relationship of each transferee to the decedent is found; the contingencies of the several estates taken are defined.

The statute clearly indicates that each of the transferees shall pay inheritance taxes; the exemptions and percentages applicable to each; the method of calculation, adjustment, and repayment in event contingencies happen, which lessen the estate taken by one and thereby increase the estate taken by another.

Section 10143e, Burns 1914, of the inheritance tax statute, further provides that the taxes shall be a lien upon the property taken by the respective transferees; provides the method of collection of the taxes from the respective transferees.

Section 10143g, Burns 1914, provides that—

"If such legacy or property be not in money," the administrator, executor or trustee "shall collect the tax thereon upon the appraised value thereof from the person entitled thereto." And further provides that the executor, administrator, or trustee "having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom." And further, "if any such legacy shall be charged upon or payable out of real property, the * * * devisee shall deduct such tax therefrom and pay it to the administrator, executor or trustee and the tax shall remain a lien or charge on such real property, until paid." And further "the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the prosecuting attorney under section 16 of this act."

While it is true that said section also provides that "every executor, administrator or trustee shall have full power to sell so much of the property of decedent as will enable him to pay such taxes, in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate," this, in view of the herein quoted parts of the statute, cannot be construed to mean that the executor, administrator, or trustee is empowered to sell the property of one transferee to pay the taxes upon the property of another transferee. This last-quoted provision for sales must be held to define by comparison a "manner" of sale of such property only as is chargeable with inheritance taxes not otherwise paid or collectible and only of the interest therein of the defaulting heir, grantee, or legatee.

The executor, administrator, or trustee is not to necessarily act under this statute in his general capacity as such, but as an agent named by the state to act for the state in making such collection. He is made personally responsible for such collection. Section 10143e, Burns 1914.

The provisions quoted make it clear that the residuary estate is not chargeable generally with the inheritance tax upon other transfers. The will in this case does not expressly, nor by clear implication, charge the residuum therewith.

The exception to the second conclusion should have been sustained.

[5-7] Appellants' exception to conclusion No. 3 questions the charge of the residuary estate of taxes assessed during decedent's life upon the 100 acres going to Wilma N. Wright. These taxes were properly chargeable against the residuary estate, unless the daughter, Wilma, took a taxable interest in this 100 acres during the life of her foster mother.

The facts found relating to this are:

That on the same day that the mother executed her will she caused a deed to be prepared to Wilma, which was, quoting the court's findings, "executed in connection with and as a part of her will." "That said will and deed were placed in the same envelope by said Lucinda E. Foreman, and were then placed in the possession and care of" the attorney who drew the same, "and were never in the possession of any other person." "That the testatrix intended by said deed to pass title to said grantee, Wilma N. Wright, conditionally, that is to say, on the condition that said grantee should live to the age of 21 years; that said deed was not to be delivered to said grantee until she arrived at the age of 21 years; and if she died before becoming of that age, said deed was not to pass title, but was to be destroyed, and the property to be disposed of under the will. That said executors were during the minority of said grantee to hold said land in trust for her."

The will itself expresses the following:

"Item 3. I have also this day executed a deed to my foster daughter, Wilma N. Wright, for one hundred acres of land" (describing the said 100 acres), "and have placed the same with this, my last will and testament, and I hereby release and relinquish all right and control over and to said deed to my executors hereinafter named, it being my desire and I direct that said deed be taken by my executors and placed of record, as hereinafter set forth. If I should die before said Wilma N. Wright reaches the age of twenty-one years, the said deed shall not be delivered to her before she reaches the age of twenty-one years. If the said Wilma N. Wright should die before reaching the age of twenty-one years, then I desire and direct that said deed be destroyed by my said executors, and the one hundred acres of land described herein shall be disposed of under the terms of this will, as hereinafter provided. However, if said Wilma N. Wright shall reach the age of twenty-one years, the said deed shall be delivered to her, as herein stated. I further direct that said deed shall be treated and acted upon as one of the provisions of this my last will and testament, and that the same shall be delivered and recorded as herein directed. It is my intention that the title in and to said real estate so described in said deed shall vest in Wilma N. Wright, either by virtue of said deed or by this will, provided she lives to be of the age of twenty-one years, and that, in the event she does not live to be twenty-one years of age, then neither she nor her heirs shall have any interest whatever in said real estate except in the manner provided in section seven (7) of this will."

"Item 7. Should I die before said Wilma N. Wright reaches the age of twenty-one years, I will and direct that the real estate conveyed and devised as aforesaid to said Wilma N. Wright be held by my executors until said Wilma N. Wright becomes twenty-one years of age, or, if she dies before said age, then until her death, in trust for said Wilma N. Wright, and that all of the rents, profits and income of said one hundred acres of land which I have devised to her be used in the care, support, maintenance and education of said Wilma N. Wright, which as hereinbefore stated, shall become hers absolutely when she reaches the age of twenty-one years."

These instruments created a trust and took effect at the death of the testatrix in the child's favor, and a part of the trust was that the title should at the death of the testatrix vest in the executors in trust, to go to the child from the executors by delivery of the deed.

Such a deed, when a release of all right of control thereover by the grantor is shown, ordinarily passes a present title, which, though not accompanied by all the rights and incidents of ownership, becomes complete at the death of the grantor.

This is on the theory, however, that the delivery to the third person is, because of the certainty of the named event to happen, a delivery in effect to the grantee named.

This rule applies when there is an absence of other stipulations, conditions, or terms named by the grantor relating to delivery. Other such facts here exist which show that the grantor had a purpose and intent that a present title should not pass to the child.

Not by any chance did she intend that the daughter should take at the time this deed was handed to the mother's attorney, nor at the mother's death, an interest which might be inherited from the daughter. If the rule that such a deed of conveyance so deposited and beyond recall or power to change is applied in all its strength, then a full and indefeasible title in fee simple passed at the time of such deposit, subject only to possession and use of the grantor during her life.

Such a result, accomplished by rules of construction, rather than by express word of the grantor as to the deposit, would be exactly contrary to her intent shown by her acts and words.

But it is said that the strong and well-understood meaning and effect of the language of the deed cannot be varied by acts and words contrary to the language of the deed.

This rule has no application until there is such a delivery as calls the language of the deed into operation.

The mother did not deposit this deed for delivery to the child. The depository was directed to deliver the deed and will to the executors of the will. The mother's directions at the time did not go beyond delivery by the attorney to the executors. When so

delivered to the executors, it is found that the mother's direction is in the will; that the will creates a trust in the executors for the child's benefit, and, under certain circumstances, for the residuary legatees covering the property described in the deed. Such a trust in the executors excludes the idea that the deed is to be delivered to the child, or operative as a conveyance to the child at the mother's death.

The mother expressly declared in her will that the executors shall destroy the deed in the event of the daughter's death before reaching her twenty-first birthday. This, again, is contrary to the claim that the deed was intended to convey a present title to the child. A destruction of the deed cannot destroy such present title, if title has passed.

The mother declared in her will that, in event the child died before reaching such age, title should "be disposed of under the terms of this will."

Such terms are: Item 6. That if the child does not live to such age, this 100 acres is to "be considered and treated as a part of the residue of my property." Item 4 places the residuum of the estate in the hands of the executors for the benefit of Barbara Nation, sister of the testatrix, during her life; and item 5 directs that at the said sister's death said executors "shall divide said property hereby placed in trust for my said sister between" her children.

Thus the mother evinced her intent that this deed should never become effective as a deed unless Wilma reached the age of 21. She deemed it best to name this deed as an instrument whereby this title should pass to Wilma from the executors as trustees, the title meantime resting in the executors as trustees, to be divested by the act of the executors in delivering the deed. The executors are directed to part with their title as trustees by this deed to the child, or to the sister's children by a division made by the executors.

In our opinion this deed has no efficacy, in itself, to pass title. In the absence of any mention of this deed, the child, on attaining her majority, would under the will have taken title, and, because of the peculiar wording of the will, would have been entitled to some evidence of a passing thereof from the executors as trustees. The mother directed that this deed be used for that purpose, and, when considered in connection with the will, it may fairly be said to accomplish that purpose.

Such a construction of her acts and instruments is entirely consistent with her declaration in item 3, above quoted, that the deed is to be a part of the will, that the title shall vest in Wilma by virtue of the deed or the will, and that neither Wilma nor her heirs shall have any interest except as stated in item 7.

The mother's statement that "I hereby release and relinquish all right and control over and to said deed to my executor," if it has, under the circumstances, any force, can have no more force than a declaration of a testator that he by depositing his will releases and relinquishes all control over the same. Such a statement does not bind him against a revocation. This deed and this will must, by reason of the facts and the declared intent of the testatrix, be treated as one instrument; the deed was intended to be of no effect except as given life under circumstances stated in the will, and the will would be, at least, ambiguous without the deed.

The statement that the deed is released and relinquished is only one element of an irrevocable escrow, or deposit, but is not controlling when other facts show the absence of such a delivery as is another and necessary element of such deposit or escrow.

Our conclusion is that the child took no present interest by virtue of this deed. This 100 acres remained the property of the mother during her life, and taxes accrued thereon prior to her death should be paid as other debts of her estate out of the residuum. The exception to conclusion No. 3 was properly overruled.

[8] Appellant's exception to conclusion No. 4 raises a similar question as to taxes assessed during grantor's life upon the 100 acres deeded to the Greens. This deed was made and delivered to grantees during the grantor's life. It contained no covenants of warranty, nor any agreement as to taxes. The fact that the grantor retained a life estate and possession of this land did not require more than that the life tenant pay the taxes assessed during her life tenancy, provided she derived income therefrom sufficient. *Clark v. Middleworth*, 82 Ind. 240. She died within 20 days after it was executed. There was no showing that she received any such income. The Green-land was and is liable for the taxes referred to in this conclusion. The exception should have been sustained.

The exception to conclusion No. 5 is expressly waived by appellants.

[9, 10] As to the sixth conclusion: The executors employed counsel and incurred considerable expense in defending the petition of the father that he be appointed guardian, and his petition for a modification of the decree in the divorce proceeding as to the custody of the child, and in prosecuting a petition that they (the Greens) be appointed guardians. They were successful in such efforts.

The court in its sixth conclusion of law required that the fees of such counsel and such expenses, aggregating about \$1,500, be charged to the interest taken by the child, and not to the residuary estate. This is assigned as cross-error.

The majority of the members of the court is of opinion that this expense is properly charged to the property set apart by the mother for the child's welfare. The decision of the question involved is based on the proposition that the executors, under the terms of the will, occupied a dual relation, and that in the discharge of their duties they acted in a dual capacity. They were executors of the will, and, as such, they were also trustees holding the legal title to the real estate which would pass to the child, Wilma N. Wright, in the event she attained the age of 21 years. In their capacity of executors, it was their duty to settle the estate of the testator in accordance with the terms of the will; and, in their capacity of trustees, it was their duty to control, manage, and protect the trust property. It was also their duty to dispose of the income, as provided by the instrument creating the trust, and, ultimately, to turn over the corpus of the trust to the proper cestui que trust. The costs incident to protecting their rights to the custody, control, and management of the trust property is properly chargeable to the trust estate, and not to the residuary legatees under the will. A guardian nominated by will is entitled by statute to appointment over all others; but his appointment, duties, and powers are governed by the law regulating guardians not so nominated. See *Burns* 1914, § 3066.

The writer, with whom concurs Justice Willoughby, while conceding all said propositions when other controlling facts are absent, is of opinion that here such other facts are not absent. A testator may do with his own as he pleases; and when his intent is ascertained, if the same can be legally carried out, the law does not, and the courts cannot, substitute other means of accomplishing the intent than those the testator dictated. The will here is conceded to be valid. The will not only directs to whom title shall pass, but what title and how the property shall be controlled and enjoyed. The testatrix expressed her disapproval of statutory guardianship for the custody and care of her child and its property by naming other custody and caretakers. She realized the danger, in that the foster father might become such guardian; and, to prevent this, she exercised in her will her right to nominate a guardian. We see no other occasion for appointing a guardian. In her mind this was necessary to prevent the failure of her express desire that her executors, as such, should perform the duties a guardian would perform, and more, for her child. For this purpose she declared the executors should have the custody of the child and its property interests, and the application of the proceeds of the property. It being necessary that the legal title, or fee, of the property rest somewhere until it was ascertained whether it should go to the child

or into the residuum, she placed it, not in the guardians, nor in others as trustees, but in the executors as trustees. She defined no duties for the trustees, as such, to perform except to hold this property and to eventually deliver her deed to the child, or to divide between the heirs of her sister. All other duties were to be performed by the executors. She had the right to and she did expressly name all these terms. She expressly declared that her niece and her niece's husband should be executors, and charged "them with the duty of carrying out and seeing that the provisions of" the will "are complied with."

The only actors designated by her to perform any duty under the will, pending the child's minority, are the executors, not the guardians nor the trustees.

It is true, she does not expressly direct that the expenses of maintaining the conditions created by her will, nor of seeing that "the terms of my will are complied with," be paid out of her estate generally. But, on the other hand, she does not say such expenses shall be charged to property in the hands of a guardian, nor of the trustees. The result is that, as such expenses are not by the testatrix expressly charged against any particular estate or interest, they are chargeable to that interest which is subject to the payment of the expenses of carrying out and complying with the provisions of her will.

In this case the residuary was, in our opinion, chargeable with such expenses.

Considering the family history, and the facts surrounding the grantor and testatrix at the time she executed these documents, considering her fears of the man who had been decreed unfit to care for the child, and her anxiety for the child's best interests, we are driven to the conclusion that all else was in the testatrix's mind secondary, and the child's interests were to be first, and always first, protected by the niece and her husband, acting as executors. She clearly expressed in her will this as her desire and intention as above all other considerations, including considerations for the residuary legatees, who are never entitled to anything until all other terms of a will are complied with.

The court found as a fact that counsel was employed and these expenses incurred by the executors. The court did not find that this was done by the Greens as individuals, nor as guardians, nor as trustees. They could not have performed the duties imposed upon them by the will without so doing.

Under this will it was not necessary that the efforts and acts of the executors be for the benefit of the entire estate, nor of any other interest therein, to justify a charge against the residuary estate.

The prevailing opinion, however, leads to the conclusion that the cross-error is not sustained.

The court is, however, directed to carefully

revise said costs and charges for services, and separate the same as to said various proceedings and parties, in order that said child's interest shall be charged only with that part thereof caused by said trustees.

Because the errors assigned on conclusions Nos. 2 and 4 are sustained, the judgment below is reversed; and the court is directed to restate said conclusions in accordance herewith, and to enter such order, or judgment, as is consistent herewith.

(188 Ind. 642)

TOLLESTON CLUB OF CHICAGO et al. v. CARSON. (No. 22692.)*

(Supreme Court of Indiana. April 24, 1919.)

1. QUIETING TITLE — 10(1) — PLAINTIFF'S TITLE.

In suits to quiet title the plaintiff must recover, if at all, upon the strength of his own title.

2. COURTS — 93(4) — STARE DECISIS.

Although open to criticism, the proposition that submerged land will be regarded as surveyed, so that, unless otherwise indicated, the grant of a border lot carries title to the submerged land and even to the opposite shore, will be followed under the doctrine of stare decisis.

8. NAVIGABLE WATERS — 37(4) — SWAMP LANDS — TITLE UNDER PATENT — MEANDER LINES.

A state patent under 1 Rev. St. 1852, p. 471, regulating the sale and reclamation of swamp lands donated by the United States for a specified price per acre, conveys only the surveyed portion above the meander line.

Appeal from Superior Court, Porter County; Harry B. Tuthill, Judge.

On rehearing. Former opinion (114 N. E. 629) superseded, and judgment reversed as to appellant Tolleston Club and Walker, with directions to grant a new trial.

Randall W. Burns, of Chicago, Ill., John H. Gillett, Gerald A. Gillett, and Fred Burnett, all of Hammond, and Simeon P. Shope, of Chicago, Ill., for appellants.

Peter Crumpacker, Fred C. Crumpacker, and Chas. T. Crumpacker, all of Hammond, for appellee.

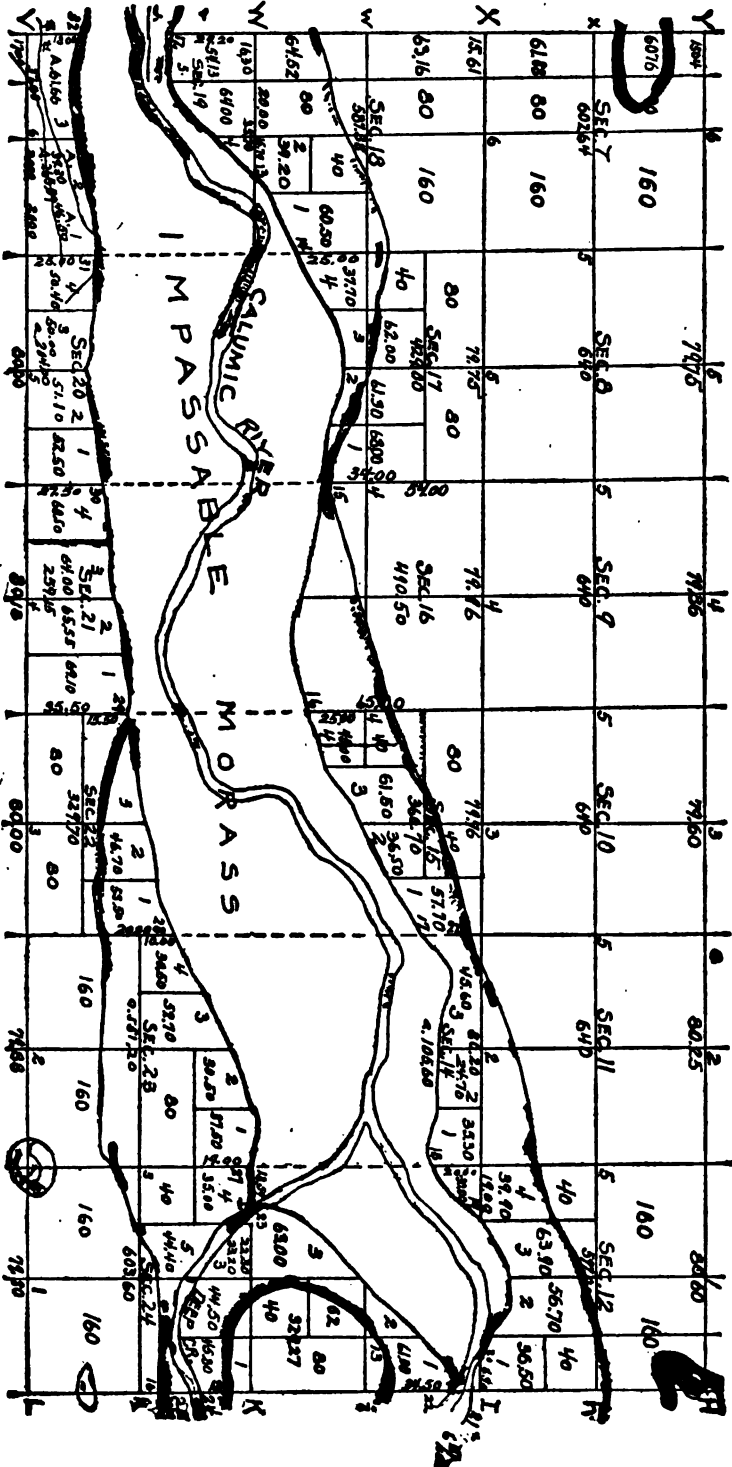
LAIRY, J. Appellee, Isabella Carson, brought this action against appellants, the Tolleston Club of Chicago, Amos W. Walker, and many others, the purpose being to quiet her title to certain lands described by metes and bounds in section 17, township 36 north, range 8 west, in Lake county, Ind. All of the defendants defaulted except the Tolleston Club and Walker. A trial on the issues

formed resulted in a verdict and judgment, to reverse which this appeal is prosecuted.

In order to convey a clear understanding of the questions involved it is necessary to make a statement showing the source of the conflicting claims of title.

In 1834 and 1835 the government of the United States caused a survey of township 36 north, range 8 west, in the state of Indiana. The Calumet river flows across the township from east to west a little north of the center. At the time of the survey there was a marsh on both sides of the current, a large part of which was covered by water, and which was designated on the plat as an "impassable morass." The plat of the survey shows meander lines run on both sides of the river bordering the "impassable morass," the distances between the meander lines in sections 17 and 20 being over one mile. Outside the meander lines the section lines, both north and south and east and west, are shown on the plat by solid black lines, and the subdivision of the sections into quarters is shown by similar lines. The north and south section lines are shown on the plat by dotted lines extending across the "impassable morass" between the meander lines, but the east and west section lines which would lie between the meander lines are not shown. A large part of the south half of section 17 in which the land in controversy lies is south of the north meander line. The plat shows that the part of section 17 lying north of the meander line was subdivided. The north half of the northeast quarter and the north half of the northwest quarter are shown as 80-acre tracts, and the southwest quarter of the northwest quarter is shown as a 40-acre tract. The southeast quarter of the northeast quarter and that part of the northeast quarter of the southeast quarter lying north of the meander line was indicated on the plat as lot 1, containing 68 acres. The southwest quarter of the northeast quarter and that part of the northwest quarter of the southeast quarter lying north of the meander line was indicated on the plat as lot 2 containing 61.80 acres. The southeast quarter of the northwest quarter and that part of the northeast quarter of the southwest quarter lying north of the meander line was indicated in the plat as lot 3, containing 62 acres. The parts of the northwest quarter of the southwest quarter and the southwest quarter of the southwest quarter lying north of the meander line constitutes lot 4, as indicated on the plat. A copy of the map of the government survey, covering section 17 and other sections contiguous to the marsh is set out for reference: [Map omitted, as copy could not be obtained. It is, however, identical with map set forth as Exhibit A in former opinion reported in 114 N. E. at page 633, omitting words "Exhibit A."]

"EXHIBIT A"



The state of Indiana acquired title to all or a part of said section 17 under an act of Congress approved September 28, 1850, 9 Stat. 520, c. 84 (U. S. Comp. St. §§ 4958-4960), known as the Swamp Land Act. The patent evidencing such grant is as follows:

"Whereas, by the act of Congress approved September 28, 1850, entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,' it is provided that all the swamp and overflowed lands, made unfit thereby for cultivation within the state of Indiana, which remained unsold at the passage of said act, shall be granted to said state; and, whereas, in pursuance of instructions from the General Land Office of the United States, the several tracts or parcels of land hereinafter described have been selected as swamp and overflowed lands, inuring to the said state, under the act aforesaid, being situate in the district of lands subject to sale at Winamac, Indiana, to wit: Whole of sections two, three, six, seven, eight, nine, ten and eleven. The whole of fractional sections twelve, fifteen, seventeen, eighteen, nineteen, twenty, twenty-one and twenty-two [here follows the description of many additional tracts of lands not included in this controversy] all in township thirty-six north of range eight west, containing in all eleven thousand, three hundred and three acres, and thirty-nine hundredths of an acre, according to the official plats of survey of the lands returned to the General Land Office, by the surveyor general, and for which the governor of the said state of Indiana, did on the eighteenth day of December, one thousand, eight hundred and fifty-two request a patent to be issued to the said state, as required in the aforesaid act.

"Now therefore, know ye, that the United States of America, in consideration of the premises, and in conformity with the act of Congress, have given and granted, and by these presents do give and grant, unto the said state of Indiana, in fee simple subject to the disposal of the Legislature thereof, the tracts of land above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances thereto belonging, unto the said state of Indiana, in fee simple and to its assigns forever."

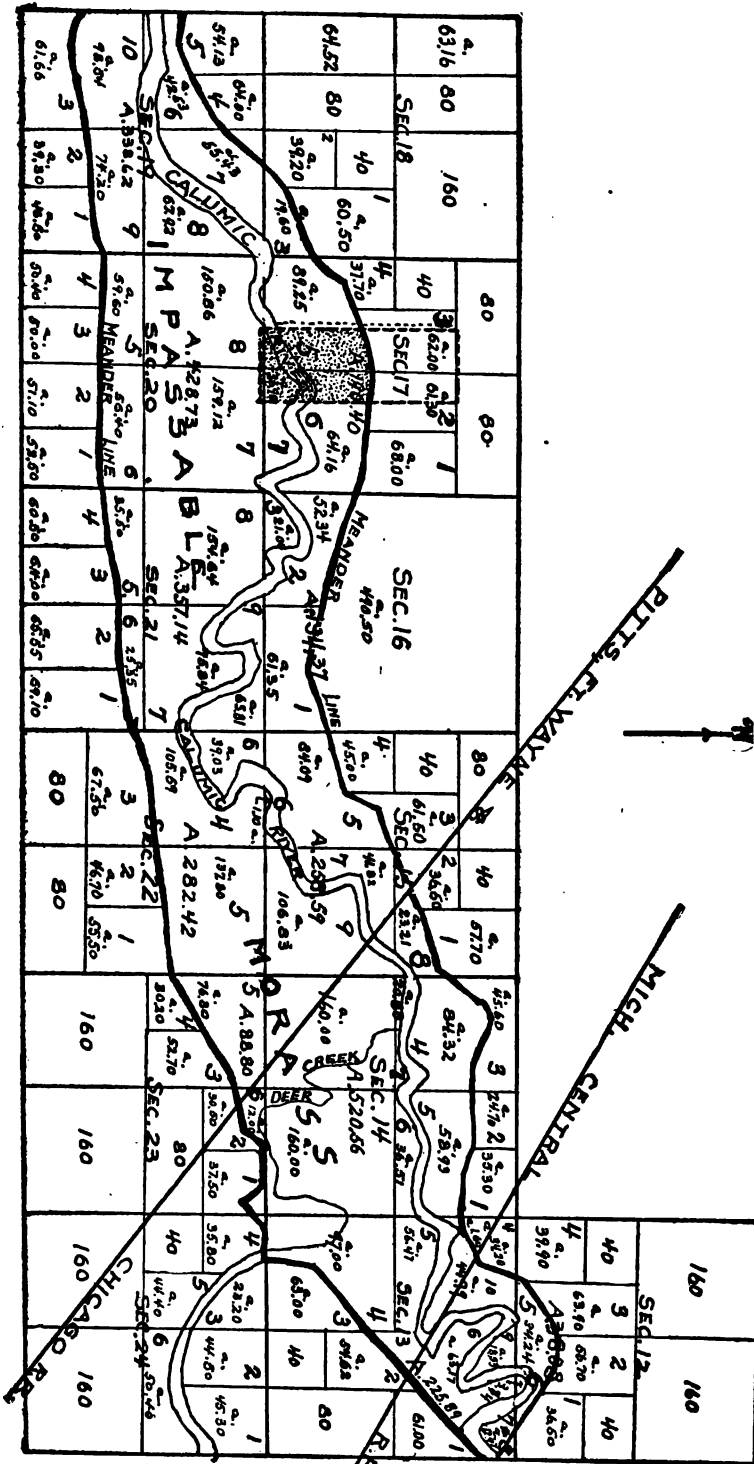
In 1856 the state of Indiana granted to Aaron N. Hart, by separate patents, the fol-

lowing described tracts of land in said section 17, to wit: The northwest quarter of the northwest quarter; the southwest quarter of the northwest quarter; lot 2 in said section containing 61.30 acres; lot 3 in said section containing 62 acres; and lot 4 in said section containing 37.70 acres. Appellee claims the land in controversy under a deed to parts of lot 2 and lot 3, tracing her chain of title through mesne conveyances to Aaron N. Hart.

In 1870, the Congress of the United States passed an act which, after reciting by way of preamble that there was at the time lying along the banks of the Little Calumet river in the counties of Porter and Lake in the state of Indiana a body of lands supposed to contain about 4,000 acres which had never been sold or surveyed, and which was described in the original government survey as an impassable morass, and after further reciting in the preamble that the Calumet Drainage Company had been organized under the laws of the state of Indiana for the purpose of draining the valley of said river, including the impassable morass, provided that said unsold land should be subject to a lien under the laws of Indiana for the proper proportion of the costs of such drainage, and further provided by section 2 of the act that said lands might be surveyed and sold to the highest bidder under the directions of the Secretary of the Interior subject to such lien.

In 1872 the United States government caused the lands lying between the meander lines in township 36 north, range 8 west, to be surveyed for the purpose of sale under the provisions of the act to which reference has been made. That part of the south one-half of section 17 lying south of the meander line was mostly included in lot 5 and lot 6 as shown by the plat of this survey a copy of which is set out for reference: [Survey omitted, as copy could not be obtained. It is, however, identical with that set forth in former opinion reported in 114 N. E. at page 634, and marked "Exhibit B," the designation being omitted.]

EXHIBIT B



The Tolleston Club claims title to the lands in controversy lying south of the north meander line, basing its claim on deeds under a chain of title originating in patents issued by the government of the United States under the last survey.

The tract of land in controversy is described by metes and bounds as follows: Beginning at a point in the middle of the north line of lot 2, in said section; thence south on a line parallel with the north and south middle line of said section, to the south line thereof; thence west to said north and south center line of said sections; then north along said center line to the northwest corner of said lot 2; thence east to the place of beginning. Also, commencing at a point 591.1 feet east of the southwest corner of the northeast quarter of the northwest quarter of said section; running thence east to the northeast corner of lot 3 as surveyed and designated by the United States government in said section; thence south along the east line of said lot 3 to the south line of said section 17; thence west along said south line to a point due south of the place of beginning; thence north to the place of beginning.

Appellee claims title to the land south of the meander line on the theory that the entire section was covered by the original government survey of 1834, and that no part of the section was excluded or left unsurveyed; that the title of the United States government passed to the state of Indiana under the patent heretofore set out, and that the sale of lot 2 and lot 3 by the state to Aaron N. Hart conveyed, not only the high land north of the meander line but also the submerged land lying south thereof within the subdivision of the section.

The Tolleston Club makes no claim to the land described north of the meander line; but, as to that part of the land south of the meander line included in the description, it asserts title on two grounds: First, it claims a record title to the lots laid off by the government in 1872, within the meander lines through a chain of conveyances extending back to the United States government; and, second, it claims title by adverse possession under color of title for more than 20 years.

The title claimed by appellant Walker is based on a quitclaim deed dated in 1896 by which James Carson and Isabella Carson his wife conveys to Amos W. Walker "all interest in the following described real estate to wit: An undivided interest amounting to five (5) acres in the north half (N. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) and the southwest quarter (S. W. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$) and lot three (3) and four (4) and the west thirty (W. 30) and thirty one-hundredths (30/100) acres of lot number two (2) all in section seventeen (17), township thirty-six (36) north, range eight (8), situated

in the county of Lake in the state of Indiana."

James Carson was at the time of the conveyance the owner of an undivided interest in the land described as a tenant in common with others and appellant Walker claims that under the description contained in the deed all of the interest of James Carson in the lands described therein passed to him, and that the lands subsequently set off to Carson in severalty under the partition proceeding, which was pending at the date of the deed, vested in him under and by virtue of said conveyance. He asserts that the subsequent conveyance from James Carson to Isabella Carson conveyed no title to the real estate in controversy, and that he owns the same in fee simple. He also bases a claim to the land on a tax deed. In the trial court, appellant Walker sought affirmative relief by cross-complaints asking that his title be quieted.

It is thus seen that appellant Walker and appellee, Isabella Carson, both derive title from the same source; the controversy between them arising over the construction of the quitclaim deed executed by James Carson and wife to Walker. Appellant Tolleston Club claims that part of the land described lying south of the north meander line as against both Isabella Carson and appellant Walker.

[1] In suits to quiet title, the plaintiff must recover, if at all, on the strength of his own title. The evidence must show title in the plaintiff; it is not sufficient that it shows that the adverse claimant is without title. *Brady v. Gregory* (1912) 49 Ind. App. 355, 358, 97 N. E. 452; *Howard v. Twibell* (1913) 178 Ind. 67, 69, 100 N. E. 372, Ann. Cas. 1915C, 93. If Isabella Carson has a record title to that part of land described lying south of the meander line, such title is derived through a grant from the state of Indiana covering that part of the land described. Appellant, Tolleston Club, asserts that the state, at the time of such grant, had no title to the land in section 17, lying south of the north meander line, for the reason, as asserted, that the land between the meander lines shown on the plat made by the government was not surveyed, and did not pass from the United States government to the state under the swamp land grant and the patent made thereunder. It is not controverted, however, that the title to lots 2 and 3 lying north of the meander line and containing, respectively, 61.30 acres and 62 acres passed to the state under the swamp land grant whether the land in section 17 south of the meander line passed by such grant or not. If it be held that the grant made by the state to the remote grantor of appellee, Isabella Carson, for lots 2 and 3 as shown on the government plat included only the land within the lines bounding those lots as indicated on the plat,

and that the meander line marked the southern boundary of such grants, it will then be apparent that so far as the title of appellee is concerned it can make no difference whether the title to the land south of the meander line in section 17 passed to the state under the swamp land grant or whether it remained in the United States government.

Appellee asserts that the meander line as shown on the plat of the government survey was not the southern boundary line of lots 2 and 3, and that it was intended only as a line separating the salable land within the lot from that which was unsalable south of the meander line of the subdivision of which the lot formed a part. It is asserted that when the salable land north of the meander line was sold and granted by the state, the patent carried the title to the submerged land beyond the meander line to the limits of the subdivision. As sustaining this position appellee relies on numerous cases decided by this court. *Stoner v. Rice* (1889) 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387; *Brophy v. Richeson* (1894) 137 Ind. 114, 36 N. E. 424; *Tolleston Club v. State* (1895) 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; *Kean v. Roby* (1896) 145 Ind. 221, 42 N. E. 1011; *Tolleston Club v. Clough* (1896) 146 Ind. 93, 43 N. E. 647; *Mason v. Calumet, etc., Co.* (1898) 150 Ind. 699, 50 N. E. 85; *Gary Land Co. v. Griesel* (1913) 179 Ind. 204, 100 N. E. 673.

The cases in this state prior to *Stoner v. Rice*, supra, are not entirely consistent with each other, and some of those cases cannot be reconciled with the cases following *Stoner v. Rice*, supra. The case of *Ross v. Faust* (1876) 54 Ind. 471, 23 Am. St. Rep. 655, was an action of trespass against the defendant for removing gravel from the bed of White River, the plaintiff being the owner of a lot of land on the bank. In making the survey the government surveyor indicated a meander line on the bank of the river following the sinuosities thereof; and it was held that such line did not mark the limit of the grant. It was further held that the stream was the boundary, and that, being nonnavigable, the title of plaintiff extended beyond the meander line on the bank to the thread of the current. The decision in this case was based on the riparian rights of the plaintiff, and it has been followed consistently by all of the later cases in this state which involve the strict application of the doctrine of riparian ownership. *Sphung v. Moore* (1889) 120 Ind. 352, 22 N. E. 319; *Sizor v. City of Logansport* (1898) 151 Ind. 626, 50 N. E. 377, 44 L. R. A. 814; *Leonard v. Wood* (1904) 33 Ind. App. 83, 70 N. E. 827; *Illyes v. White River, etc., Co.* (1911) 175 Ind. 118, 93 N. E. 670.

Where the meander line borders the banks of a river or other narrow body of water the rule stated in *Ross v. Faust*, supra, can generally be applied without difficulty; but

where it borders a large lake or swamp of a circular or irregular form the application of the rule is not so simple, and, in disposing of cases in which such conditions were presented, the court encountered difficulties, as appears from the decisions hereafter cited in this opinion. In cases where it appeared that lakes or other nonnavigable waters of circular or irregular shapes were meandered, and bordering lots on all sides were owned by different persons, it became manifest that the title of each adjoining proprietor could not extend to the center of the body of water without overlapping. When such a condition was encountered it was first held that title of the owner of the border lot extended to the middle of the lake if within the boundary of the subdivision of which the lot formed a part. *Ridgway v. Ludlow* (1877) 58 Ind. 248. In *State v. Portsmouth Savings Bank* (1886) 106 Ind. 435, 7 N. E. 379, it was held that the owners of rim lots bordering on a lake could not claim title beyond the limits of the subdivisions of which the lots were a part. In these cases the title of the owner of the border lot to lands beyond the meander line or under the body of water seems to be based on the doctrine of riparian ownership, with the limitation that the title of the riparian owner could not extend beyond the limits of the subdivision of which the border lot formed a part.

The only case decided prior to *Stoner v. Rice*, supra, which is not in line with the foregoing decisions, is that of *Edwards v. Ogle* (1881) 76 Ind. 302. Under the facts peculiar to that case, the court held that the owner of the border lot, laid off by the Squibbs survey, took only to the meander line.

The case of *Stoner v. Rice*, supra, is a departure from the earlier cases, and the decision rests on a basis entirely different. The doctrine of riparian ownership is abandoned. The land lying under the body of water is treated as surveyed, and the lines of the survey are regarded as being protracted across the water so as to fill out the subdivisions lying on the bank. Unless otherwise indicated, the grant of a border lot carries with it as a part of the grant the title to the submerged land to the limits of the subdivision within the lines so protracted. Under this rule as developed by later decisions, the title of an abutting owner may extend beyond the center of the water, and may even include land on the opposite side. *Gary Land Co. v. Griesel* (1913) 179 Ind. 204, 100 N. E. 673.

The case of *Stoner v. Rice*, supra, was criticized in the case of *Hardin v. Jordan* (1891) 140 U. S. 371, 11 Sup. Ct. 806, 838, 35 L. Ed. 428, on the ground that it is in conflict with the common law of England as recognized and adopted in the other states of the Union. The same case is again discussed in the dissenting opinion of Justices White and Mc-

Kenna in the case of *Kean v. Calumet Canal Co.* (1903) 190 U. S. 488, 23 Sup. Ct. 651, 47 L. Ed. 1134, where it is said that the Indiana court evidently adopted the rule announced in *Clute v. Fisher* (1887) 85 Mich. 48, 31 N. W. 614, which case followed two earlier decisions of the Supreme Court of Michigan. *Wilson v. Hoffman* (1884) 54 Mich. 246, 20 N. W. 37, and *Keyser v. Southerland* (1886) 59 Mich. 455, 28 N. W. 835. It is then pointed out that the cases last cited were based on the authority of *Brown's Lessees v. Clements* (1845) 3 How. 650, 11 L. Ed. 767, which case had been expressly overruled by the Supreme Court of the United States long prior to the decision of *Clute v. Fisher*, supra. *Gazzam v. Phillips* (1857) 20 How. 372, 15 L. Ed. 958.

[2] The soundness of the rule adopted in *Stoner v. Rice*, supra, and followed in the later decisions of this state, may be open to serious doubt. It is not necessary for the court to express its approval or dissatisfaction with the rule adopted, or to intimate what the decision would be were the question a new one. The rule has stood and has been followed in this state for many years, and it has been recognized in the prevailing opinion in the case of *Kean v. Calumet Canal Co.*, supra. No doubt many titles have passed on the faith of the rule, and the doctrine of stare decisis requires us to adhere to it now, whether right or wrong. To change the rule now would unsettle titles, and would result in greater harm than good.

The court feels impelled to adhere to the rule adopted in *Stoner v. Rice*, supra, and followed by the later decisions, for the reason that it has become a rule affecting the title to real estate in this state.

Appellants assert that this rule cannot be applied in construing the grant from the United States to the state of Indiana for the reason that the construction of a grant purporting to convey lands owned by the general government presents a federal question, and that the extent of such grant and the question as to whether certain lands passed thereby, when presented either in a state or federal court, must be determined in accordance with the common law as announced by the Supreme Court of the United States, and cannot be decided in accordance with any local state law. As supporting this proposition the recent cases of *Chapman & Dewey v. St. Francis* (1914) 232 U. S. 186, 34 Sup. Ct. 297, 58 L. Ed. 564, and *Producers' Oil Co. v. Hanzen* (1915) 238 U. S. 325, 35 Sup. Ct. 755, 59 L. Ed. 1330, are cited, together with numerous other decisions to the same effect. As opposed to the proposition the cases of *Hardin v. Jordan* (1891) 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; *Mitchell v. Smale* (1891) 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442, and *Kean v. Calumet Canal Co.* (1903) 190 U. S. 452, 23 Sup. Ct. 651, 47 L. Ed.

1134, are cited. In the case last cited a judgment of the Supreme Court of this state, based on the rule announced in *Stoner v. Rice*, supra, was affirmed, and the prevailing opinion recognizes and applies that rule, because, as stated by the court, the local law of Indiana and the common law as understood by the court were the same so far as the case before the court was concerned, citing *Stoner v. Rice*, supra, and *Hardin v. Jordan*, supra. This court is not required, in the case before it, to decide the questions thus raised. In view of the conclusion reached it is not necessary to decide whether the question is one to be determined in accordance with the local law of the state, or by an application of the rules of decisions announced by the Supreme Court of the United States. This case can be disposed of without deciding whether the land between the meander line shown on the plat of the government survey did or did not pass to the state under the swamp land grant. In the discussion following, the court assumes that the title to that land did pass to the state without so deciding.

The rule in *Stoner v. Rice*, supra, applies without doubt to the construction of the grant made by the state of Indiana to the remote grant of appellee; but the rule with which we are dealing does not apply where it is apparent that the intention of the parties to the conveyance was to treat the meander line as a boundary limiting the extent of the grant. The application of this rule to the grants of lots 2 and 3, made by the state of Indiana to the remote grantor of appellee, requires the court to hold that such grants included the submerged land south of the meander line within the side lines of those lots as extended to the south line of the subdivision, unless there is something in the form of the grants or in the statute under the authority of which they were made which indicates an intention to limit the grant to the number of acres north of the meander line and extending thereto as the boundary.

[3] The lands in question were sold by the state under the authority of an act of the Legislature, entitled "An act to regulate the sale of swamp lands donated by the United States to the state of Indiana, and to provide for the draining and reclaiming thereof in accordance with the condition of said grant." 1 R. S. 1852, p. 471.

In recent decision of *State v. Tiesburg Land Co.* (1915) 61 Ind. App. 555, 109 N. E. 530, 111 N. E. 342, the Appellate Court of this state, in an able opinion by Hottel, J., discussed the provisions of the act cited, and construed the grant in the light of the provisions of the statute under which it was made. The decision is based on the proposition that grants of public lands being purely statutory, should be construed by the

courts with reference to the statutes under which they are made, and that public officers in disposing of the lands of the state have no authority other than such as is conferred by positive statute. The conclusion reached in that case was that the grants made by the state under the provisions of the act in question conveyed only the lands set off and bounded by the meander lines shown on the plat. The conclusion reached is supported by the authority of *State v. Portsmouth Savings Bank*, supra, *Tolleston Club v. Lindgren* (1906) 39 Ind. App. 448, 77 N. E. 818, and many other authorities cited in the opinion. After the decision by the Appellate Court, a petition to transfer the case to this court was filed under the provisions of the statute on that subject. After a careful consideration of the questions involved, this court denied the petition to transfer, thus giving to the opinion the sanction of this court. Upon further consideration, this court is convinced that the question here involved is correctly decided by the Appellate Court in the case to which we have referred. The opinion is well considered, and the reasons advanced support the conclusion reached. The court accordingly holds, following *State v. Tuesburg Land Co.*, supra, that the grant from the state to the remote grantor of appellee included only the land set off by the meander line, and that such line constituted the southern boundary of the land granted. That being true, appellee derived no title to any land south of that line by the chain of conveyances under which she claims.

The court is not unmindful of the fact that a different rule was announced in the case of *Tolleston Club v. State*, supra, and in some later cases which followed that decision. In these cases the rule announced in *Stoner v. Rice*, supra, was applied to grants made by the state under the provisions of the Swamp Land Act of 1852, but it does not appear that the provisions of that act were called to the attention of the court, or that they were considered in arriving at the result reached by any of such decisions. It is certain that the provisions of the statute are not referred to or discussed in any of the opinions to which we refer, and we are justified in the conclusion that those decisions were rendered without considering the statute or giving weight to its provisions. In other decisions where the statute was given consideration, a different rule was applied. *State v. Portsmouth Savings Bank*, supra; *Tolleston Club*

v. Lindgren, supra; *State v. Tuesburg Land Co.*, supra.

In view of the conflict in this state, the court does not feel bound by the doctrine of stare decisis to adhere to any rule on this subject; but, on the contrary, feels free to adopt the rule which is supported by the better reason. In so far as the opinion in the cases of *Tolleston Club v. State*, supra, and the opinions in later cases based thereon, conflict with the rule herein stated the same are hereby overruled.

The verdict of the jury finds in favor of appellee, Isabella Carson, as against the Tolleston Club as to all of the real estate described in her complaint, including that portion lying south of the meander line, and the judgment follows the verdict. From what has been said it appears that the verdict of the jury on the issue formed between those parties was contrary to law, and that the motion of the Tolleston Club for a new trial should have been sustained. The judgment as to the Tolleston Club is therefore reversed, with directions to sustain its motion for a new trial.

The questions presented by the assignments of error of appellant Walker depend for decision on the construction to be given to the quitclaim deed and the effect to be given to the tax deed, reference to which is made in a former part of this opinion.

The trial court construed the quitclaim deed as conveying to Walker an undivided interest amounting to 5 acres in the land described in the complaint, and held that the tax deed was insufficient to convey title, and determined the amount due for which Walker was entitled to a lien, and directed the jury to return a verdict accordingly. The court was correct in its construction of the quitclaim deed and in its finding with reference to the effect of the tax deed; but the verdict returned in obedience to the court's instruction finds that Walker is the owner of an undivided interest amounting to 5 acres in the entire tract described in the complaint, including the part lying south of the meander line; and it also found that he was entitled to a lien against the same land which he was entitled to have foreclosed. The verdict for the reasons heretofore stated is contrary to law and the motion of appellant Walker for a new trial should have been sustained.

The judgment is therefore reversed as to appellant Walker, with instructions to grant a new trial.

(71 Ind. App. 215)

DAVIDSON et al. v. LEMONTREE.*
(No. 9840.)(Appellate Court of Indiana, Division No. 2.
May 9, 1919.)**1. TIME** ¶9(1) — **COMPUTATION—DAYS—MOTION TO CHANGE—TIME FOR FILING.**

Under Burns' Ann. St. 1914, § 1350, providing that time shall be computed by excluding the first day and including the last, a motion for change of venue filed on the 10th, in a case set for trial on the 15th, was in time within rule requiring it to be filed five days before the case was set for trial.

2. APPEAL AND ERROR ¶1043(8) — **HARMLESS ERROR—REFUSAL OF CHANGE OF VENUE.**

Where the evidence is not in the record, the court cannot determine whether substantial justice has been done, and therefore must reverse for error in overruling a motion for change of venue.

Appeal from Superior Court, Marion County; Vincent G. Clifford, Judge.

Action between Sarah Davidson and others and Fannie Lemontree. Judgment for the latter, and the former appeal. Reversed, with directions.

William G. White and Arthur J. Jones, both of Indianapolis, for appellants.

Isadore Wulfson, Frank C. Groninger, Taylor E. Groninger, and Ella M. Groninger, all of Indianapolis, for appellee.

McMAHAN, J. [1, 2] This case was set for trial on the 15th of May, 1918. On May 10th the appellants filed a verified motion for a change of venue from the county. There was at that time a rule in force in the trial court requiring all motions for a change of venue from the county to be filed at least five days before the day on which the cause stands for trial on the trial calendar. The court overruled this motion for the reason that it was not filed five days before May 15th. The motion was filed in time, and it should have been sustained. Section 1350, Burns' R. S. 1914. The rule of the court did not require that five full days should intervene between the day on which the motion was filed and the day set for trial as was the case in Fry v. Hoffman, 54 Ind. App. 434, 102 N. E. 167, 103 N. E. 15. Appellee suggests that, where it appears to the court that the merits of the cause have been fairly tried or determined, the cause should not be reversed. The evidence not being in the record, we are not able to say that substantial justice has been done.

Judgment reversed, with directions to sustain the motion for a new trial and for further proceedings not inconsistent with this opinion.

(70 Ind. App. 548)

FERGUSON et al. v. CLEVELAND, C. & ST. L. RY. CO. (No. 9758.)†

(Appellate Court of Indiana, Division No. 2.
May 9, 1919.)**RAILROADS** ¶376(2) — **DEATH OF PERSON SEEN ON TRACK—LAST CLEAR CHANCE.**

Where railroad employes discover the presence of a person on the track and his ignorance of his danger in time to protect him by using ordinary care, it is their duty so to do under the last clear chance doctrine, regardless of whether he is a licensee or a trespasser, and for failure in such duty the company is liable.

Appeal from Circuit Court, Marion County; Louis B. Ewbank, Judge.

On petition for rehearing. Petition overruled.

For former opinion, see 122 N. E. 14.

George W. Galvin and Hottel & Patrick, all of Indianapolis, for appellant.

NICHOLS, J. The appellant contends that, although the second paragraph of the complaint contains—

"some allegations bordering on the doctrine of last clear chance, it does not allege facts to show that the appellee knew of decedent's presence on the track in time to have avoided the injury, and hence cannot be fairly said to be drawn on that theory; in other words, the theory of this paragraph is that decedent was rightfully on the track under an implied license, and that his death resulted from the original negligence chargeable to the appellee."

We are wholly unable to harmonize this statement with the following averment quoted from the plaintiff's second paragraph of complaint, speaking of appellant's decedent:

"While upon said switch track and in the customary and lawful use of the same, the said defendant propelled one of its locomotive engines and train of cars along said track and suddenly and without any warning or notice of its intention so to do negligently and carelessly switched its locomotive engine and said train of cars from the main track to said switch track so being used by decedent, who was in entire ignorance of any peril or danger, with full knowledge of decedent's presence and peril caused solely by the movements of said locomotive and train of cars, and with full knowledge of his ignorance of danger and peril, negligently and carelessly ran its said locomotive engine and train of cars against, upon and over said decedent, instantly killing him."

With these averments, it can make no difference whether the appellant's decedent was upon the appellee's tracks under an implied license based upon one state of facts or upon some other state of facts, or whether he was

there as a trespasser; for under the doctrine of last clear chance the appellee could not escape its liability even though the decedent was a trespasser, where before the commission of its negligent act the presence of the decedent and his ignorance of his peril and danger were known to the appellee in time to have avoided his injury by the use of ordinary care. 29 Cyc. 443; Chicago, etc., R. Co. v. Pritchard, 168 Ind. 398, 414, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 859. This being the law, the facts necessary to a recovery would not have made it incumbent upon the appellant to show that her decedent was rightfully upon the appellee's tracks, under an implied license based upon either the state of facts set up in the first paragraph of the complaint or upon the state of facts set up in the second paragraph of complaint; for, if the appellee discovered the presence of appellant's decedent and his ignorance of his danger and peril in time to have protected him, it was its duty so to do as the one having the last clear chance, regardless of whether he was a licensee for any reason, or a trespasser, and, failing so to protect him, it would have been liable in damages.

The petition for rehearing is overruled.

(70 Ind. App. 130)

UNITED STATES FIDELITY & GUARANTY CO. v. ELLIOTT et al. (No. 9837.)

(Appellate Court of Indiana, Division No. 2. May 9, 1919.)

**SCHOOLS AND SCHOOL DISTRICTS — §81(2)—
ASSIGNMENT BY CONTRACTOR — RELEASE OF
SURETY.**

Where a contractor for construction of high school in alleged violation of his contract with his surety assigned a future payment under the contract to a bank to pay a materialman, the surety, which, with knowledge of such assignment, took over the contract on the contractor's failure and completed the work, was thereby estopped from claiming that such assignment released it as surety, the surety's acts constituting a ratification of the assignment.

Appeal from Circuit Court, Henry County; Fred C. Gause, Judge.

Action by the school towns of Middletown and Fall Creek Township against Howard C. Elliott, the United States Fidelity & Guaranty Company, and others for an accounting. Judgment for plaintiffs, and defendant Guaranty Company alone appeals. Affirmed.

Pickens, Moores, Davidson & Pickens, of Indianapolis, and Barnard & Brown, of New Castle, for appellant.

Forkner & Forkner, of New Castle, for appellees.

NICHOLS, J. The appellees, the school towns of Middletown and of Fall Creek township, in Henry county, entered into a contract with the appellee Howard C. Elliott for the construction of a joint high school building. The appellant became surety on the contractor's bond to save the school corporations from any loss resulting from the breach by the contractor of the terms and conditions of the contract.

The contract provided that the work should be done under the direction of the architect employed by the school corporations that payment should be made "only upon certificate of the architect," and that the school corporations should pay 85 per cent. of the value of the labor and materials monthly as the work progressed, and the balance within 30 days after the completion of the building. The contractor failed to carry out his contract, and left the work unfinished. In order to avoid a reletting of the contract, the appellant, with Elliott and the school corporations, entered into a written agreement as follows:

"For the consideration hereinafter named, the within Howard C. Elliott assigns and transfers all his rights and interests in the contract to the United States Fidelity & Guaranty Company of Baltimore, Md., and said company, in consideration of said assignment, assumes said contract, and, without waiving any claims it may have against said Elliott, agrees to perform the said contract in all particulars, and agrees to protect the school town of Middletown and the trustee of Fall Creek school township, Henry county, Ind., from material and labor claims now unpaid, and such as shall accrue in the course of the construction and completion of said building, and from all liability thereon. And in consideration of the foregoing assignment and agreements the said school town and school township agree to permit the said guaranty company to complete the same and pay the balance of the contract price, under this contract, as it shall become due under proper estimates of the architect; the building to be completed by August 1, 1915. Dated at Middletown, Indiana, January 18, 1915."

This action was commenced by said school corporations against the appellee Elliott and 17 others, including the appellant, for an accounting among the parties, for an adjudication of claims asserted by certain appellees, who were materialmen, subcontractors, and laborers, against the funds held by the plaintiffs to pay for the erection of said building and to determine a controversy between the plaintiffs and appellant as surety of said Elliott growing out of the payment by plaintiffs out of funds claimed by appellant of \$2,000 to the Citizens' State Bank, a creditor of Elliott. This payment to the bank is the only question involved in this appeal. The appellant claims that this payment was not authorized by the contract and bond or justified by law.

The appellant, after taking over the work, completed the building to the satisfaction of the architect, and the school corporations thereupon accepted it. The complaint, after setting out the above facts, further alleged that the entire cost of the building was \$45,841, that the plaintiffs before suit had paid \$35,322 on partial estimates upon claims for labor, material, and to the contractor and upon orders and assignments given by him, and that plaintiffs were ready and willing to pay to the parties entitled thereto, upon proper adjudication, any other additional sum that might be found or decreed by the court upon a final hearing. Then followed a schedule of claims remaining unsettled, aggregating \$8,359.38, about which there was no controversy, and which were all paid before this appeal was taken.

The plaintiffs, on motion of appellant, filed a bill of particulars which showed payments on architect's certificates numbered 1 to 9 aggregating \$33,212.29, and also a payment on an "assignment to Citizens' State Bank of Newcastle, Ind., dated October 14, 1914, for \$2,000."

Appellant filed an answer the material part of which alleged that the said payment of \$2,000 to the bank was made after the acceptance of the building and with and after notice that the same was not properly chargeable against appellant as surety on said bond or by reason of any contract relations or lawful obligations, and was a voluntary payment for which appellant was not answerable, and that said payment was not made under the direction or by the authority of the architect, as was required by the contract between plaintiffs and the contractor. It was also alleged that when said \$2,000 was so paid plaintiffs did not owe the appellee Elliott anything on the contract, and that Elliott was in default in the performance of his contract in a sum exceeding \$10,000 and owed the plaintiffs more than \$2,000 on that account, and asking that the said school corporations be required to pay the appellant the said sum of \$2,000.

Appellant filed a cross-complaint setting up the same facts and asking for affirmative relief and for judgment against Elliott in the sum of \$15,000.

The cause was submitted to the court for trial with the agreement that the court should determine the rights of all the parties without further pleadings.

The court found against the appellant upon its contention that said \$2,000 was wrongfully paid to said bank, and a decree was rendered accordingly.

The further facts relative to the payment of said \$2,000 are in substance as follows: On October 14, 1914, the contractor, Elliott, went to the Citizens' State Bank to borrow

\$2,000 for the purpose of paying for material and labor used in the construction of said building. The bank would not advance him the money on his own responsibility, but agreed with him that, if he would make an assignment of \$2,000 of the proceeds coming to him on his building contract and got the school corporations to accept the assignment, the bank would give him credit for \$2,000. This was done, the said assignment and acceptance being in writing and dated October 17, 1914, the acceptance providing that out of the next money paid to the contractor the plaintiffs would issue their check to the bank for said \$2,000.

The bank thereupon gave the contractor credit for \$2,000, and the contractor gave his check for \$1,943.50 to a materialman for material. Said check was presented to the bank and paid October 19, 1914. The balance of said \$2,000 was checked out in the regular course of business.

The appellant, having received notice that the contractor was having financial difficulties, and that it might be to its interest to investigate, sent a representative to Middletown, who investigated the matters, and was informed that the contractor had made such assignment to the bank, and that it had been accepted by the plaintiffs, and that the plaintiffs had agreed to pay said \$2,000 out of the next money coming to the contractor. This representative of appellant and the plaintiffs in their investigation on this occasion found that there were claims then outstanding against the contractor of about \$8,000, including the \$2,000 borrowed of the bank.

The appellant, not being satisfied with the application of the funds collected by the contractor, threatened to take over the contract and complete the building, as was its right under the terms of the bond, and in order to avoid this said contractor and appellant, on the 11th of November, 1914, entered into a writing authorizing the plaintiffs thereafter to pay all moneys then due or to become due said contractor under the contract to F. A. Wisehart, as the agent of the appellant, and to said contractor jointly, said moneys to be deposited in a bank and to be checked out only by said Wisehart and Elliott jointly. This agreement was accepted by plaintiffs, and the next payment was made accordingly, after which Mr. Elliott authorized all payments to be made to Mr. Wisehart which was done.

The materialmen were having trouble in getting pay for materials furnished and refused to permit any materials to be unloaded from the cars unless payments were made in advance. There was not sufficient money due under the estimate made next after the said assignment to the bank to pay the bank and to pay for the materials being

delivered, so the money on the next and succeeding estimates prior to the last and final one was used for the purpose of paying for material, and no payment was made to the bank until after the final estimate was made.

The contractor failed, and, in order to avoid a reletting of the contract, appellant on the 18th of January, 1915, entered into the written agreement with said contractor and the plaintiffs, hereinbefore set out, whereby the contractor assigned and transferred all his rights under the contract to appellant, and appellant agreed to perform the contract and protect plaintiffs, and plaintiffs agreed to pay the balance of contract price to appellant. The appellant took over the work and completed the building according to the contract. The architect made his final estimate August 13, 1915, showing that there was a balance of \$12,628.71 due on the contract. The plaintiffs then accepted the building, and on August 23d filed the complaint in this cause. After the complaint was filed and before the trial plaintiffs paid the said \$2,000 to the bank.

It is appellant's contention that the acceptance of the assignment from the contractor to the bank and the payment to the bank constituted a material departure by the plaintiffs from the terms of the building contract, and, being made without the consent of appellant, released it as surety on the contractor's bond. It is not necessary for us to determine what effect the acceptance of said assignment might have had upon the liability of appellant. The appellant was fully advised that this assignment had been made, and that the plaintiffs had accepted the same. When it learned of this, if it thought that the action of the plaintiffs in accepting such assignment released it as surety, it had the legal right to stand upon the terms of the contract and permit the contract to be declared forfeited and to permit the plaintiffs to relet the contract, or it might waive its right to claim a release and take over the contract and complete the building as it had a right to do under the terms of the contract. With knowledge of all the facts, appellant elected to take over the contract and complete the building rather than to have the plaintiffs relet the contract. Having done so, appellant is estopped from claiming that it was released as surety. The decision of the court was clearly correct.

The appellant, by taking over the contract and completing the building, ratified the acts of plaintiffs. *Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358.

There was no error in overruling the motion for a new trial.

Judgment affirmed.

(70 Ind. App. 167)
EWART v. EWART. (No. 10371.)

(Appellate Court of Indiana, Division No. 2,
May 9, 1919.)

1. WILLS §440—CONSTRUCTION—INTENTION.

In construing a will, the primary purpose of the court is to determine, if possible, testator's intention as expressed, and to give effect thereto.

2. WILLS §470—CONSTRUCTION—CONSIDERATION AS WHOLE.

In determining testator's intention, the whole will should be taken together.

3. WILLS §601(1)—ESTATE CREATED—FEE WITH DEVISE OVER.

A devise to testator's son, to have and to hold forever, with the power to sell and to invest the proceeds in such property, as he may deem best, creates a fee, despite a repugnant devise over after the son's death to grandchildren.

Appeal from Circuit Court, Huntington County; Samuel E. Cools, Judge.

Action to quiet title by David Oliver Ewart against Anna B. Ewart and others. From judgment for plaintiff, the named defendant appeals. Affirmed.

J. W. Moffett, of Huntington, for appellant.

Cline & Cline and Hemphill & Rosellip, all of Huntington, for appellee.

NICHOLS, J. The appellee David Oliver Ewart filed his complaint in the Huntington circuit court against his coappellees and the appellant to quiet the title to an 80-acre tract of land in Huntington county. The defendants, including the appellant, answered separately in general denial. There was a trial which resulted in special findings of fact and conclusion of law in favor of appellee. Appellant duly excepted to the conclusion of law, and after motion for a new trial, which was overruled, judgment was entered in favor of appellee quieting the title to said real estate in him in fee simple. From this judgment this appeal is prosecuted.

The only error relied upon for reversal is that the court erred in its conclusion of law rendered upon the special findings of facts.

The substance of the special findings, so far as they concern this opinion, is as follows:

Mahlon D. Ewart died testate December 30, 1892, and his will was probated January 9, 1893. It contains provisions as follows:

Item 1. Direction for the payment of his debts.

Item 2. A devise and bequest of all his estate real and personal to his wife, Thalia T. Ewart, during her natural life.

Item 3. A bequest to Samuel De Haven of \$300.

Item 4. A bequest to Caroline Lantis of \$300.

Item 5. A bequest to Albert De Haven of \$300.

Item 6. A devise to appellee of the real estate in controversy, situate in Huntington county, Ind., "to have and to hold forever with the power to sell the same and invest the proceeds in such other property, real or personal, as he may deem best," subject to the life estate of testator's wife, Thalia T. Ewart, "and after the death of my dear son, David Oliver, I will and bequeath the real estate herein in this item, to my grandchildren, Verney Ewart, Alaska Ewart, Lloyd Ewart, and Emerson Ewart, equally and should my son David Oliver Ewart sell the real estate in this item bequeathed, he shall be deemed a trustee of the fund therefrom derived to this extent, that on his death whatever of the same is remaining, shall descend to my grandchildren as herein provided, to wit, Verney Ewart, Alaska Ewart, Lloyd Ewart and Emerson Ewart."

Item 7. A devise to Theodore Ewart, similar to the one in item 6.

Under item 6 of the will aforesaid, appellee David Oliver Ewart claims title to the real estate in controversy in fee simple. He moved onto said land in the year 1892, and has since continued to occupy it in person, or by his son Alaska as tenant, and has never sold it. Thalia T. Ewart, widow, died August 26, 1899. "Emerson" Ewart named in item 6 should be Emmet B. Ewart. He was a son of appellee David Oliver Ewart, and died August 12, 1914, testate, leaving his widow the appellant, but leaving no children. The will of Emmet B. Ewart herein gives \$500 and one-third of his real estate to his widow, appellant. Appellees Alaska Ewart, Lloyd Ewart, and Verney V. Will (formerly Ewart) are the children of the appellee David Oliver Ewart, and are the same persons mentioned in item 6 of the will of Mahlon D. Ewart, and the appellant is the widow and only heir at law of the said Emmet B. Ewart, and is the same person named in his will by that name. Appellees Alaska Ewart, Lloyd Ewart, and Verney V. Will claimed an interest in said real estate through the will of Mahlon D. Ewart, and from no other source, but are not prosecuting an appeal, and appellant claims a fee-simple title to one-twelfth of said real estate through the will of her said husband, Emmet B. Ewart, and through the will of said Mahlon D. Ewart, and from no other source, and further claims that appellee David Oliver Ewart has only a life estate in said real estate. The liens created by items 3, 4, and 5 have been fully paid and discharged. Upon the foregoing facts the court stated the following conclusion of law:

"(1) The law is with the plaintiff, and that he is the owner of said real estate in fee simple, and his title should be quieted in him as against all the other defendants. Dated this 30th day of June, 1916."

[1-3] The controlling question in this case is the nature of the estate devised to appellee David Oliver Ewart by the last will and testament of his father, Mahlon D. Ewart, and to determine this it is necessary to construe the will of said Mahlon D. Ewart, especially item 6 thereof. In performing this duty, it should be the primary purpose of the court to determine, if possible, the intention of the testator as expressed in his will and to give effect thereto. In determining this intention, isolated statements or separate clauses and provisions should not be considered alone, but the whole will should be taken together, and each part be construed with relation to the language used in other parts and effect given to the general intention thereby ascertained. 40 Cyc. 1414, and cases there cited. *Hayes v. Martz*, 173 Ind. 279, 89 N. E. 303, 90 N. E. 309. Applying this rule of interpretation to the will in controversy, appellant earnestly insists that it was not the intention of Mahlon D. Ewart, testator, to give to appellee David Oliver Ewart a fee simple in the land involved, as is evidenced by the latter clause of item 6 of such will, by which testator undertakes to give to appellant's husband and other grandchildren of testator, at the death of appellee David Oliver Ewart, the real estate involved, or in the event that it has been sold by appellee David Oliver Ewart, then the amount remaining of the proceeds of such sale at his death. Appellant's contention is plausible, and it would seem that it should prevail, except for another principle of construction which must prevail as against appellant's contention. The devise David Oliver Ewart is "to have and hold forever, with the power to sell the same and to invest the proceeds thereof in such other property, real or personal, as he may deem best." It is a well-established rule that, where an estate is given to a person generally or indefinitely, with power of disposition, it carries a fee and the devise over is repugnant and void. The only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes it to the power of disposal. 40 Cyc. 1580; *Curry v. Curry*, 58 Ind. App. 567, 105 N. E. 965; *Cameron v. Parish*, 155 Ind. 329, 57 N. E. 547; *Mulvane v. Rude*, 146 Ind. 478, 481, 45 N. E. 659; *Logan v. Sills*, 28 Ind. App. 170, 62 N. E. 459; *Benninghoff v. Evangelical Association*, 28 Ind. App. 374, 61 N. E. 952. The authorities to sustain this principle are numerous, but we do not deem it necessary

to cite others. Appellant has cited no authorities by which she can escape the rule, and we know of none.

The judgment is affirmed.

HASKELL & BARKER CAR CO. v. TRZOP.* (No. 9705.)

(Appellate Court of Indiana, Division No. 1.
May 6, 1919.)

1. PLEADING \S 367(4)—MAKING MORE DEFINITE—PERSONAL INJURIES.

In a complaint alleging generally that plaintiff was greatly bruised and injured and became sick and sore and was permanently hurt and injured, and also that his right leg was broken and had failed to heal, and that he had received injuries to his spine, the allegation of the specific injuries was additional to the general allegation, and defendant was entitled to have the former made more definite, especially where plaintiff offered evidence of injuries other than those specified.

2. MASTER AND SERVANT \S 185(7)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—SAFE PLACE TO WORK.

Where a car repairer was injured by the moving of a car without the customary warning, the negligence was that of a fellow servant for which the master was not liable at common law, not the failure to furnish a safe place to work for which the master would be liable.

3. MASTER AND SERVANT \S 259(2)—INJURIES TO SERVANT—COMPLAINT—CONCLUSION—FELLOW SERVANT.

An allegation that the person failing to give warning was not the fellow servant of plaintiff was a conclusion of law, and did not cure defect of complaint alleging facts which showed negligence of a fellow servant.

4. TRIAL \S 251(9)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS—DAMAGES.

Instructions authorizing the jury to award such damages as would, under the evidence, compensate for the injuries received, was erroneous because not limited to the injuries complained of.

Appeal from Circuit Court, Laporte County; James F. Gallaher, Judge.

Action by Joseph Trzop against the Haskell & Barker Car Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

McVey & McLane, of Laporte, and Cornelius R. Collins and Jeremiah B. Collins, both of Michigan City, for appellant.

Warren C. Ransburg, of Laporte, and Francis J. Woolley and F. W. Jaros, both of Chicago, Ill., for appellee.

ENLOE, J. Action for damages for personal injuries alleged to have been sustained

by appellee, while working as a laborer in the car shops of appellant, at Michigan City, assisting in the construction of steel gondola cars.

The complaint is in two paragraphs. The first is under the employers' liability act of 1911. The second paragraph attempts to state a cause of action at common law.

The appellant filed its motion to make each paragraph of said complaint more specific, in certain designated particulars, which motions were severally overruled, and appellant thereupon unsuccessfully demurred to each paragraph of said complaint, trial was had, and verdict and judgment against appellant.

Appellant duly filed its motion and reasons for a new trial, and, the same being overruled, has appealed said case to this court, and the errors relied upon for a reversal are:

Error in overruling motion to make the several paragraphs of complaint more specific; in overruling separate demurrers to each paragraph of the amended complaint; and in overruling motion for a new trial.

[1] In the first paragraph of complaint the allegations as to injuries sustained were as follows:

"And by means of said negligence of the defendant, the plaintiff was then and there greatly bruised, hurt, wounded, and injured; and became and was sick, sore, lame, and disordered, and so remained for a great length of time, to wit, hitherto; and thereby also plaintiff suffered great pain and will continue to suffer great pain for the term of his natural life; and thereby also the plaintiff was permanently hurt and injured; and thereby also divers bones of the plaintiff's body were injured, to wit, the bones of his right leg below the knee were broken, dislocated, and became diseased and failed to properly unite, and thereby also the muscles, ligaments, tendons, and other parts of plaintiff's said leg and foot were greatly injured, and his entire leg and foot became wasted and deformed; and thereby also plaintiff's back and spine were injured and became curved, lame, and sore."

As to this paragraph, the fifth and sixth specifications in appellant's motion to make more specific were as follows:

"(5) That the said plaintiff be required to state in said paragraph of complaint, severally, wherein he was then and there greatly bruised, hurt, wounded, and injured; and further that he be required to state what sickness he suffered by reason thereof; and what soreness he suffered by reason thereof; and what lameness he suffered by reason thereof; and wherein and what disorder he suffered by reason thereof, as stated in said first paragraph of amended complaint.

"(6) That the said plaintiff be required to state wherein he was permanently hurt, and wherein permanently injured, as stated in said first paragraph of amended complaint."

In the case of Schapker v. Schwetz, 56 Ind. App. 499, 105 N. E. 579, the court said:

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion 128 N. E. 401. Rehearing denied.

"A motion to require a plaintiff to make his complaint more specific, so as to inform the defendant of the exact nature and character of the injury complained of, so as to enable him to prepare his defense, if he has one, has received the sanction of our courts at all times."

The appellant was entitled to know specifically as to parts of appellee's body affected, and nature of the said alleged bruises, hurts, and wounds, so alleged to have been received, and for which he was claiming damages; and as to the above specifications the court erred in overruling said motion. This paragraph is good as against the demurrer interposed thereto.

In the second paragraph of complaint, the averments, so far as they relate to the place where plaintiff was performing his work and to the injuries by him received, are as follows:

"And in the course of the said work, the plaintiff, in the regular course of his employment as a servant of defendant, was then and there at work, by the order and direction of defendant, * * * under a certain car which then and there stood upon a certain track known as, to wit, the third track in defendant's steel car shop, in process of construction, said car being nearly completed and the plaintiff being then and there engaged in, to wit, attaching certain pipes and screwing up certain nuts and bolts attached to a certain hanger holding said pipes, under the said car; by reason whereof the plaintiff was in a position of great danger in case the said car should be moved along the said track without reasonable and sufficient warning to him. * * * And plaintiff further avers that it was then and there and long theretofore had been customary in defendant's said shop not to move such cars under such circumstances as above stated without previous notice to workmen engaged at work about such cars; whereupon it became and was the duty of the defendant to use reasonable care to furnish plaintiff a safe place to work, and for that purpose to use reasonable care to have and keep the said car, under which the plaintiff was so at work as aforesaid, at rest, and not cause the same to be moved without due and reasonable notice to the plaintiff. Yet, nevertheless the defendant then and there carelessly and negligently failed to furnish the plaintiff a safe place to work, and keep the same safe, and to use reasonable care to have and keep said car stationary and at rest while the plaintiff was so at work under the same, but, on the contrary, carelessly and negligently suffered, permitted, and caused the said car to be suddenly moved by means of, to wit, a certain electric machine and cable, and by, to wit, the order of defendant, through defendant's certain agents then in charge of defendant's said track and cars, and machine for moving cars who were not fellow servants of the plaintiff, whose names are to the plaintiff unknown, without any reasonable or sufficient warning or notice to the plaintiff, while the plaintiff was, as aforesaid, under the said car at work in the course of his employment, with all due care and diligence on his part and in ignorance of the said risk of injury. So that by reason of the foregoing

plaintiff did not have a reasonably safe place to work; by means whereof, and without any contributory negligence on the part of the plaintiff, certain parts of the said car then and there ran and struck upon and against the plaintiff, whereby he was then and there injured, in his person, as hereafter in this complaint set forth.

"And by means of the said negligence of the defendant, the plaintiff was then and there greatly bruised, hurt, wounded, and injured, and became and was sick, sore, lame, and disordered, and so remained for a great length of time, to wit, hitherto; and thereby also plaintiff suffered great pain and will continue to suffer great pain for the term of his natural life; and thereby also the plaintiff was permanently hurt and injured; and thereby also divers bones of the plaintiff's body were injured, to wit, the bones of his right leg below the knee were broken, dislocated, and became diseased, and failed to properly unite, and thereby also the muscles, ligaments, tendons, and other parts of plaintiff's said leg and foot were greatly injured, and his entire leg and foot became wasted and deformed; and thereby also plaintiff's bank and spine were injured, and became curved, lame, and sore."

The thirteenth, fifteenth, sixteenth, and seventeenth specifications in appellant's motion to make this paragraph more specific were as follows:

"(13) That the said plaintiff be required to state in his said paragraph of amended complaint wherein this defendant was careless and negligent in failing to furnish the plaintiff a safe place to work as stated in said second paragraph of amended complaint."

"(15) That the said plaintiff be required to state in his said paragraph of amended complaint severally, wherein he was greatly bruised, hurt, wounded, and injured as stated in said second paragraph of amended complaint."

"(16) That the said plaintiff be required to state in his said paragraph of amended complaint severally what sickness he suffered, what part of his body became disordered, and what disorder he suffered as stated in the second paragraph of amended complaint."

"(17) That the said plaintiff be required to state in his said paragraph of amended complaint what part of the said plaintiff was permanently hurt and injured as stated in the second paragraph of amended complaint."

Plaintiff does not allege in this paragraph in what several particulars he was permanently hurt and injured. The language, "and thereby also divers bones of the plaintiff's body were injured, to wit, the bones of his right leg below the knee were broken," etc., clearly implies that these latter specific injuries were additional to those above complained of. Also, it appears from this record that on the trial the testimony was not limited to the injuries to the leg, specifically complained of in said second paragraph, but testimony was also given concerning injury to and pain suffered in hand, ribs, back, and upper part of appellee's limb—of which no specific complaint was made in the pleadings under consideration.

The appellant's motion to require appellee to make this paragraph of his complaint more specific, in the above-mentioned particulars, should have been sustained.

[2] It is next urged that the court erred in its ruling on the demurrer to the second paragraph of complaint.

In this second paragraph of complaint there is an attempt to state a common-law duty and a liability thereunder. The paragraph is bottomed upon the duty of the master to furnish a reasonably safe place to the servant in which to work, and to exercise reasonable care to see that such place is kept reasonably safe; but the appellee wholly fails to allege any fact showing a defect in the place where, under his employment, he was required to labor. In this second paragraph, the specific averments are such that it shows appellee's injury to have been occasioned by one of the assumed risks of his employment. This paragraph avers:

"That it was then and long theretofore had been the custom in this shop not to move the cars without notice to the workmen engaged in working about such cars."

And appellee is complaining because, as to him, although he does not allege that the usual and customary notice was not given, he did not hear the notice given, and was in consequence injured. It is nowhere in this paragraph of complaint alleged that the appellant had not established reasonable rules and regulations for the shifting of these cars from one position to another, during the course of their construction, and no negligence is charged against the master in this respect, so the presumption is that the master had adopted such regulations, and that they were reasonably sufficient. In fact, the allegations of the existence of the custom, as alleged in this paragraph of complaint, is an indirect allegation of the establishing by the master of such regulations for the conduct of the work.

The real essence of appellee's grievance is that somebody negligently gave a signal to move the car in question, which signal was negligently given, because appellee was at that time in a place of danger and had not been given actual warning and notice that said car was about to be moved.

In *Jurkiewicz v. Am. Car & F. Co.*, 147 Mich. 622, 111 N. W. 183, it is said:

"The duty of providing a safe place, machinery, and appliances is recognized; but the duty of the master does not extend so far as to require that he shall see at his peril that such machinery and appliances are properly used. Reasonable regulations must be made for their use; but when this is done, and the fault of one servant makes the place unsafe, which, but for such fault, would be safe, the rule of nonliability for the fault of a fellow servant applies."

In *Indianapolis Terra Cotta Co. v. Wachstetter*, 44 Ind. App. 550, 88 N. E. 853, the court said:

"But if the damage arose, not from any act or omission of the master, not from a danger inherent in the place, or with the tools and implements and machinery furnished him to work with, but from the manner in which the servants performed their duty to the master—a transitory peril occasioned by the execution of the work—then the master is not chargeable with notice of such peril, or bound to exercise care to ascertain it, and is charged with no duty to warn his servants against it, unless he have actual knowledge of the existence of the danger at the time."

Further on in the same case the court says (44 Ind. App. 558, 88 N. E. 856):

"If it be conceded that Powell was a vice principal, and represented appellant in the matter, it was not his duty to stand over the men engaged in unloading the car of plaster to see that they properly performed their work, and no liability could be imposed upon the master for an injury received by a servant on account of the negligent performance by a fellow servant of the work in which they were jointly engaged, unless the master had actual knowledge" thereof, "and the injured servant did not."

In the case of *Howard et ux. v. Denver, etc., Ry. Co.* (C. C.) 26 Fed. 837, it is said:

"The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employé of the machinery shall create danger."

In the case of *St. Louis, etc., Ry. Co. v. Needham*, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833, the court said:

"In other words, the line of demarcation here between the absolute duty of the master and the duty of the servants is the line that separates the work of *construction, preparation, and preservation from the work of operation*. [Our italics.] Is the act in question work required to construct, to prepare, to place in a safe location, or to keep in repair the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to perform it. Is the act in question required to properly and safely operate the machinery furnished or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance."

In the case of *Knickerbocker Ice Co. v. Smith*, 45 Ind. App. 445, 91 N. E. 28, the court said:

"But there are certain duties the servant owes to the master, and the performance of all such duties the master may delegate to servants, and in the performance of such duties the servant represents not the master but himself. Among other duties which the master may

thus delegate to servants is the proper handling of appliances which the master furnishes the servants to work with, in the performance of the duties they owe him. * * *

"The master has a right to presume that his servants, in the performance of their duties to him, in handling and using the appliances and tools with which they are furnished, will exercise reasonable precaution not to injure each other, and for their careless use of such instruments, by which a fellow servant is injured, the master is not responsible."

In Chicago, etc., R. Co. v. Barker, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375, the court said:

"The full test of liability is not the condition of the place, nor the machinery at the instant of the injury, but the character of the duty, the negligent performance of which caused the injury. Was it a duty of construction, preparation or repair, or was it a duty of operation?"

[3] From the foregoing authorities it clearly appears that the carelessness in giving the signal to move the car in question, and the carelessness in failing to warn and give appellee notice that said car was about to be moved, if any such carelessness actually existed, was the carelessness of a fellow servant, for which the master was not liable at common law. The averment in the complaint that those persons were not the fellow servants of appellee, being a conclusion of law, does not cure the defect.

The demurrer to the second paragraph of complaint should have been sustained.

Complaint is also made of the third and fourth instructions given by the court. Each of these instructions is at variance with the views hereinbefore expressed, as to the duty of the master to give warnings to servants of approaching danger, and under the facts in issue in this case are erroneous.

Instruction No. 9½ is also objected to. We do not think it fairly open to the objections urged against it.

[4] Instruction No. 10 is not accurate. The jury was told that in assessing appellee's damages they should "give him such an amount in damages as will under all the evidence in the case compensate him for the injuries received." This should have been limited to the evidence relating to the injuries sustained as complained of. Monongahela R., etc., Co. v. Hardsaw, 169 Ind. 147, 81 N. E. 492.

For the foregoing errors, this cause is reversed, with directions to the trial court to sustain appellant's motion to make the first paragraph of complaint more definite and certain as to said matter contained in said fifth and sixth specifications of its said motion, and to sustain appellant's demurrer to said second paragraph of said complaint, and for further proceedings not inconsistent herewith.

(70 Ind. App. 106)

IRVINE et al. v. BAXTER STOVE CO.
(No. 9766.)(Appellate Court of Indiana, Division No. 1.
May 6, 1919.)

1. APPEAL AND ERROR ⇨766—BRIEF—SUFFICIENCY—AMENDMENT.

The objection that no question is presented where neither the motion for new trial nor its substance is set out in appellant's brief cannot be sustained, where, since the filing appellee's brief, appellant by leave of court has amended his brief by inserting therein a copy of said motion.

2. APPEAL AND ERROR ⇨301—REVIEW—NECESSITY OF OBJECTION AS GROUND FOR NEW TRIAL—INSTRUCTIONS.

Where appellant did not assign the action of the court in giving instructions as a ground for a new trial, objections to the instruction will not be considered upon appeal.

3. PARTNERSHIP ⇨34—HOLDING OUT AS PARTNER—NECESSITY OF FINANCIAL LOSS.

Where one holds himself out as a partner or knowingly permits himself to be so held out, he is liable to those who deal with the firm in the belief that such representation is true as fully as if he were a partner in fact, and it is not necessary that creditor suffer financial loss by reason of such holding out.

4. APPEAL AND ERROR ⇨1063(5)—HARMLESS ERROR — INSTRUCTIONS TOO FAVORABLE TO APPELLANT.

An instruction that a creditor could not recover against one alleged to have been held out as a member of the defendant partnership, unless by reason of the fact of such holding out the plaintiff "has sustained some financial loss, or stands to sustain a financial loss," while erroneous as placing too great a burden upon plaintiff, was too favorable to defendant, so that his objection thereto cannot be sustained.

5. APPEAL AND ERROR ⇨758(2)—REVIEW—BRIEFS—DISCLOSURE OF SPECIFIC OBJECTIONS BELOW.

Where appellant's motion for new trial alleges that the court erred in the admission of certain evidence, but the brief does not disclose what objections, if any, were made thereto in the trial court at the time, no question is presented for determination upon appeal.

6. APPEAL AND ERROR ⇨204(1)—MOTION FOR NEW TRIAL—ADMISSIBILITY OF EVIDENCE—OBJECTIONS AT TIME OF RULING.

Objections to the admissibility of evidence, to be reviewable on appeal, must be made at the trial.

7. TRIAL ⇨48, 255(4)—COMPETENCY—SPECIFIC PURPOSE—INSTRUCTION LIMITING APPLICATION.

Evidence competent for some purpose should not be excluded because a jury may erroneously use it for another purpose, and the party desiring to guard against such possibility should tender an instruction limiting its application to the matter for which it is competent.

8. APPEAL AND ERROR ¶528(4) — RECORD — SUFFICIENCY—BRINGING MATTERS INTO THE RECORD—AFFIDAVIT.

The mere statement in an affidavit filed with a motion for new trial that the court, in the presence of the jury, had stated that it would instruct the jury in regard to the competency of evidence received for but one particular purpose, is insufficient, since matters cannot be brought into the record by affidavit.

9. APPEAL AND ERROR ¶1001(1)—VERDICT—EVIDENCE—SUFFICIENCY.

The Appellate Court may not reverse a verdict because not sustained by sufficient evidence, where there is legal evidence supporting every essential fact necessary to appellee's right of recovery.

10. APPEAL AND ERROR ¶761—WAIVER OF OBJECTIONS — FAILURE TO MAKE SPECIFIC REFERENCE IN BRIEF.

Grounds for a new trial are waived by appellant by a failure to make any specific reference thereto in his proposition or points in his brief.

Appeal from Circuit Court, Rush County; Will M. Sparks, Judge.

Action by the Baxter Stove Company against James T. Irvine, Jr., and another. Judgment for plaintiff, and the defendant James T. Irvine, Sr., after the overruling of his separate motion for new trial, appeals. Judgment affirmed.

Osborn & Hamilton, of Greensburg, and Benjamin F. Miller and Howard E. Barrett, both of Rushville, for appellant.

John H. Kiplinger and Donald L. Smith, both of Rushville, for appellee.

BATMAN, P. J. The complaint in this action is in two paragraphs, in which appellee is plaintiff, and James T. Irvine, Jr., and James T. Irvine, Sr., are defendants. The first paragraph is based on a promissory note alleged to have been executed to appellee by the said Irvine and Irvine under the firm name and style of James Irvine & Co. The second paragraph alleges in substance, that said James T. Irvine, Sr., held himself out as a partner in the firm of James Irvine & Co., and knowingly permitted James T. Irvine, Jr., to hold him out as a partner in said firm, with the intention that appellee should act on such representation as being true; that appellee, believing said representation and having no knowledge that the same was not true, was induced thereby to sell goods and extend credit to said James Irvine & Co., and to accept a certain promissory note for \$166.18 executed by said company; that said note is now due and unpaid. Each paragraph of the complaint referred to the same promissory note, which was made a part thereof by a copy filed as an exhibit therewith. James T. Irvine, Jr., filed an

answer in two paragraphs, the first being a general denial, and the second a plea of payment. James T. Irvine, Sr., also filed an answer in two paragraphs, the first being a general denial, and the second a plea of non est factum. To the second paragraph of the answer of James T. Irvine, Jr., appellee filed a reply in general denial. The cause was submitted to a jury for trial, resulting in a verdict for appellee, on which judgment was duly rendered. James T. Irvine, Sr., filed a separate motion for a new trial which was overruled. He is now prosecuting this appeal, and has assigned the action of the court in overruling his motion for a new trial as the sole error on which he relies for reversal.

[1] Appellee contends that no question is presented for our determination, as neither the motion for a new trial or its substance is set out in appellant's brief. Since the filing of appellee's brief, appellant, by leave of court, has amended his brief by inserting therein a copy of said motion, which has cured the alleged omission therein.

[2] Appellant contends that the court erred in giving instructions Nos. 7, 9, 12, and 13 on its own motion. We are not required to consider any objections made to said instructions Nos. 7 and 9, as appellant did not assign the action of the court in giving either of them as a ground for a new trial. *Parker Land, etc., Co. v. Ayres* (1908) 43 Ind. App. 513, 87 N. E. 1062.

[3, 4] Said instructions Nos. 12 and 13, given by the court on its own motion, relate to the cause of action stated in appellee's second paragraph of complaint. By these instructions the jury was informed, in effect, that there could be no recovery against appellant on said paragraph, unless the jury should find that appellant, by his acts or language, knowingly, voluntarily, and intentionally held himself out to appellee as a partner in the alleged firm of James Irvine & Co., or so permitted himself to be so held out by said James T. Irvine, Jr., and that by reason of said fact appellee has sustained some financial loss, or *stands to sustain a financial loss*. Appellant bases his objection to said instructions on the clause which we have italicized. He insists that appellee must have sustained some financial loss before there can be a recovery on said second paragraph of complaint. We do not understand that appellee was required to establish such fact. It is well settled that, where one holds himself out as a partner in a particular firm, or knowingly permits himself to be so held out, he is liable to those who deal with such firm, in the belief that such representation is true, as fully as if he were a partner in fact. 30 Cyc. 391; 20 R. O. L. 1067; *Story on Partnership* (2d Ed.) § 64; *Strecker v. Conn* (1883) 90 Ind. 469; *Breinig*

v. Sparrow (1906) 39 Ind. App. 455, 80 N. E. 37; Steele v. Michigan Buggy Co. (1912) 50 Ind. App. 635, 95 N. E. 435; Phipps v. Little, 213 Mass. 414, 100 N. E. 615; Peck v. Lusk, 38 Iowa, 93; Brickwood's Sackett on Instructions, vol. 2, § 2201. A person becoming a creditor of such a firm under the circumstances stated would have a right to join a party so held out as a member thereof, in an action against the real members of such firm, and recover a joint judgment against all, without alleging or proving that he had suffered, or may suffer, a financial loss by reason of such holding out. An instruction authorizing a recovery without such a condition was approved by the Supreme Court in the case of Dailey v. Coons (1878) 64 Ind. 545. It follows that said instructions are erroneous, but there was no reversible error in giving the same, as they placed a greater burden on appellee than the law required it to assume, and therefore were favorable to appellant. *Pennsylvania Co. v. Stalker* (1918) 119 N. E. 163.

Appellant also contends that the court erred in refusing to give instructions Nos. 3 and 4 requested by him. These instructions are the same as Nos. 12 and 13 given by the court on its own motion, except that neither of them contain the clause which we have italicized above. For the reasons stated in passing on said instructions given, there was no error in refusing to give said requested instructions.

[5, 6] Appellant in his motion for a new trial alleges that the court erred in the admission of certain evidence, but has failed to present any question thereon for our determination, as his brief does not disclose what objections, if any, were made in the trial court to the admission of such evidence at the time it was offered. Only such objections thereto as were made at such time are available on appeal. *McCray v. Whitney* (1913) 56 Ind. App. 94, 104 N. E. 979. And the brief of the complaining party must show what these objections were. *Templer v. Thompson* (1917) 117 N. E. 936. True, certain objections thereto are stated in the motion for a new trial, some of which appellant has attempted to present in his brief, but these will not be considered in the absence of a showing that they were made to the trial court, when it ruled on the admissibility of such evidence. However, the only portion of such objectionable evidence to which appellant has made any reference in his proposi-

tions or points consists of a certain letter written by one Elmer Hutchinson, and another by Perry C. Kirtley. The record fails to disclose that any objections were made in the trial court to the admission of the former letter, and hence there was no reversible error in its admission. The latter letter was written to appellant in response to one received from him, the contents of which had been given in evidence without objection. It was pertinent to the issues formed on the first paragraph of the complaint, and there was no error in its admission under the facts and circumstances shown by the record.

[7, 8] Appellant predicates error on the failure of the court to instruct the jury that the letter of Perry C. Kirtley should not be considered as affecting the issues under the second paragraph of the complaint. It is a well-settled rule that evidence competent for some purpose should not be excluded because a jury may erroneously use it for another purpose. 10 R. C. L. 929. A party desiring to guard against such possibility should tender an instruction limiting its application to the matter for which it is competent. *Clark v. Clark* (1918) 118 N. E. 123; *International, etc., Co. v. Hauelsen* (1918) 118 N. E. 320. Appellant, however, seeks to avoid an application of this rule in the instant case on the ground that the court in the presence of the jury, stated that it would instruct the jury in that regard. The only evidence of any such statement appears by affidavit filed with the motion for a new trial. This is not sufficient, as matters of this kind cannot be brought into the record this way. *Hood v. Tyner* (1891) 8 Ind. App. 51, 28 N. E. 1033; *Dorsey v. State* (1912) 179 Ind. 531, 100 N. E. 369; *Shank v. State* (1915) 183 Ind. 298, 108 N. E. 521. Therefore we cannot say that appellant was relieved from a compliance with the rule cited.

[9, 10] Appellant also contends that the verdict is not sustained by sufficient evidence. We cannot concur in this contention, as there is legal evidence supporting every essential fact necessary to appellee's right of recovery. This is sufficient on appeal. *Ellison v. Ryan* (1908) 43 Ind. App. 610, 87 N. E. 244. Other grounds for a new trial are waived by appellant by a failure to make any specific reference thereto in his propositions or points. *Buffkin v. State* (1914) 182 Ind. 204, 106 N. E. 362.

We find no reversible error in the record. Judgment affirmed.

(74 Ind. App. 80)

THOMPSON et ux. v. FESLER et ux.*
(No. 9799.)

(Appellate Court of Indiana. April 22, 1919.)

1. APPEAL AND ERROR §1054(3)—REVIEW—HARMLESS ERROR.

In an action for breach of contract tried to the court, admission of evidence, if error, *held* harmless, where the court ignored it in making his special findings.

2. NEW TRIAL §79 — GROUNDS — JUDGMENT BASED ON FINDINGS OF COURT.

In an action for breach of contract tried to the court, where the judgment and conclusions of law were based solely on the facts as found by the court, and not upon the evidence erroneously admitted, it was not error to refuse a new trial.

3. CONTRACTS §273 — RESCISSION — PARTIAL RESCISSION—SEVERABLE OR DIVISIBLE CONTRACTS.

Unless a contract is clearly divisible or separable, there can be no partial rescission thereof, but, when a contract is divisible into a number of independent elements or transactions, and good cause for its rescission exists as to one part, it may be rescinded, and the rest of the contract affirmed.

4. CONTRACTS §171(1) — DIVISIBILITY — CONSTRUCTION—INTENT OF PARTIES.

The usual test of the severability of a contract is the entirety or divisibility of the consideration, and the intention of the parties will control; such intention to be determined by a fair consideration of the terms and provision of the contract itself.

5. VENDOR AND PURCHASER §44—RESCISSION—BURDEN OF PROOF.

Where plaintiff claimed rescission as to part of the contract on the ground that an equity in property taken in exchange as part of the purchase price represented to be worth \$400 was not worth that amount, the burden was on plaintiff to show fraud as a fact sufficient to authorize rescission.

6. VENDOR AND PURCHASER §55 — CONTRACT FOR SALE—DIVISIBILITY—PARTIAL RESCISSION.

A contract for the sale of land whereby the seller was to receive an equity in other property recited to be worth \$400 as part of the cash payment, the remainder of the purchase price to be paid by installments, constituted one entire contract, and was not severable as to the \$400 equity in the other property, so that it could be rescinded as to that part and affirmed as to the remainder.

Appeal from Circuit Court, Marion County; Louis B. Ewbank, Judge.

Action by Joseph W. Thompson and wife against Leo K. Fesler and wife. From a judgment for defendants and a denial of a new trial, plaintiffs appeal. Affirmed.

S. D. Miller, F. C. Dailey, and W. H. Thompson, all of Indianapolis, for appellants.

Joseph W. Hutchinson and Emsley W. Johnson, both of Indianapolis, for appellees.

McMAHAN, J. Appellants, Joseph W. Thompson and Georgiana H. Thompson, commenced this action against Leo K. Fesler and Flora B. Fesler, appellees, to recover a balance alleged to be due on a contract whereby appellants sold and appellee Leo K. Fesler agreed to buy certain real estate in Indianapolis, and known as lot 274, Morton place. The real estate was conveyed to appellees, who are husband and wife. The complaint seeks to have the amount charged as a lien upon the real estate, and alleges that, as payment of \$400 of the purchase price of said real estate, appellee Leo K. Fesler agreed to transfer to appellants an equity of \$400 in lot 230 in Osgood's Park addition to the city of Indianapolis, and that he never in fact had an equity of \$400 in said lot, and appellants seek to recover the balance of \$400 and interest due on the purchase price of the real estate conveyed by them to appellees.

The controversy in this case arises out of a sale by which appellants, Joseph W. Thompson and his wife, sold and conveyed to the appellees the said lot 274, Morton place. The particular question to be decided arises directly upon the agreement between the appellants and appellees as to the method of payment for the property conveyed. No question is raised as to this conveyance, its effect or validity, but the point in issue, aside from the question of rescission and that relating to the erroneous admission of evidence, is whether or not appellee Leo K. Fesler has paid the consideration for the property according to the terms of the written contract of sale by which he obligated himself to make certain payments for the Morton place property. In this connection the single question for our consideration is narrowed to the cash payment agreed to be made by the appellees as a part consideration for said property. The particular part of the contract which we are called upon to construe reads as follows:

"The buyers agree to pay to the sellers for said real estate, subject to a first mortgage of two thousand dollars, to the Marion Trust Company of Indianapolis, Indiana, the sum of three thousand dollars; said three thousand dollars payable eight hundred dollars in cash on the execution of this agreement, and said cash payment shall be made and received in the following manner: Four hundred dollars in cash on the execution of this agreement, and the sellers agree to accept an equity which belongs to the buyers in lot No. 230 in Osgood's Park addition to the city of Indianapolis, Marion county, Indiana, said equity amounting to four hun-

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Transfer denied.

dred dollars, and said sellers accept said equity as said four hundred dollars cash payment."

"Commencing with May 1, 1912, the buyers agree to pay the sellers the sum of thirty-five dollars per month for twelve months. On May 1, 1913, the buyers agree to pay to the sellers the sum of three hundred dollars; that thereafter on May 1st each succeeding year following the buyers shall pay to the sellers the sum of five hundred dollars until three thousand dollars has been paid; said three thousand dollars, to be the sum total of all previous payments made to that date, not including interest payments."

"The sellers agree contemporaneously with the signing of this agreement to convey to the buyers the aforesaid real estate by warranty deed, subject only to the aforesaid two thousand dollar mortgage to the Marion Trust Company, subject also to all taxes and municipal assessments after the year 1912. The buyers herewith agree to execute to the sellers a second mortgage upon said described real estate covering all deferred payments on said real estate. All of said deferred payments coming due after May 1, 1913, are to draw interest at 6 per cent. per annum, payable semiannually. * * * All of said semiannual interest payments shall be paid by said buyers to said sellers in addition to the aforesaid monthly and yearly payments."

The cause was tried by the court. The court found the facts specially, and stated its conclusions of law thereon to the effect that appellants take nothing, and judgment followed the conclusions of law.

Appellants filed their separate and also their joint motion for a new trial. Each of these motions contained 14 specifications which are identical in each motion. The only specifications presented on this appeal are that the court erred in the introduction of certain evidence.

The errors assigned are: (1) The overruling of the motion for a new trial; (2 and 3) that the court erred in its conclusions of law Nos. 1 and 2. The remaining assignments, Nos. 4, 5, 6, 7 and 8 all relate to the alleged errors of the court in its conclusions of law. The errors assigned by each appellant are identical in form and will be considered together.

Two witnesses, Thomas F. Carson and Linton A. Cox, on their direct examination, while testifying in behalf of appellees, were, over the objection of appellants, permitted to testify as to the value of said lot 230. Mr. Carson testified that the lot was worth \$1,525, and Mr. Cox testified that it was worth from \$1,575 to \$1,600.

The appellants contend that the admission of this evidence was error; that the value of said lot was not in issue; that the only question was the value of appellee's equity or estate in said lot. Appellants argue that the question in controversy is the extent of the equity of Leo K. Fesler, whether in fact he had a \$400 equity in the lot; that this equity was the interest Fesler had in the lot under

his contract of purchase from the College Park Land Company; and that this equity or estate depended on the amount paid on the contract, and not on the value of the lot.

[1] The admission of this testimony, if error, was harmless as the court ignored it in making the special findings. The court failed to make any finding as to the value of the lot other than to find that nothing had been proved or attempted to be proved as to the actual value of said lot 230 in Osgood's Park addition, or of the actual value of the appellee Leo K. Fesler's interest therein at the time said contract was entered into, nor at any other time, except so far as the several contracts entered into may constitute admissions of such values on April 28, 1909, and on December 7, 1912.

[2] The judgment and the conclusions of law are based solely upon the facts as found by the court and not upon the evidence. There was therefore no error in overruling the motion for a new trial.

The facts, as found by the court, are substantially as follows:

In April, 1909, appellee Leo K. Fesler entered into a contract with the College Park Land Company for the purchase of lot 230 in Osgood's Forest Park addition to the city of Indianapolis for \$1,325, payable as follows: \$20 cash and \$10 per month with 6 per cent. interest, payable semiannually until the purchase price was paid in full. This contract was executed in printed form and in a small passbook containing blank pages for the entry of payments and made therefor, this passbook being held and retained by said purchaser to be presented when payments were made. That appellee Leo K. Fesler made the \$10 payments each month up to and including July, 1912, making a total of \$400, and no more, paid by him on said contract.

That prior to and during the years of 1911 and 1912, until the execution of the deed, as hereinafter stated, Joseph W. Thompson was the owner in fee simple of lot No. 274 in Morton place, an addition to the city of Indianapolis, Ind., and on which lot there was during all of said time a valuable residence.

That on the 7th day of December, 1912, the appellants and the appellee Leo K. Fesler, pursuant to negotiations made prior thereto, entered into a contract in which appellants agreed to sell said Morton Place property to appellees, and appellees agreed to pay therefor in accordance with the terms and conditions as stated in that part of the contract hereinbefore set out.

Pursuant to negotiations and with a view of purchasing the property, appellees took possession of the Morton place property on the 1st day of May, 1912, and occupied the same until the execution of the above-mentioned contract of sale and purchase, and thereafter continued to occupy the same, and have ever since the 14th of December, 1912, owned and held the same as their property. That on the 14th day of December, 1912, the appellants, by their warranty deed of that date, conveyed the Morton place lot to the appellees as husband and wife. That thereupon the said appellee Leo K. Fesler executed his certain promissory notes for

the installments of purchase money, secured by a second mortgage in which his wife joined, and paid the appellants the sum of \$400 in cash, all as provided in the written contract of sale and purchase. That thereupon the said appellee Leo K. Fesler, by a written transfer and assignment in which his wife joined, transferred and assigned to Joseph W. Thompson the said contract of sale and purchase with the said College Park Land Company of said lot No. 230. That said College Park Land Company, by its written indorsement, consented to said assignment and transfer by Leo K. Fesler to Joseph W. Thompson. And the appellees thereafter paid such of the monthly installments of purchase money for which said notes secured by said second mortgage were so given as by their terms matured.

That prior to May 1, 1912, and from that date to the present time, the appellants resided in the city of Washington, D. C.; that on or after the time appellees took possession of the Morton place residence it was agreed between Joseph W. Thompson and Leo K. Fesler that the latter should retain the said passbook, and from certain monthly payments to be made on the Morton place property by said Fesler he was to make the monthly payments of \$10 to the land company on the purchase price of lot 230, for and on behalf of Joseph W. Thompson, on the contemplated assignment to and acceptance by him of Fesler's contract of purchase with the land company, all of which payments were to be properly adjusted on the final execution of said contract of sale and purchase and the execution of the deed by appellants to appellees for the Morton place property. That Leo K. Fesler did retain said passbook from May 1, 1912, to December 15, 1912, and made five monthly payments of \$10 each on the purchase price of said lot 230 for and on behalf of Joseph W. Thompson, and that all of said payments made by said Fesler were, on the execution of the deed and mortgage, adjusted and properly credited as part payment of the purchase price of the Morton place property, and the said Fesler was properly credited with all sums paid by him on behalf of appellant Joseph W. Thompson on said lot 230. That after the execution of the said contract of sale and purchase and after the execution of the deed by appellants to appellees for the Morton place property, and after the execution of the mortgage securing the notes for the unpaid purchase price of the Morton place property, Mr. Fesler forwarded said passbook to Mr. Thompson at the city of Washington.

At the time the contract was entered into between the appellants and appellee for the purchase of the Morton place property, appellee had paid the College Park Land Company on the contract for the purchase of lot 230 in Osgood's Forest Park the sum of \$400, in 37 installments, and there was still unpaid of the purchase price of said last-described lot, under said contract of purchase, the sum of \$1,125.30, and the payments made by said Fesler had only reduced his debt for the contract price of \$1,325 in the sum of \$199.70, in addition to paying the accrued interest on said debt.

Mr. Fesler made no representation or statement as to the amount he had paid on the purchase price of said lot 230 or as to the balance of the purchase money remaining unpaid,

other than that he "had an equity of \$400" in said lot, and he made that statement without any fraudulent intent and in the belief that such statement was true.

Neither of the appellants ever saw or inspected the said passbook until the same was received by Joseph W. Thompson about the 18th day of December, 1912, and that the said passbook showed the payment of 37 installments amounting to \$400, but did not show anything in regard to whether said payments had been applied upon the principal of the debt or the interest thereon. The appellee Leo K. Fesler had not, in fact, made any payments on or under his contract except the 37 payments aggregating \$400. Neither of appellants had actual knowledge that no other payments by way of interest or otherwise had been made by appellee Leo K. Fesler on the purchase price of said lot in addition to those entered in the passbook until about March 10, 1913, when they learned that said payments aggregating \$400 were all the payments that had been made, and that those had been applied by the College Park Land Company as partial payments to the discharge of the accrued interest, and after that was satisfied to the payment of the principal debt.

After the receipt of said passbook appellant Joseph W. Thompson paid to the College Park Land Company under the assignment of the Fesler contract with the College Park Land Company the sum of \$10 in January, \$10 in February, and \$15 in March, 1913.

Out of the \$400 paid by Mr. Fesler on lot 230 the Land Company applied a sum sufficient to pay and satisfy the several installments of interest, but such application was not shown in the passbook.

The appellant Joseph W. Thompson, upon the receipt of the information from the land company about March 10, 1913, that Leo K. Fesler had not paid the sum of \$400 on the purchase price of said lot, and upon obtaining actual knowledge that the land company had applied the payments made by the appellee Leo K. Fesler on the Forest Park lot, as shown by the said passbook, to the discharge and liquidation of the semiannual installments of interest due, and the balance (only) upon the principal debt, notified the appellees that he rescinded the agreement to accept the alleged equity of \$400 in the Forest Park lot, and immediately notified appellees that he rescinded and canceled the assignment so made by appellee Leo K. Fesler of his contract with the College Park Land Company, and thereupon reassigned the said assignment of the said contract and entered in said passbook and in connection with the assignment and reassignment of the said contract of sale a memorandum of rescission, and returned said passbook and the assignment and reassignment thereof to appellee Leo K. Fesler, and notified him in writing of his intention to rescind and of his rescission of the acceptance of said contract and of the acceptance of the said equity for the reason that appellee Leo K. Fesler did not have an equity of \$400 at the time the trade was made, and that he never did have an equity amounting to \$400 in the Forest Park lot, and that for these reasons appellants would not accept the alleged equity in said lot in payment of \$400 of the purchase price.

Before the commencement of this action ap-

pellants demanded of appellee Leo K. Fesler payment of a second \$400, as the second and further half of the cash payment of \$800 promised and stipulated by him to be paid as a part of the purchase price of the Morton place property under the contract of sale and purchase for the sale of property as hereinbefore set out.

The appellant Joseph W. Thompson has never offered to restore to appellee Leo F. Fesler before the bringing of this action any sum of money paid by appellee Leo K. Fesler to appellant Joseph W. Thompson, which has been paid under the terms of said contract of sale and purchase, and has never offered to return or to cancel the mortgage executed by Leo K. Fesler and his wife, and has never offered to return or cancel the notes secured by said mortgage, and has never offered to return to appellees the sum of \$400 cash which was paid at the time said contract was signed.

Nothing has been proved or attempted to be proved as to the actual value of the said lot 230 in Osgood's Forest Park addition, or of the actual value of Leo K. Fesler's interest therein at the time of said contract between appellees and appellants being entered into, nor at any other time, except so far as the several contracts entered into may constitute admissions of such values on April 28, 1909, and on December 7, 1912, respectively.

The court stated as conclusions of law: (1) That neither of the appellants was entitled to recover; and (2) that the appellees were entitled to a judgment for costs.

Appellants argue that we must determine from the facts, as found by the court, whether the appellee Leo K. Fesler did in fact have a \$400 equity in lot 230. It is appellants' claim that appellees agreed to pay \$400 in cash, but that, in lieu of such payment, appellants were to accept a \$400 equity in said lot and that as a matter of fact the appellees' equity amounted to less than \$200 and that, when appellants discovered that only \$200 had been applied on the contract price of said lot, the remainder having been applied on interest, they were entitled to rescind that part of the agreement relating to the acceptance of said equity.

This contention is based on the theory that the provision of the contract as to the acceptance of the "equity" in lot 230 is a separate part of the agreement, having nothing whatever to do with the sale by appellants and the purchase by appellee of the Morton place property, that the acceptance of this equity is not made a condition of the sale, and that it is not a part of the consideration of the sale.

Acting on this theory, appellants attempted to rescind so much of the contract as related to their accepting appellees' equity in said lot and to require that appellees pay them \$400 cash in lieu of said equity, leaving the remainder of the contract to be enforced as written.

[3] The general rule is that, unless a contract is clearly divisible or separable, there

can be no such thing as partial rescission of it. If one party has legal grounds to cancel the contract, he will have an option either to rescind it or affirm it, but his election of either course must go to the entire contract, and not to a part of it. In other words, he must rescind in toto or not at all. When a contract is divisible into a number of elements or transactions, each of which is so independent of the others that it may stand or fall by itself, and good cause for its rescission exists as to one part, it may be rescinded, and the rest of the contract affirmed.

[4] The usual test of the severability of a contract is the entirety or divisibility of the consideration. 2 Black on Rescission and Cancellation, §§ 583 and 585.

In determining whether a contract shall be treated as severable or as an entirety, the intention of the parties will control, and this intention must be determined by a fair consideration of the terms and provisions of the contract itself. *Gilmore Co. v. Samuels Co.*, 135 Ky. 706, 123 S. W. 271, 21 Ann. Cas. 611.

Among the rules to be applied in determining the real intention of the parties are the following:

"A contract is entire when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions and the consideration are common each to the other and interdependent. A divisible contract is one in its nature and purposes susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other. 7 Am. & Eng. Encyc. of Law (2d Ed.) 95."

The test chiefly relied upon is whether the parties have apportioned the consideration on the one side to the different covenants on the other. If the consideration is apportioned, so that for each covenant there is a corresponding consideration, the contract is severable. If, on the other hand, the consideration is not apportioned, and the same consideration supports all the covenants and agreements, the contract is entire. 3 Page on Contracts, § 1484. A contract is entire when by its terms, nature, and purpose it contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent. On the other hand, it is the general rule that a severable contract is one which in its nature and purpose is susceptible of division and apportionment. 13 C. J. 561; *Straus v. Yeager*, 48 Ind. App. 448, 93 N. E. 877. Such a contract possesses essential oneness in all material respects. The consideration of it is entire on both sides. *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, 736. The rule, as stated in 2 Parsons on Contracts, p. 517, is as follows:

"The question whether a contract is entire or separable is often of great importance. Any

contract may consist of many parts; and they may be considered as parts of one whole, or as so many different contracts entered into at one time and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract. * * * If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items."

With these rules in mind we will proceed to an analysis of some of the cases which appellants claim uphold their contention that the agreement to accept the equity in lot 230 is severable and independent of the contract for the sale of the Morton place property.

In *Straus v. Yeager*, 48 Ind. App. 448, 93 N. E. 877, the parties entered into a contract dated October 31, 1906, wherein the appellant agreed to sell and convey for the sum of \$29,850 certain real estate to the appellee. The purchase price was to be paid as follows: \$50 in cash; \$9,000 to be paid in cash November 13, 1906; \$1,000 March 1, 1907; and the balance secured by mortgages and evidenced by notes dated March 1, 1907. It was also provided that, if either party refused to perform said contract, the other party might by suit enforce specific performance of any act required of the defendant party, or might recover from the defaulting party damages. Following this part of the contract there was also the following provision:

"It is further agreed that, in consideration of the foregoing, the second party [Yeager] hereby sells and the first party [Straus] hereby buys the stock of goods now owned by the second party. * * * Stock to be turned over * * * November 13, 1906, and inventory to be made, starting on the 13th of November or the 14th."

The payment of the \$9,000 not having been made, and the stock of goods not having been turned over in accordance with the contract, suit was commenced the next day to recover the \$9,000. The appellee contended that the agreement to convey and the agreement to pay constituted an indivisible contract, and that before suit could be maintained to recover any part of the purchase price there should have been a tender of the deed and an offer to perform the contract to convey. The court held that the agreement of appellee to pay the \$9,000 at a date prior to the time fixed for the conveyance of the real estate did not depend on the execution and delivery of the deed, and that an action would lie to recover the installment becoming due November 13th, and that said sum

was an advance payment not depending on the conveyance of the real estate.

In *Cole v. Harvey*, 142 Iowa, 574, 120 N. W. 97, appellant was the agent of one Russell in procuring a purchaser for certain real estate, and through his efforts two tracts of land were contracted to be sold to appellee and his two brothers. In order to protect appellant in the collection of his commission, the appellee and his brothers entered into a written agreement with appellant whereby they agreed to hold out of the purchase money \$1,200 and to pay the same to appellant; they having been authorized by Russell to make such payment to appellant. Russell failed to make the conveyance, and the contract to sell was abandoned. Afterwards appellee entered into a separate agreement with Russell for the purchase of one of the tracts mentioned in the first agreement, and paid the whole of the purchase price to Russell. Appellant contended that his agreement with the Harvey brothers was a divisible agreement, and that on a purchase of either tract he was entitled to the \$1,200 commission. The questions of divisibility and rescission were not involved.

In *Young Mfg. Co. v. Wakefield*, 121 Mass. 91, the court held that, where a number of articles (rubber coats) are bought at the same time for different prices, even if of the same general description so that a warranty of quality would apply to each, the contract is not entire, but is in effect a separate contract for each article sold, and a right of rescission exists as to each article if the warranty in regard to it is broken. The court, on page 92, said:

"If but one consideration is paid for all the articles sold, so that it is not possible to determine the amount of consideration paid for each, the contract is entire."

Bartlett v. Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101, was a case where the parties had entered into an agreement for the sale by appellant to appellee of two parcels of land. Appellant prepared the deed and included four parcels of land instead of two, and through fraud included four parcels instead of two, and obtained the signature of appellee. The court there held that, if it could be shown that the two parcels of land were included by fraud, and that no part of the consideration was paid and received on account thereof, the conveyance as to the parcels fraudulently included could be avoided without rescinding the actual sale or setting aside the entire deed.

Morse v. Brackett, 98 Mass. 205, was a case where one party purchased eight bags of wool, all supposed to be of the same kind. After delivery it was discovered that one bag was different than the others. The purchaser attempted to rescind as to the one bag, but the court held that the contract was

entire and that a rescission could not be exercised as to one bag.

In *Bank v. Hamblet*, 35 Me. 491, it was held that bonds given between the parties, both being a part of the same transaction, the one being to sell and the other to buy land at a stipulated price, are not dependent, if they fixed the time and place at which the purchaser is to make payment. The bond given by appellee in this case provided that the payment must be made prior to the time when the conveyance was to be made. The court, in discussing the contract, said:

"It is well settled, when acts are to be performed by each party at the same time, neither party can maintain an action against the other without performance or an offer of performance on his part. But if it is the design of the parties that one party alone is to do the first act, after the execution of the contract, and by failure, to commit a breach thereof, the other party may be excused from tendering a performance. * * * It was the contract that the defendant on a day and place certain should pay or offer to pay the sums. * * * On failure to do this, the bond was to be effectual against him."

McDaniels v. Whitney, 38 Iowa, 60, was a case where the court was equally divided on the question as to the divisibility of the contract, two judges holding that it was divisible, and two that it was not.

In *Spear v. Snyder*, 29 Minn. 463, 13 N. W. 910, the plaintiff agreed to put down five wells at a stipulated price per foot. It was agreed that, in case of a failure to "get a good supply of water," plaintiff should "have no pay." It was held that the agreement was severable and that the plaintiff could recover on the completion of one well.

In *Bank v. Trust Co.*, 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611, three notes had been discounted by the appellee, and the proceeds placed to the credit of the payee with the appellee trust company. Before all the funds had been checked out, appellee discovered that the maker of the notes was insolvent, whereupon it charged off the amount of one note and returned it to the payee. Held that the discounting of the three notes was a divisible contract, and that under the circumstances a rescission could be had as to one note, the court holding that:

"As a general rule, when the party wishes to rescind an entire contract, he must do so in toto, or not at all. But this is the rule of construction based upon the intention of the parties, * * * and not a rule of law controlling that intention. * * * Where the consideration is divisible, and the price can be apportioned, then, if a distinct divisible portion of the consideration fails, the price paid for such portion may be recovered back. In such a case the purchaser may elect to take what can be delivered to him, and if the purchase money has been paid, he may recover back the excess, or, if there has been no payment, defend pro tanto."

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In *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572, the grantor in a deed made a contract to sell two lots to the grantee at a fixed price for each lot. When the deed was made the grantor omitted one lot from the deed. Held that the grantee could recover the price he was to have paid, and in fact did pay, for the omitted lot.

The remainder of the authorities cited by appellant are along the same general line as those heretofore reviewed. All of them agree that the question as to whether the contract is entire or severable is one of intention, to be determined from the language used and the subject-matter of the contract.

Even though the contract should be held to be divisible, we do not believe that appellants are entitled to a rescission. This action is in the nature of a suit in chancery. In *Patten v. Stewart*, 24 Ind. 332, the court said.

"It is well settled that an application for the rescission of a contract is addressed to the sound discretion of a court of chancery, but that discretion can be exercised in conformity to established principles. It is a general rule that a contract will not be rescinded, even for fraud, unless the contracting parties can be restored to the same situation occupied by them, respectively, when the contract was entered into, nor unless the application for a rescission be made within a reasonable time. * * * A party who seeks the aid of the court to compel the rescission of a contract for fraud must show that he has exercised at least reasonable diligence in ascertaining the facts, if readily within his power, and has been prompt in seeking his remedy within a reasonable time after the facts constituting the fraud are discovered. The relief is granted to the vigilant, and not to the negligent."

The plaintiff in the case last cited relied upon the defendant's representation that his title was clear and undisputed. He did not investigate the title at the time of his purchase, nor require an abstract of his title, nor require the defendant to exhibit his title deeds, and he never examined or investigated the title until long afterwards. The records of the public office where the evidence of the defendant's title would likely be found were of easy access, and open to his inspection, but he failed to examine them or to use any other means to ascertain whether the representations of the defendant were true or false. The court held there was no right to rescind.

The special findings in the present case do not disclose when the parties began the negotiations that resulted in the execution of the contract for the sale of the Morton place property, but it is shown that they came to an understanding before the 1st of May, 1912, as to all the terms of the contract, and, with that settled, appellees took possession of the Morton place property on May 1st, but for some undisclosed reason the contract

was not reduced to writing until the following December. The evidence, however, discloses that in March, 1912, the appellee Leo K. Fesler wrote to appellant Joseph W. Thompson a letter in which something was said about buying the Morton place property if appellants would take over appellees' contract for lot 230 as a cash payment.

The court found as a fact that appellee Leo K. Fesler made no representation as to the amount he had paid on said lot 230 or as to the balance remaining unpaid of the purchase price for the same other than that he "had an equity of \$400" in said lot, and that he made such statement without any fraudulent intent and in the belief that the statement was true.

[5] The burden was on appellants to show fraud sufficient to authorize a rescission. Fraud is a question of fact, and must be found as a fact in the special findings, and not left to inference. *Johnston v. Redwell*, 15 Ind. App. 236, 43 N. E. 246.

It was agreed between appellants and appellees when appellees took possession of the property that appellee Leo K. Fesler should keep the passbook containing the contract for the purchase of lot 230, and from certain monthly payments to be made on the Morton place property he was to make the monthly payment of \$10 to the land company on said lot 230 for and on behalf of the appellant Joseph W. Thompson. In accordance with this agreement, Mr. Fesler retained the passbook, and between May 1, 1912, and the date of the execution of the deed by appellants he made five monthly payments on behalf of Joseph W. Thompson.

Appellants had ample time to have investigated the facts relating to the amount which the appellee had paid toward the purchase price of said lot 230. Nothing was concealed from them, and in so far as the facts are disclosed by the special findings they made no inquiry concerning the value of said lot 230 or of appellees' equity in it, although the evidence discloses that Mr. Thompson did make an investigation as to the value of the lot and was presumably satisfied as to its value.

[8] The contract for the sale of the Morton place property and the terms of payment, including the acceptance by appellants of the equity in lot 230, in our judgment is one entire contract. The provision relating to the sale depends upon that part relating to the acceptance of the equity in lot 230. They are interdependent, and the appellants cannot adopt the parts of the contract which they think are beneficial to them and at the same time rescind a part which they deem to their disadvantage.

In *Stuart v. Hayden*, 72 Fed. 402, 18 C. C. A. 618, there had been an exchange of real estate for certain bank stock, \$19,500 cash,

and the agreement of the purchaser to pay a \$30,000 mortgage. The bank failed, and there was an attempt to rescind as to the bank stock without refunding the \$19,500 cash or releasing the purchaser from his agreement to pay the \$30,000 mortgage on the real estate. The court in passing on the question there involved, said:

"Conceding that Gruetter and Joers were induced to make this trade by the fraudulent misstatements of Stuart, they could not rescind in the part which was burdensome and affirm it in the part which was beneficial to them. They could not rescind it as to the stock and affirm it as to the cash. They must either rescind or affirm it altogether."

So in the present case the appellants cannot rescind as to the equity in lot 230 and affirm as to the cash. In view of the conclusion which we have reached, it is not necessary for us to enter into a discussion of the meaning of the expression "\$400 equity" as used in the contract.

There was no error in the conclusions of law as stated by the court.

Judgment affirmed.

NICHOLS, J., not participating.

(70 Ind. App. 112)

GRANITE SAND & GRAVEL CO. v. WILLOUGHBY et al. (No. 10492.)

(Appellate Court of Indiana, Division No. 2. May 8, 1919.)

1. MASTER AND SERVANT \S 371—WORKMEN'S COMPENSATION — CONSTRUCTION—INJURIES ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

Workmen's compensation acts should be given a liberal construction in determining whether injuries arose out of and in due course of the employment.

2. MASTER AND SERVANT \S 375(1) — WORKMEN'S COMPENSATION—INJURIES ARISING IN "COURSE OF EMPLOYMENT."

An injury occurs in the course of the employment within the Workmen's Compensation Act when it occurs within the period of the employment at a place where the employé may reasonably be, and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

3. MASTER AND SERVANT \S 375(1) — WORKMEN'S COMPENSATION—INJURIES ARISING IN COURSE OF AND OUT OF EMPLOYMENT.

Where an employé engaged in picking out dirt and foreign substances from gravel loaded into railroad cars by the employer remained in the car while it was moved away from the loading chute to allow the removal of a car and was

injured by falling from the car while it was being switched, the injury was sustained in due course of, and arose out of, the employment.

Appeal from Industrial Board.

Proceeding under the Workmen's Compensation Act by George Willoughby and others to recover compensation for the death of Cecil Willoughby, employé, opposed by the Granite Sand & Gravel Company, employer. From an award of compensation by the Industrial Board, employer appeals. Affirmed.

Joseph W. Hutchinson, of Indianapolis, for appellant.

Salem D. Clark, of Indianapolis, for appellees.

NICHOLS, J. This was an application by he appellees as dependents of Cecil Willoughby against the appellant for the adjustment of their claim for compensation under the Workmen's Compensation Act (Laws 1915, c. 106), wherein it was claimed that said Cecil Willoughby died as a result of an injury arising out of and in the course of his employment by appellant.

As appears by the board's findings, the material facts are that:

On the 15th day of June, 1918, one Cecil Willoughby was in the employment of the defendant at an average weekly wage of \$18; that at said time the defendant was engaged in the operation of a gravel pit from which it was shipping gravel; that leading from a main railroad track a switch led into the premises occupied by the defendant and over which it shipped gravel; that the defendant loaded cars by means of a chute through which it conveyed the gravel into the cars; that as cars were thus loaded they were pushed down the switch and away from the main track, and another car was brought under the chute for the purpose of loading; that because of such position of cars it became necessary when loaded cars were to be removed at a time when a car was in the process of loading, to remove such car from under the chute in order that the loaded cars might be removed; that as the gravel was conveyed into the car the defendant had employes therein to pick out dirt, sticks, and foreign substances; that the said Cecil Willoughby was employed for such service on the 15th day of June, 1918, was engaged therein, and in the discharge of said duties was standing in a car picking out sticks, dirt, and foreign articles from the gravel that was being conveyed therein through the chute; that while the said Cecil Willoughby was so engaged the railroad switching crew desired to remove the loaded car; that in company with another employé, who was also working in the car with him, the said Cecil Willoughby got out and assisted to raise the chute so that the cars could be removed; that after raising the chute the said Cecil Willoughby re-entered the car in which he had been working, and while said car was being switched by the railroad switching crew the said Cecil Willoughby was accidentally thrown out of said car, which ran over his body, inflicting injuries which

resulted in his death on said date; that the defendant had at no time instructed the said Cecil Willoughby that he should not remain in the car in which he was employed to work when it was being switched; that the defendant had actual knowledge of the injury and the death of the said Cecil Willoughby at the time of the occurrence; that the said Cecil Willoughby left surviving him the appellees as his dependents.

On those findings there was an award against the appellant of 300 weeks' compensation at the rate of \$9.90 per week, beginning June 15, 1918, and an order to pay burial expenses not to exceed \$100. From this award an appeal was prayed, and granted to this court. The only error relied upon for reversal is that the award of the full board in said cause is contrary to law.

[1] It has been held by the courts, elsewhere, as well as in this state, that the Workmen's Compensation Acts should be liberally construed, and should be given a broad and liberal construction in order that the humane purposes of their enactment may be realized, and this is certainly true in determining whether an accident that produced injury arose out of and in due course of the employment. *Holland-St. Louis Sugar Co. v. Shraluka*, 116 N. E. 830.

[2] An injury occurs in the course of the employment, within the meaning of the Compensation Act, when it occurs within the period of the employment, at a place where the employé may reasonably be, and while he is reasonably fulfilling the duties of his employment, or is engaged in doing something incidental to it. In *re Ayers*, 118 N. E. 386; *N. K. Fairbanks Co. v. Industrial Commission of Ill.*, 285 Ill. 11, 120 N. E. 457.

[3] In this case, the employé's duties required him to work inside of a railroad car standing on a switch, at a chute from which the car was being loaded. It became necessary to remove the car from the chute in order that certain cars behind it might be taken away. After assisting in lifting the chute, he re-entered the car and stayed with it while it was away from the chute, until he was injured. He was in the place where his duties required him to be, and ready to commence them as soon as his car was reset at the chute. The appellant by its superintendent knew that sometimes the men remained in the car, but never gave them any instructions concerning what they should do while the car was being moved. No instructions were given to the decedent as to what he should do while his car was being moved, though such conduct could have been prohibited if deemed improper. It is not unreasonable that he believed, and we hold that he had a right to believe, that he was in his proper place when he was in the car where his duties required him to be as soon as the car was in proper position again. We hold that Cecil Willoughby received the injury

that resulted in his death, while in the due course of his employment, and that his injury and death grew out of his employment.

The award of the Industrial Board is affirmed, with 5 per cent. penalty as provided by statute.

(70 Ind. App. 157)

MUNCIE FOUNDRY & MACHINE CO. v. THOMPSON. (No. 10497.)

(Appellate Court of Indiana, Division No. 1. May 9, 1919.)

1. MASTER AND SERVANT \Rightarrow 367—WORKMEN'S COMPENSATION—RELATION OF PARTIES—"INDEPENDENT CONTRACTOR"—"EMPLOYÉ."

Foundry worker unloading coke from freight cars for a certain sum per ton is an "employé," and not an "independent contractor," where there is no contract to unload certain number of tons or work for certain period of time; worker having right to quit and foundry company having right to discharge him at any time without liability (citing Words and Phrases, First and Second Series, Employé; Independent Contractor).

2. MASTER AND SERVANT \Rightarrow 416—WORKMEN'S COMPENSATION — FINDINGS OF INDUSTRIAL BOARD.

In proceedings under Workmen's Compensation Act, Industrial Board must find as legal basis for an award that claimant was an employé, that he received an injury by accident, that the accident arose out of and in course of the employment, the character and extent of the injury, and the claimant's average weekly wage.

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act (Laws 1915, c. 106), by Joshua Thompson for compensation for injuries, opposed by the Muncie Foundry & Machine Company. From award by Industrial Board, employer appeals. Reversed and remanded, with directions.

Joseph W. Hutchinson, of Indianapolis, for appellant.

Cromer & Long, of Muncie, for appellee.

ENLOE, J. The record in this case discloses: That on the 8th day of July, 1918, the appellee began working for appellant, at its plant at Muncie, Ind., unloading coke from the freight cars in which it was shipped to the plant, into the "bins" of appellant at said plant; that this coke was shoveled from the car into the hopper of a conveyor, by which it was carried and dumped into the bins; that appellee was working under an agreement, at the time of his injury, by which he was to receive as compensation for his labor 40 cents per ton for the coke unloaded; that, prior to the time of receiving the injury complained of, he had been assist-

ed in unloading said coke by two other persons, one of whom assisted in unloading two cars, and the other person assisted on one car; that appellee had been doing this work without any help or assistance from any other person for several days before he was injured; that on July 19, 1918, appellee was at the plant of appellant unloading a car of coke, and, while so at work, he observed that the conveyor had stopped, and thinking it had become clogged, thereby causing it to stop, he opened a door thereon to investigate the matter; he found some pieces of coke on the belt, and in attempting to remove them his hand was caught and he was injured; that as a result of the injury he lost the thumb of his right hand by amputation, the crushing of the bones of the hand, and a laceration of the tendons and soft tissues thereof, all of which resulted, as found by the Industrial Board, in a "75 per cent. impairment of the natural use and function of the whole right hand"; that the average weekly wage of the appellee was in excess of \$24. The Industrial Board further found—

"That the plaintiff's injury was not due to any willful misconduct upon his part, and was not in violation of any specific instruction given to him by the defendant."

A hearing was first had before one member of the board, and afterwards, on due application by appellant for review of the proceeding, a review was had by the full board, and on such hearing the board awarded compensation to appellee at the rate of \$13.20 per week, for 112½ weeks, beginning July 28, 1918, and from that award this appeal is prosecuted.

The error assigned is that the award of the full board in said cause is contrary to law.

Under this assignment the appellant urges three propositions, viz:

(1) "The finding of the full board is not sustained by sufficient evidence. The specific point to which we call the court's attention is that the full board found that appellee was in the employment of appellant; whereas, in truth and in fact he was not an employé of appellant, but an independent contractor."

[1] With this contention we cannot agree. It is frequently said in the cases that—

"To draw the distinction between independent contractors and servants is often difficult, and the rules which courts have undertaken to lay down on this subject are not always simple of application."

See Independent Contractor, Words and Phrases, vol. 4, p. 3542.

What contract, as an independent contractor, did the appellee have with appellant?

How many cars must he unload at 40 cents per ton, before his contract would be complete? Or during what period of time was he, under his contract, to unload cars for appellant? As to each of these questions there is no answer found in this record favorable to appellant.

Contracts are entered into for the purpose of acquiring rights, on the one hand, and imposing obligations on the other. Could appellee, under the evidence in this case, as shown in this record, have quit work at any time, without incurring any legal liability to appellant? Could appellant at any time discharge the appellee without incurring any legal liability to him to respond in damages for breach of the alleged contract? To these questions upon the record before us we answer that there could be no such liability. The appellee could cease labor for appellant at any time he chose, and appellant had the right to discharge him any time it chose. Appellee's pay, instead of being measured by the hour, day, week, or month, was, by this contract, to be measured by the ton of coke unloaded; but he was none the less a laborer, in the employ of the appellant, doing appellant's work at the time he received the injury in question.

Appellant next insists that the facts found are not sufficient to sustain the award, because:

(1) There is no finding that the appellee was in the course of his employment at the time he received the injury upon which the award is based; and

(2) There is no finding of facts which shows that the injury complained of and upon which the award is based, arose out of the employment.

This contention is well taken. The board is, by the statute, required to find the facts upon which it bases an award. There is not, in this case, any general finding that the injury sustained by him was received by accident arising out of and in the course of the employment, as servant of appellant.

[2] In cases of this character, there are five facts which must be found as a legal basis for an award of compensation, viz.:

- (1) That claimant was an employé.
- (2) That he received an injury by accident.
- (3) That the accident arose out of and in the course of the employment.
- (4) The character and extent of such injury.
- (5) Claimant's average weekly wage.

The cases of *Inland Steel Co. v. Lambert*, 118 N. E. 162, and *Retmier et al. v. Cruse*, 119 N. E. 32, in so far as they each are at variance with the views herein expressed, as to the findings to be made by said board are hereby disapproved.

For the failure of the board to find the facts necessary to sustain its award, this cause is reversed and remanded to said In-

dustrial Board, with directions to restate its findings of fact, and for further proceedings not in conflict herewith.

Award is reversed.

(226 N. Y. 128)

In re SARATOGA AVE. IN CITY OF NEW YORK.

(Court of Appeals of New York. April 8, 1919.)

1. EMINENT DOMAIN §47(1) — PROPERTY SUBJECT TO APPROPRIATION — PREVIOUS PUBLIC USE.

When a public corporation having public obligations with power to acquire property by eminent domain acquires the same by purchase to carry out such obligations, it can hold it for such public use with the same right of priority therein that it would have had if it had acquired it pursuant to the condemnation statute.

2. EMINENT DOMAIN §47(1) — PROPERTY SUBJECT TO CONDEMNATION—PUBLIC USES OR PURPOSES.

When lands are used in immediate and necessary connection with a public trust by a public corporation, they are recognized as being held for a public use or purpose.

3. EMINENT DOMAIN §47(1)—LANDS SUBJECT TO CONDEMNATION — LANDS ALREADY DEVOTED TO PUBLIC USE.

A general grant or power to condemn lands does not extend to lands which have already been devoted to a public use.

4. EMINENT DOMAIN §47(1) — PROPERTY SUBJECT TO CONDEMNATION—PROPERTY ALREADY DEVOTED TO PUBLIC USE—STATUTORY PROVISIONS.

Neither Laws 1869, c. 670, nor Laws 1872, c. 331, and Laws 1874, c. 581, amendatory thereto, nor Greater New York Charter, §§ 438-443, 970, 971, specifically grants power to the city to acquire by condemnation proceedings lands already devoted to a public use.

5. EMINENT DOMAIN §2(6)—PLAN OF FUTURE STREETS—TAKING OF PROPERTY.

Laws 1869, c. 670, providing for the laying out of a plan for roads and streets in Kings county, does not dedicate lands designated as streets to a public use, and if, construed to prevent the owner of property without limit of time from conveying an unincumbered title thereto, it is unconstitutional as taking private property without compensation.

6. CONSTITUTIONAL LAW §48 — CONSTRUCTION FAVORING VALIDITY.

A statute, if possible, should be construed so that it does not violate any constitutional provision.

Appeal from Supreme Court, Appellate Division, Second Department.

Proceedings by the City of New York to acquire title to and open and extend part of Saratoga Avenue. From an order of the Appellate Division (180 App. Div. 638, 168 N. Y. Supp. 180), reversing an order of the Special Term excluding the real property of the Nassau Electric Railroad Company from the lands sought to be condemned, the Nassau Electric Railroad Company appeals. Reversed.

See, also, 182 App. Div. 898, 168 N. Y. Supp. 1128.

The order granting leave to appeal to this court certified that the following question of law had arisen which in its opinion ought to be reviewed by the Court of Appeals, viz.:

"Has the city of New York by this proceeding the right against the objection of the Nassau Electric Railroad Company to acquire title for the purpose of a public street to the real property of said company within the lines of Chester street and Bristol street as laid out on the map of the town survey commissioners of Kings county, pursuant to chapter 670 of the Laws of 1869, as amended?"

The map therein referred to was duly filed in 1874. The lands in question in 1874 were included within the town of Flatlands, county of Kings, and since 1897 have been included within the city of New York. The Nassau Electric Railroad Company is a street surface railroad corporation, and the city of New York a municipal corporation. The city of New York in 1911 duly commenced a proceeding to acquire title to lands required for the opening of certain streets in said city.

The Nassau Electric Railroad Company owned a part of the lands sought to be acquired for opening and extending Chester and Bristol streets in said city, and denied the right of the city of New York to take the same from it without its consent. The referee to whom was referred the issues of law and fact raised by the answer of the Nassau Electric Railroad Company found as a matter of fact among other things:

"VIII. That prior thereto and at the time said petition of the city of New York was presented to the Supreme Court, and ever since, the defendant, Nassau Electric Railroad Company, has used said above-described land for a car barn and for storage yard for its trolley cars, used by it in the conduct of its business as a street surface railroad corporation, which said cars were used by it in the operation of its railroad. The said real estate was acquired by the Nassau Electric Railroad Company for, and has been devoted to the use of a storage yard and car barn for its cars, at the times hereinafter mentioned and the same is held by the defendant, the Nassau Electric Railroad Company, for a public use.

"IX. That it is necessary for the defendant, the Nassau Electric Railroad Company, in the conduct and operation of its business, as a street surface railroad corporation, to have and use real estate conveniently located to its tracks

for the storage of its cars and their equipment, when the same is not in use and in operation and for the purpose of making repairs thereon.

"X. That the opening of Chester and Bristol streets through the above-described real estate and devoting the same to a public use for street purposes, as proposed by the city of New York, in said opening proceeding, would interfere with the use to which the defendant, the Nassau Electric Railroad Company, now uses real estate and has used the same for many years prior to the presentation of said petition by the city of New York, and the use of the land in Chester and Bristol streets, as the same is proposed to be opened for street purposes, would be inconsistent with the use of the same by the defendant, the Nassau Electric Railroad Company, for the storing of cars therein, as it now uses the same and has used the same since and prior to the presentation of said petition.

"XI. That the land in Chester street, as the same is proposed to be opened by the city of New York, as the same affects the above-described real estate, has never been dedicated for street purposes, and the city of New York has never acquired any right, title, or interest therein, or thereto, and has no right, title, or interest therein or thereto now."

He also made a finding in regard to Bristol street similar to finding IX in regard to Chester street.

The referee also found as conclusions of law:

"I. That the land in Chester street, as the same is proposed to be opened, so far as the same is part of the land belonging to the defendant, Nassau Electric Railroad Company, as described above, has never been dedicated to a street use, and the public has never acquired any interest therein for street purposes or otherwise.

"III. That said land in Chester street was acquired by the defendant, Nassau Electric Railroad Company, for a public use, namely, that of a railroad use, and, being so acquired and used, said land cannot now be acquired by the city for street purposes."

He also found as conclusions of law regarding Bristol street the same as he found regarding Chester street in said conclusions I and III.

The report of the referee was confirmed, and an order was duly made excluding the property of the Nassau Electric Railroad Company from the proceeding. An appeal was taken therefrom to the Appellate Division, where said order was reversed. Matter of City of New York (Saratoga Avenue), 180 App. Div. 638, 168 N. Y. Supp. 180. An appeal is taken to this court by permission from said order of reversal.

Charles A. Collin, of New York City, for appellant.

William P. Burr, Corp. Counsel, of New York City (Joseph A. Solovel, of Brooklyn, of counsel), for respondent City of New York.

CHASE, J. (after stating the facts as above). In considering the question submit-

ted to this court it is necessary first to determine whether the appellant is now holding the lands in controversy for a public use. It acquired title thereto by purchase years before this proceeding was commenced.

[1] When a public corporation having public obligations with power to acquire property by eminent domain acquires the same by purchase for the purpose of carrying out such obligations, it can hold it for such public use with the same right of priority therein that it would have had if it had acquired it pursuant to the provisions of the Code of Civil Procedure relating to condemnation. *Lewis on Eminent Domain* (3d Ed.) § 443.

The appellant has for years used the lands in question on which to maintain its car barns, car tracks, and a storage yard for trolley cars. The lands are contiguous to its main tracks on which its franchises are exercised. Its use as such has been continuous and immediately connected with its business as a street surface railroad corporation. Such use is necessary in running and operating its railroad, as more specifically stated in the findings quoted in the statement of facts herewith.

[2] When lands are used in immediate and necessary connection with a public trust by a public corporation, the courts recognize that they are held for a public use or purpose. *Matter of N. Y. & H. R. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Matter of Mayor, etc., of N. Y.*, 52 Misc. Rep. 598, 102 N. Y. Supp. 500, affirmed 135 App. Div. 912, 120 N. Y. Supp. 839; 198 N. Y. 606, 92 N. E. 1083; *Matter of N. Y. C. & H. R. R. Co.*, 77 N. Y. 248; *State v. Commissioners of Mansfield*, 23 N. J. Law, 510, 57 Am. Dec. 409.

[3, 4] It is settled that a general grant of power to condemn lands does not extend to lands which have already been devoted to a public use. *Matter of City of New York (Newport Avenue)* 218 N. Y. 274, 112 N. E. 911; *Matter of Mayor, supra*; *N. Y. C. & H. R. R. Co. v. City of Buffalo*, 200 N. Y. 113, 93 N. E. 520. To reach such lands the grant of power must be specific. *Matter of City of New York (Newport Avenue) supra*. There is no such specific grant of power in chapter 670 of the Laws of 1869, nor by the amendments thereto in 1872 (chapter 331) and 1874 (chapter 581) nor by sections 438-443 and 970, 971, of the Greater New York Charter. *Matter of City of New York (Newport Avenue) supra*. See opinion of Crane, J., in s. c., 77 Misc. Rep. 250, 135 N. Y. Supp. 708, adopted in s. c., 171 App. Div. 928, 155 N. Y. Supp. 1127.

The answer to the question submitted to this court depends, therefore, upon whether by the survey made by the commissioners appointed pursuant to chapter 670 of the Laws of 1869, and the filing of the map by them, the town of Flatlands and its successors acquired a right and interest in the lands in controversy superior to that of all other per-

sons therein, and by reason of which the acquisition of said lands and the use of them by the railroad company on which to maintain its car barn and storage tracks has always been and now is subordinate to the right of the town of Flatlands and its successors to take the same for street purposes.

It appears by the title of chapter 670 of the Laws of 1869 that it was enacted for the purpose of laying out "a plan for roads and streets in the towns of Kings county." It does not purport to be an act to lay out roads and streets.

It appointed the then present (1869) supervisors of the towns of New Lots, Flatbush, Flatlands, New Utrecht, and Gravesend in said county and the chairman of the board of supervisors of said county commissioners as therein provided. Section 1. They were directed to appoint a competent surveyor to make and execute all requisite surveys and maps under their direction. Section 3. They were expressly directed to "plan and lay out streets, roads and avenues in the said towns, conforming to the avenues and streets and plan of the city of Brooklyn, as now terminated at the city line, as nearly as may be practicable and judicious." They were further directed to have a map made thereof and "file the same, when completed, in the office of the clerk of Kings county," and "place suitable monuments to indicate the several localities." Section 4. The purpose and effect of such survey and map are stated in section 5 of the act which is as follows:

"The said commissioners, surveyors or assistants, may enter, in the daytime, into and upon any lands and premises which they shall deem necessary for the purposes aforesaid. They shall have exclusive power to lay out streets, avenues and public places, of such width, extent and direction as they shall decide, and after the passage of this act, until the adoption of such permanent plan, no person or persons, or officers, shall lay out streets or roads in said towns, without the consent of said commissioners first obtained, except in cases where streets, avenues or roads have been or shall be authorized by special acts of the Legislature, in which cases such acts shall have full power and effect, anything in this act to the contrary notwithstanding. After the establishment or adoption of such permanent plan, no street or avenue shall be laid out in said towns, or either of them, except in accordance with said plan so adopted, and all streets or avenues afterwards opened, widened or improved, shall be made to conform to such permanent plan and the lines thereof. If any buildings shall be erected on the line of any avenue or street, as laid out on said plan after the filing of said map, no compensation shall be paid to the owner thereof on the opening of said street."

The act does not include any direction or authority to the commissioners or others to institute a proceeding to acquire title of any kind to the lands included within the roads and streets to be shown on the map. It does

not provide an efficient step toward an appropriation of the lands. The only provision of the act directly affecting the several towns named therein and the inhabitants thereof is that, after the adoption of the permanent plan, "no street or avenue shall be laid out in said towns or either of them except in accordance with said plan so adopted."

It does not purport to open any street or highway or dedicate any land to street or highway purposes or direct when, if ever, the same shall be opened and used as a street or highway.

The act is intended, as the title expressly states, to provide a plan for future roads and streets in the towns of Kings county and prevent the laying out of roads and streets except in accord with such systematic and well-considered purpose. The act does not purport to do more. It does not take any right, title, or interest from the owner of the property included within the roads and streets as shown on the map. The plan has become subject to change (Greater New York Charter [Laws 1901, c. 466] § 442), but otherwise all authority under the act of 1869 was exercised when the map was filed. The roads and streets shown thereon cannot be actually taken for public use by the municipality without the institution of a new and independent proceeding. Such proceeding may not be commenced in 999 years or it may never be commenced.

[5] The act falls far short of dedicating the lands to public use. If the provisions of the act and the action of the commissioners thereunder can be construed to prevent the owner of property without limit of time from conveying an unincumbered title thereto it takes private property without compensation and falls within the constitutional prohibition. *People ex rel. N. Y. C. & H. R. R. R. Co. v. Priest*, 206 N. Y. 274, 288, 99 N. E. 547; *Ingersoll v. Nassau Elec. R. R. Co.*, 157 N. Y. 453, 468, 52 N. E. 545, 43 L. R. A. 236; *Wynehamer v. People*, 13 N. Y. 378; *Bert-holf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

[8] If the act is construed simply as a plan to aid in establishing a uniform system of roads and streets as the same may from time to time be taken and dedicated to public use, it serves a useful purpose, and does not violate any constitutional provision. It should be so construed.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this court and in the Appellate Division, and the question certified should be answered in the negative.

HISCOCK, C. J., and OUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

COLLIN, J., not sitting.

Order reversed, etc.

(226 N. Y. 38)

UNITED PAPER BOARD CO. v. IROQUOIS PULP & PAPER CO.

(Court of Appeals of New York. March 11, 1919.)

1. WATERS AND WATER COURSES § 42—STREAMS—RIPARIAN RIGHTS—REASONABLE USE.

A riparian owner may use the water of a flowing stream for domestic or industrial purposes, provided he does not injure the rights of other owners, puts it to reasonable use, and returns the water to the stream on his own land.

2. NAVIGABLE WATERS § 39(2)—WATERS AND WATER COURSES § 40—"RIPARIAN RIGHTS"—NATURE AND EXTENT.

Rights of a riparian owner in navigable or unnavigable waters are incident to his ownership of the bank, and do not depend upon ownership of the bed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Riparian Right.]

3. NAVIGABLE WATERS § 46(1)—WATERS AND WATER COURSES § 153—GRANTS AND RESERVATIONS OF WATER RIGHTS—RIGHTS OF RIPARIAN OWNERS.

A riparian owner may release or grant his right in navigable or unnavigable waters to another or restrict or reserve it, as owner of the estate of which it is a part, to specified uses or places.

4. WATERS AND WATER COURSES § 156(2)—CONVEYANCES—CONSTRUCTION—INTENTION OF PARTIES.

The intent of parties as expressed in a deed by a riparian owner, conveying rights to use water for manufacturing purposes on the lands conveyed with certain reservations, must be ascertained from its language, considered with the physical conditions and the attending circumstances.

5. WATERS AND WATER COURSES § 156(2)—GRANTS AND RESERVATIONS—CONSTRUCTION AND OPERATION.

A grant of water rights will not be impaired by any exceptions in the grant further than necessary; such a grant and reservation to be construed most beneficially for the grantee.

6. WATERS AND WATER COURSES § 156(2)—CONVEYANCE OF RIPARIAN LANDS—CONSTRUCTION.

A conveyance of riparian land, with right to take one-half of all the water flowing by a point, except that necessary to operate grantor's sawmill transferred to the grantee the entire riparian right of grantors, except that expressly reserved, not merely one-half his right.

7. WATERS AND WATER COURSES § 156(6)—GRANTS AND RESERVATIONS—RIGHTS RESERVED.

The grantee of a servient estate cannot make use of water rights granted by the former owner of both estates to the grantee of the dominant estate, nor use more water than necessary to

accomplish the purposes provided in the reservations to the servient estate.

Cardoso, J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by the United Paper Board Company against the Iroquois Pulp & Paper Company. From a judgment for defendant, dismissing the complaint (174 App. Div. 902, 159 N. Y. Supp. 1146), plaintiff appeals. Reversed and remanded.

William S. Ostrander, of Saratoga Springs, for appellant.

Edgar T. Brackett, of Saratoga Springs, and Joseph A. Kellogg, of New York City, for respondent.

COLLIN, J. The plaintiff seeks a judgment perpetually restraining the defendant from diverting or receiving waters of the Hudson river in excess of a designated quantity and to recover damages for a diversion. The Special Term directed a judgment dismissing the complaint. The Appellate Division affirmed the consequent judgment by a nonunanimous decision. We have decided that the facts found by the Special Term or the proofs before it do not support its decision.

Each of the parties owns and operates upon the eastern bank of the Hudson river, in the town of Greenwich, Washington county, mills for the manufacture of pulp for paper and paper board. Each utilizes for the purposes of power waters of the Hudson river, which flow southerly. The lands of each are contiguous to the river, and hence each is a riparian owner. The lands of both were in 1888 of a single tract, owned by Lemon Thomson and John A. Dix. Such ownership is unquestioned. In 1888 Thomson and Dix duly granted, by a warranty deed, duly recorded, the lands and rights which the plaintiff, in virtue of mesne grants, owns. The lands granted formed the southern part of the single tract, bordered on the river, and are described by metes and bounds in the deed which conveys them, "with a right," as it continues, "to excavate, provide, build, maintain and use a canal flume or conductor for water with necessary or suitable bulkheads or headgates therein and for carrying or conveying water from the Hudson river at some point above the dam crossing said river above the sawmill of said parties of the first part on the easterly side, shore or bank thereof which shall be approved as to location by said Thomson and running from thence southerly on along and by a course and location also to be approved by said Thomson and Dix to and unto the northerly end of the hereinbefore described premises and the right to take, have, and use and enjoy by means of such canal flume or

conductor one-half of all the water flowing in the Hudson river at that point saving, excepting, and reserving therefrom and thereout so much of said waters and the right to draw and use the same whenever the same shall not be required by the said party of the second part, his heirs, or assigns for actual use in propelling machinery or for manufacturing purposes on the lands hereby conveyed and at all times when the water of said river shall be actually flowing over the crest of the said dam as shall be necessary or required to propel the machinery of and supply power for operating the sawmills, appurtenances and appliances now owned by said Thomson and Dix on and below said dam." "The sawmills, appurtenances and appliances" thus mentioned were on the lands retained by Thomson and Dix north of or upper to those conveyed and near the river bank. Adjacent to or a short distance north of the site of the sawmills was "the dam crossing said river" mentioned in the deed and commonly known as the Saratoga dam. It extended from the western bank of the river through about 800 feet to a point about 60 feet westerly from the river's eastern bank. This space of 60 feet was and is occupied in part by a pier contiguous to the dam and east of the pier by posts and headgates. It was erected by the state of New York in, and has been maintained by the state from, about 1870, and creates a level in the river above the same for a distance of about three miles. It was thus erected prior to the grant of 1888 of Thomson and Dix or their ownership of the single tract. The single tract extended for some distance above and below the easterly end of the state dam. The sawmill (for the findings use the singular number as descriptive of it) mentioned in the deed of Thomson and Dix, was supplied with water for power purpose through a raceway or intake having its mouth or opening in the headgates of the dam. In November, 1889, mills had been constructed upon the lands now of the plaintiff. There had also been constructed the canal flume or conductor, authorized by the grant of Thomson and Dix for conveying water, from a point in the river, some distance above the intake or raceway to the sawmill, to the pulp and paper mill on the lands now of the plaintiff for power purpose. Of its length of about 1500 feet, 500 feet were in the lands then remaining to Thomson and Dix and 1000 feet in the conveyed lands. In 1902 the devisees of Lemon Thomson and John A. Dix duly granted by deed to the defendant the northerly part of the tract upon which were the sawmill and the raceway from the headgates to it. The deed described the lands by metes and bounds and stated:

"It is intended by this deed to convey and this deed does convey to the party of the second part all the right, title and interest in the above-

described lands, water rights, privileges of all kinds and water power of the Hudson river connected with or in the neighborhood of said premises or at the east end of the state Saratoga dam at Thomson, which belonged to Lemon Thomson at the time of his death, or which now belongs to the said parties of the first part or either of them."

The mills of the defendant were built upon the site of the sawmill and its appurtenances, and are supplied with water for power purpose through the raceway or intake formerly to the sawmill. The mouth or the size of the raceway has not been enlarged since the conveyance of Thomson and Dix in 1888. Through the raceway it receives the water operating its mills and in quantities largely in excess of the quantity required in 1888 to supply power for operating the sawmill. The plaintiff uses and always has used since 1902 more water than the defendant, and the relative capacity of the water wheels of the respective parties shows that the plaintiff's wheels consume more water at all times than the defendant's wheels.

Notwithstanding the range which the briefs and arguments of counsel have taken, the principles which determine the issues at bar are few and not obscure. The parties are in contention concerning the quantity of flowage through the raceway or intake to the mills of the defendant. The plaintiff asserts that the defendant could and can, under the deed of Thomson and Dix to the original predecessor of plaintiff and the deed of 1902 to the defendant, rightfully and lawfully receive at its mill not more than the quantity "required to propel the machinery of and supply power for operating the sawmills, appurtenances and appliances" in 1888, and such quantity only: (a) When the water was not needed by plaintiff's mill, or (b) when water was flowing over the crest of the Saratoga dam. The defendant asserts that, inasmuch as the plaintiff has received at all times and does receive at its mill a quantity greater than the defendant has received or receives, the defendant does not receive one-half of the waters flowing in the river at the point of the mouth of the flume to the plaintiff's mill, and therefore more than the one-half to which plaintiff is entitled, under the deed, remains for it. The dispute, therefore, has to do only with the flowage of the waters. The adjudication of it can be had only through the determination of the meaning and effect of the deed or grant of 1888 appealed to by both parties. There is not an issue between either party and the state or between the parties as an upper and lower riparian owner. The right of the plaintiff to the flowage through the flume or canal to its mill is created, defined, and controlled by the grant and its terms. The right, broadly and generally speaking, is to take water, for the purpose of power at

its mill, from the river at a point 1500 feet above the mill, through and by means of a conduit.

[1] Such right was vested in or owned by Thomson and Dix at the time they executed and delivered the deed. They owned the land at and intermediate the points at which the water was under the grant, to be taken from and returned to the river. The rule of law is familiar that each owner of land contiguous to a natural water course has a right, as owner of such land and as naturally connected with and incident to it, to the natural flow of the stream along his land and its descent, and all the force to be derived therefrom, for any domestic or hydraulic purpose to which he may decide to apply it. He may, by means of a ditch or conduit, withdraw water from the stream and cause it to flow unnaturally through his land for agricultural, industrial, or other purpose, provided he causes it, in its substantial volume, to return upon his land to the stream. In order that he may enjoy those rights every owner is bound to use the water reasonably as it flows, so as not to injure the equal rights of all the owners. Whether or not a use or detention of the water is reasonable must be determined by the extent and capacity of the stream, the uses to which it is and has been put, and the rights that other owners on the stream have. The essential question in each particular case is what is reasonable under the conditions and circumstances there presented. Those are riparian rights, are natural and inherent, and a part of the estate of each riparian owner. *Pierson v. Speyer*, 178 N. Y. 270, 70 N. E. 799, 102 Am. St. Rep. 499; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Bullard v. Saratoga Victory Manufacturing Co.*, 77 N. Y. 525.

Under the findings and the proofs in the record before us, we must presume that the physical conditions at the locality, as we have described them, rightfully and lawfully existed. We must presume that the dam was legally constructed legally accumulating above it the water so that the potential power of the water of the river had become a reality, and creating for Thomson and Dix, as riparian owners of the land contiguous to and above and below it, the same rights in the flow, use, and control of the impounded waters (subject to the superior right of the state for the purpose of the Champlain canal, not questioned nor involved here) as would have come to them had they and the other riparian owners constructed it. Manifestly Thomson and Dix, in 1888 while they owned the single tract, could lawfully have constructed the mills and the conduit from the river to them, subsequently constructed by their grantee.

[2] Those rights of Thomson and Dix were

vested in them in virtue of their ownership of the bank of the river. Riparian rights are the various privileges, in the navigable or unnavigable waters, which are incident, under the law of the state, to the ownership of the shore or bank. In such ownership they have their origin, and, generally speaking, they are annexed exclusively to land which borders upon the waters. The rights we have spoken of did not depend to any extent upon whether or not the river was navigable at that part, or whether or not the ownership of Thomson and Dix extended to its center line rather than to high-water mark. While as to certain water rights and privileges of riparian owners those questions have materiality and importance, they are outside of our present relevant consideration. The rights involved in the instant dispute arose from the lateral contact of the lands of Thomson and Dix with the waters of the river, arrested and restrained by the dam. The navigability of the river or the ownership of the soil over which the waters flow neither increase nor diminish rights of such a nature. They are at no point of the discussion here connected with the right of navigation or other public right or with the occupation or use of the bed of the stream. The right to the use of the water of a flowing stream, navigable or unnavigable, arises by mere operation of law as incident to the ownership of the bank, and is a part of the estate of its owner. *Lyon v. Fishmongers' Company*, L. R. 1 App. Cas. 662; *Sisson v. Cummings*, 35 Hun, 22; *Webb v. Portland Manufacturing Co.*, 3 Sumn. 189, Fed. Cas. No. 17322; *Danes v. State of New York*, 219 N. Y. 67, 113 N. E. 786; *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 206, 216, 110 Pac. 927; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196.

[3] It is a valuable property right which can be severed from the riparian land by grant, condemnation, relinquishment, or prescription. Thomson and Dix as owners of the single tract might release it or grant it to another or restrict or reserve it as owners of the single tract to specified uses or places. *Matter of N. Y. C. & H. R. R. Co.*, 77 N. Y. 248; *Trustees of Town of Brookhaven v. Smith*, 188 N. Y. 74, 80 N. E. 665, 9 L. R. A. (N. S.) 326, 11 Ann. Cas. 1; *Barnes v. Midland R. R. Terminal Co.*, 193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962; *Sage v. Mayor, etc., of N. Y.*, 154 N. Y. 61, 47 N. E. 1096, 88 L. R. A. 606, 61 Am. St. Rep. 592.

[4] We are thus brought to the ascertainment of the meaning and effect of the language of the deed of Thomson and Dix of 1888. The determination of the extent of the use of the water granted by that deed determines the extent of the use reserved to themselves by the grantors and granted by them to the defendant under the deed of

1902. The right of each party was carried by the deeds out of the ownership by Thomson and Dix of the riparian rights appurtenant to their title and occupation of the bordering land. The two deeds, that is, that of 1888 and that of 1902, undoubtedly transmitted with the conveyed lands the entire rights of Thomson and Dix to use the water. The defendant has no rights in or ownership of the use of the water other than that annexed to the land conveyed to it, as restricted by the language of the deed of 1888. The real problem is to reach or ascertain the intention of the parties expressed in that deed. Its language and the physical conditions and circumstances attending the transaction are to be considered. *Manson v. Curtis*, 228 N. Y. 313, 320, 119 N. E. 559, Ann. Cas. 1918E, 247.

[5] As between the grantors and the grantee, each doubtful expression will be understood in the sense most advantageous to the grantee. The right to use the water as primarily granted, will not be impaired by the exception in the grant further than necessary. *Cromwell v. Selden*, 3 N. Y. 253; *Price v. Lawson*, 74 Md. 499, 22 Atl. 206.

[6] Turning to the language itself, it discloses that the parties to the deed mutually knew that the land described in it was conveyed for manufacturing uses. They knew that upon it the mills were to be erected. The grantors were the largest owners of the capital stock of the corporation which was to erect and operate them. They knew that the canal flume or conductor, in its size, in the location of its mouth above the dam and above the raceway or intake to the sawmill, and the water which passed into and through it to the mills were to be for the purpose of "propelling machinery or for manufacturing purposes on the lands" conveyed. For such purpose the grantors conveyed "the right to take, have and enjoy by means of such canal flume or conductor one-half of all the water flowing in the Hudson river at that point, saving, excepting and reserving therefrom and thereout so much of said water and the right to draw and use the same whenever the same shall not be required by the said party of the second part, his heirs or assigns for actual use in propelling machinery or for manufacturing purposes on the lands hereby conveyed, and at all times when the water of said river shall be actually flowing over the crest of the said dam as shall be necessary or required to propel the machinery of and supply power for operating the sawmills, appurtenances and appliances now owned by said Thomson and Dix on and below said dam." It is clear and certain that the language of this grant was not used and cannot be received in its literal meaning, and for the reasons: (a) The state had at all times the right to appropriate, in connection with the Champlain canal,

all or any part of the waters held back by the dam; and (b) the grantors had not the ownership or control of, and could not grant, "one-half of all the water flowing in the Hudson river at that point." Whether or not they owned the bed of the river to its center, or whether or not the river was navigable, they did not own or have dominion over the water itself, or, under the facts of the case, over the use of a fixed part of it. The water itself, in the nature of things, did not and could not become the subject of their ownership, control, or conveyance. *Sweet v. City of Syracuse*, 129 N. Y. 316, 335, 27 N. E. 1081, 29 N. E. 289; *City of Syracuse v. Stacey*, 160 N. Y. 231, 62 N. E. 354; *Pollock v. Cleveland Shipbuilding Co.*, 56 Ohio St. 655, 47 N. E. 582. They had a mere usufructuary right in it, subjected to the right of the state and rights equal with theirs in the owners of the opposite or western bank. Their usufructuary and proprietary right was (in so far as it is involved in the deeds, and omitting elements immaterial here) to draw from the dammed waters water, for the purpose of power, in such quantity at any time as would not conflict with the right of the state or other riparian owners, to be returned to the river before it left their land, in a manner reasonable and safe to the lower proprietors. Such right as an entirety or any part of it they could grant. The right measured their title to and interest in the water power in those waters and the extent of any grant and all grants of power by them. The language of the deed of 1888 discloses that they were by it granting their such right as an entirety, diminished, however, by the exception created by the reservation to themselves. They deemed the words "one-half of all the water flowing in the Hudson river at that point" descriptive of the right. In construing a description of this character we are not to lose sight of the obvious meaning in an attempt to treat the expression as accurate. It may have been, indeed, probably, it was, their belief or view that they owned the eastern half of the entire bed of the impounded waters, and the waters which flowed over that half, and that therefore they had the right to take, have, and use one-half of all the water flowing in the river at that point. They manifestly intended to describe in the deed the maximum of their right and title to the water or its use as "one-half of all the water flowing in the Hudson river at that point" and to grant by the deed the entire of that right—the entire of their interest in the water—diminished by the exception. The exception in the deed constituted by the reservation to the grantors of "so much of said waters and the right to draw and use the same," under the conditions stated, "as shall be necessary or required to propel the machinery of and supply power

for operating the sawmill," is cogent proof of the correctness of such conclusion. We can conceive of no reason, and none has been suggested to us, inducing the grantors to desire or stipulate the exception in case they intended to convey, without it, less than their entire ownership of the water power, or intended that they retained, without it, the right to draw, through the raceway to the sawmill, all the water they wanted or could get, provided it was somewhat less than their grantee drew. If they intended either of such results the exception was incorrectly phrased, and misleading. Nor can we conceive of any ground or premise in virtue of which the grantors could have thought or held that their title to or interest in the impounded waters exceeded the one-half of them, or that they did not by the deed transmit their entire ownership in or of them and their use, except as limited by the exception. They intended to divest themselves of their entire right to the water power created by the dam, save so much thereof as the operation of the sawmill and the preservation of its value demanded. The correctness of our conclusion is sustained, additionally, by the expressed purpose of the grant, the situation of the parties to the conveyance, and the conditions and circumstances attending the conveyance. We decide that the deed of 1888 transferred to the grantee the entire right, which was lawfully incident and annexed to the lands bordering on the river at and above the dam and owned by Thomson and Dix at the time of its execution and delivery, to withdraw and use, by means of the canal or conduit, the volume and momentum of the dammed waters, except such part of such right to withdraw and use as the grantors reserved to themselves by the exception in the deed.

[7] The rights of the parties must be determined by us in accordance with and as created by the terms of their deeds from Thomson and Dix, which are the agreed fountains of title to all their rights now under consideration. Those deeds constituted the estate of the defendant servient to that now of the plaintiff, and servient it must remain. The defendant's grantors could not after the deed of 1888 make use of that which they had by it granted, and could not use to the detriment of their grantee more water than was necessary, passing through the raceway to the sawmill, under the expressed conditions, to accomplish the stipulated result. The dominant and servient characters impressed on water power and water privileges by their common owner, by recorded grants, survive among his grantees. *Oakland Woolen Co. v. Union Gas & Electric Co.*, 101 Me. 198, 63 Atl. 915.

As a new trial must be granted, we do not consider other questions, which may be or become of fact, that have been argued.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, C. J., and CUDDENBACK, POUND, CRANE, and ANDREWS, JJ., concur. CARDOZO, J., dissents.

Judgment reversed, etc.

(228 N. Y. 147)

TRIMBOLI et al. v. KINKEL

(Court of Appeals of New York. April 8, 1919.)

1. EXECUTORS AND ADMINISTRATORS ¶138(1)
—POWERS—SALES.

Power given an executor to sell realty and distribute the proceeds does not authorize him to exchange it for other land.

2. ATTORNEY AND CLIENT ¶109—NEGLIGENCE—LAND TITLE.

Liability of an attorney who negligently passed record title to realty without noting that an executor's deed in chain of title was invalid because he exceeded his authority in exchanging, instead of selling, the land, is not obviated by fact that client probably had good title by adverse possession, where such fact was not mentioned by attorney, nor did he gather evidence to sustain such contention.

3. ADVERSE POSSESSION ¶58 — HOSTILE HOLDING.

Mere lapse of time without hostile holding will not give title to real estate by adverse possession.

4. ATTORNEY AND CLIENT ¶129(4)—NEGLIGENCE—DAMAGES.

An attorney negligently certifying his client's record title to be good is liable for broker's commissions and title examination fees incurred by client on attempting to resell the property, but not for expected profits of the resale or costs incurred by unreasonably litigating the title question with the prospective purchaser.

5. VENDOR AND PURCHASER ¶130(2)—"MARKETABLE TITLE"—DEFINITION.

A "marketable title" is one that may be freely made the subject of resale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Marketable Title.]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Giuseppe Trimboli and Gaetano Lopice against John C. Kinkel. A judgment of the Special Term for defendant was reversed, and a new trial granted by the Appellate Division (176 App. Div. 896, 162 N. Y. Supp. 1147), and defendant appeals. Af-

firmed, and judgment absolute directed for plaintiffs upon a stipulation.

Charles B. Templeton, of Albany, for appellant.

Charles L. Fasullo, of Brooklyn, for respondents.

CARDOZO, J. This is an action by client against attorney.

[1-3] In 1906 the plaintiffs retained the defendant to search the title to land in Brooklyn which the plaintiffs were about to buy. The defendant reported that the title was good and marketable. He made up an abstract which he delivered to his clients. This abstract shows that in 1861 title was in Aaron Clark and Harriet A. Anderson as tenants in common. Mr. Clark left a will by which his real estate passed to devisees in fee. Power to sell the land and divide the proceeds was given to the executor. The executor in 1863 conveyed his testator's undivided interest to the cotenant, Harriet A. Anderson. The grantee in return conveyed to the executor an interest in another parcel. The transaction was not a sale for money, but an exchange. Its nature is disclosed by the deed, which is described in the abstract. Harriet A. Anderson conveyed the land in 1868 to one Frederick W. Grimme, whose title passed thereafter, by mesne conveyances, to the plaintiffs' vendors. The law is settled that a power to sell and distribute the proceeds is not a power to exchange. *Woerz v. Rademacher*, 120 N. Y. 62, 68, 23 N. E. 1113; *Moran v. James*, 21 App. Div. 183, 185, 45 N. Y. Supp. 486; *Woodward v. Jewell*, 140 U. S. 247, 253, 11 Sup. Ct. 784, 35 L. Ed. 478. There was, therefore, a flaw in the record title. The defendant made no mention of it to his clients. He made no investigation of the occupation of the land. He supplied no evidence of adverse possession. He let his clients complete the purchase on the assumption that the record title was perfect. In 1910 the plaintiffs made a contract of resale. The purchaser rejected title because of the flaw in the record. The defendant represented the plaintiffs at the closing. Even then he supplied no evidence of adverse possession. He made no claim that title could be sustained upon that ground. His position still was that the record title was sufficient. The purchaser sued for the deposit and the expenses of searching title. The sellers defended. They were then represented by new counsel. The purchaser prevailed, and the title was adjudged unmarketable. *Turco v. Trimboli*, 152 App. Div. 431, 137 N. Y. Supp. 343. This action was then brought to compel the attorney to respond for the damages resulting from his negligence. In defense he has attempted to prove that the defect in the record title has

been cured by adverse possession for more than 50 years. The trial judge held that, with this evidence available, there was a marketable title, and that the defendant had not been negligent. The complaint was dismissed upon the merits. The Appellate Division rules that "the defendant was negligent in passing the title upon the view that the executor's deed was valid." It therefore reversed the judgment and ordered a new trial.

We agree with the Appellate Division that negligence was proved. The executor's deed was plainly invalid. It is negligence to fail to apply the settled rules of law that should be known to all conveyancers. *Byrnes v. Palmer*, 18 App. Div. 1, 45 N. Y. Supp. 479, affirmed on opinion below, 160 N. Y. 699, 55 N. E. 1093; *Citizens' Loan & S. Ass'n v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320; *Watson v. Muirhead*, 57 Pa. 161, 98 Am. Dec. 213. The defendant knew the facts; for his search went back to the executor's deed and farther. Knowing the facts, he was chargeable with knowledge of their significance. In the absence of clear and cogent evidence of adverse possession, the title was unmarketable. *Freedman v. Oppenheim*, 187 N. Y. 101, 79 N. E. 841, 116 Am. St. Rep. 595. That evidence, if it existed, should have been gathered by the defendant, and preserved in fitting form, before title was accepted. *Crocker Point Association v. Gouraud*, 224 N. Y. 343, 350, 120 N. E. 737. Nothing of the kind was done. Mere lapse of time was insufficient without proof of a hostile holding. *Simis v. McElroy*, 160 N. Y. 156, 54 N. E. 674, 73 Am. St. Rep. 673. The defendant does not acquit himself of negligence by showing that evidence could have been collected. He must show that it was collected. Until that duty had been fulfilled, the title was unmarketable.

[4, 5] The question remains whether there is any evidence of damage. The defendant has proved that for more than 50 years the plaintiffs and their grantors have been in hostile and unchallenged occupation of the land. The trial judge has held that they have title. We do not need to determine whether their ownership is unclouded by any reasonable doubt. *Freedman v. Oppenheim*, supra; *Simis v. McElroy*, supra; *Cambreleng v. Purton*, 125 N. Y. 610, 26 N. E. 907; *Ferry v. Sampson*, 112 N. Y. 415, 20 N. E. 387; *Day v. Kingsland*, 57 N. J. Eq. 134, 41 Atl. 99. At least they cannot be said to have made good their allegation that they are not the owners. *Woolley v. Newcombe*, 87 N. Y. 605. Their title to an undivided half is independent of the power of sale, and is undoubted. Their title to the other half, if not undoubted, has been supported by evidence which would make out a prima facie case in any contest with an adverse claim-

ant. *Koch v. Ellwood*, 138 App. Div. 584, 123 N. Y. Supp. 502; *Fankboner v. Corder*, 127 Ind. 164, 26 N. E. 766; *Arnold v. Limeburger*, 122 Ga. 72, 79, 49 S. E. 812; *Miller v. Bumgardner*, 109 N. C. 412, 13 S. E. 935; *Dessaunier v. Murphy*, 33 Mo. 184; *Gross v. Disney*, 95 Tenn. 592, 32 S. W. 632. In such circumstances there can be no recovery either of the whole purchase price or of half of it, even if we assume this to be the proper measure of damage where title to the whole or the half has altogether failed. The cloud, if there is any, is shadowy and vague and distant. There has been no attempt to prove the extent to which the presence of such a cloud depreciates the value. *Lawall v. Groman*, 180 Pa. 532, 540, 37 Atl. 98, 57 Am. St. Rep. 662; *Whiteman v. Hawkins*, L. R. 4 C. P. D. 13. The defendant argues that the damages are therefore nominal. But we think this does not follow. The plaintiffs relied on the defendant's assurance that they had a marketable record title. Relying upon that assurance, they made a fruitless contract of resale. They have lost the commissions paid their brokers. They have been forced to reimburse the purchaser for the cost of an examination of the title. If the defendant had been diligent, these expenses would have been saved. The consequences were to be foreseen. A marketable title is one that may be freely made the subject of resale. Resale involves certain expenses as common, if not necessary, incidents. A lawyer takes the risk that those expenses will be lost if he fails to gather in due season the evidences of title. It is a loss within the range of probable contemplation. *United States Trust Co. of N. Y. v. O'Brien*, 143 N. Y. 284, 88 N. E. 266; *Dondis v. Borden*, 230 Mass. 73, 119 N. E. 184; *Whitehead Co. v. Ryder*, 139 Mass. 366, 31 N. E. 736. A different situation would be presented if the plaintiffs had themselves been negligent in failing to supply proof of adverse possession, and had thereby thrown away the opportunity of preserving their contract and minimizing the damage. They are not chargeable with negligence, for the defendant was still their lawyer, and when title was rejected, he made no claim, and supplied no evidence, of title through possession. *Crocker Point Ass'n v. Gouraud*, supra. The fault was still his own. It is true that the plaintiffs have claimed more than they should get. They are not entitled to recover the profits of the resale. *Hadley v. Baxendale*, 9 Exch. 341; *Messmore v. N. Y. Shot & Lead Co.*, 40 N. Y. 422; *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. They are still the occupants, and, it may be, the owners of the land, which, for all that the evidence shows, is equally valuable to-day. They are not entitled to recover the costs of their lawsuit

with the purchaser. It was foolish as well as futile to litigate the validity of the exercise of the power of sale. Costs of litigation are not chargeable as damages unless reasonably incurred. *Gallo v. Brooklyn Savings Bank*, 129 App. Div. 698, 700, 114 N. Y. Supp. 78; *Hammond v. Bussey*, 20 Q. B. D. 79; *Fitzgerald v. Heady*, 225 Mass. 75, 77, 113 N. E. 844; *Sedgwick on Damages*, § 236. Payments made in the reasonable endeavor to discover evidence of adverse possession may stand upon another basis. *Den Norske Am. Actiesselskabet v. Sun Printing & Pub. Ass'n*, 226 N. Y. 1, 122 N. E. 463; *Jones v. Morgan*, 90 N. Y. 4, 11, 12, 43 Am. Rep. 131. But we have said enough to show that there is some evidence of damage. Beyond that we need not go. The extent of the recovery is not important at this time. If the plaintiffs made out a right to anything, the Appellate Division did not err in granting a new trial. Upon the inquest that will follow the defendant's stipulation for judgment absolute may charge him with heavier damages than he would otherwise have to bear. That risk, however, was assumed when the stipulation was given.

The order should be affirmed, and judgment absolute directed in favor of the plaintiffs upon the stipulation, with costs in all courts.

HISCOCK, C. J., and COLLIN, CUDDERBACK, POUND, CRANE, and ANDREWS, JJ., concur.

Order affirmed, etc.

(236 N. Y. 73)

SPERDUTO v. NEW YORK CITY INTERBOROUGH RY. CO.

(Court of Appeals of New York. March 18, 1919.)

1. MASTER AND SERVANT §=417(3¼)—WORKMEN'S COMPENSATION ACT—PROCEEDINGS—REVIEW—APPEAL—"AWARD OR DECISION."

A notice sent by the state Industrial Commission, to a self-insurer under the Workmen's Compensation Law, requiring that the present value of an award of weekly compensation be paid into a special fund under Workmen's Compensation Law, § 27, as amended by Laws 1917, c. 705, pursuant to a general resolution by the commission, is not an award or decision of the commission within Workmen's Compensation Law, § 23, and not appealable.

2. MASTER AND SERVANT §=419—WORKMEN'S COMPENSATION ACT—PROCEEDINGS—AWARD—RIGHT TO CHANGE.

An award of weekly compensation under the Workmen's Compensation Law is in effect a

judgment, and cannot be changed by requiring payment of the present value thereof into a special fund without notice and opportunity to be heard being given the interested parties, nor after the giving of such notice and opportunity can it be vacated or modified by a general resolution.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings for compensation under the Workmen's Compensation Act by Carmela Spurduto, widow of Angelo Spurduto, employé, opposed by the New York City Interborough Railway Company. From an order of the Appellate Division (186 App. Div. 145, 173 N. Y. Supp. 834), reversing what it considered a determination of the state Industrial Commission, the state Industrial Commission appeals. Appeal dismissed.

Charles D. Newton, Atty. Gen., and Robert W. Bonyne, of New York City (E. O. Aiken, of Albany, of counsel), for appellant.

Alfred T. Davison, of New York City, for respondent.

McLAUGHLIN, J. The respondent is, and during the times referred to was, a self-insurer under the Workmen's Compensation Law (Consol. Laws, c. 67). Some time prior to the 6th of March, 1918, one Angelo Spurduto, while in its employ, received an injury which resulted in his death, for which, on the 14th of March, 1918, an award of compensation was made to his widow and dependents. The award directed that certain payments be made, per week, to the widow during widowhood, and to the dependents during dependency.

On the 21st of May, 1918, the commission passed a resolution to the effect that every mutual compensation insurance company and every self-insurer should, on or before July 31, 1918, pay into the state fund, as a special fund, under the terms of section 27 of the Workmen's Compensation Law, as amended by chapter 705 of the Laws of 1917, the present value as of that date of the future installments of death benefits under every award against such carrier for death occurring as a result of accident happening between July 1, 1917, and December 31, 1917, inclusive.

On the 28th of June following, the commission, by its cashier, sent to the respondent a notice which referred to the claim by number, and read, in part, as follows:

"Gentlemen.—Pursuant to the requirements of a resolution of the State Industrial Commission, dated May 21, 1918, you are hereby instructed to pay into the State Insurance Fund, under the terms of section 27 of the Workmen's

Compensation Law, the following amounts in respect of the above-numbered award:

Net present value of future installments of compensation	\$5,456 11
Loading for administration expense (4%) ..	218 24
Total to be paid in	<u>\$5,674 35</u>

"This amount is required to be paid on or before July 31, 1918."

After the receipt of this notice, the employer served a notice of appeal which read, in part, as follows:

"Please take notice that New York City Interborough Railway Company, the above-named employer and self-insurer, hereby appeals to the Appellate Division of the Supreme Court, Third Judicial Department, from a decision and award of the State Industrial Commission, Bureau of Workmen's Compensation, made herein and dated June 28, 1918, whereby New York City Interborough Railway Company, the employer and self-insurer, is instructed to pay into the state insurance fund under the terms of section 27 of the Workmen's Compensation Law, the following amounts, in respect of this award."

Then follow the amounts directed to be paid.

The Appellate Division considered the notice sent out by the cashier as a determination or decision, and reversed it. The Attorney General appeals to this court.

[1] Section 23 of the Workmen's Compensation

Law (Consol. Laws, c. 67) permits an appeal from an award or decision of the commission. This notice was neither. The appeal, therefore, presents nothing which this court can review, and must be dismissed.

[2] While the appeal does not bring up for consideration the validity of the resolution adopted May 21, 1918, we think, for the guidance of the commission, it is proper to state that if it did, the same result would follow. The award made was in the nature of a judgment. It finally and conclusively determined the rights of the parties under the Workmen's Compensation Law. It could not be substantially changed, as proposed in this case, without notice to the parties interested and an opportunity given them to be heard. After such notice and opportunity, before a different method of payment could be fixed, the award previously made either had to be vacated or modified, and that could not be done by an omnibus resolution like the one adopted. In saying this, however, we do not mean to intimate that section 27, as amended by chapter 705 of the Laws of 1917, is a valid legislative enactment. That question is not before us, and we do not consider it.

The appeal should be dismissed, without costs.

HISCOCK, C. J., and CHASE, COLLIN; CUDDERBACK, and ORANE, JJ., concur; HOGAN, J., concurs in result.

Appeal dismissed.

(123 Ind. 233)

WILLIAMS v. STATE. (No. 23190.)

(Supreme Court of Indiana. May 9, 1919.)

1. CONSPIRACY \S 43(6) — INDICTMENT — BRIBERY.

An indictment under Burns' Ann. St. 1914, \S 2647, for conspiring to commit a felony defined by section 2378 as the solicitation or acceptance of any bribe by a prosecuting attorney, must not only state facts showing the conspiracy, but must also charge the felony with same particularity as though accused was to be tried for the felony alone.

2. INDICTMENT AND INFORMATION \S 137(1) — MOTION TO QUASH — DEFECTS APPEARING ON FACE OF INDICTMENT.

Under Burns' Ann. St. 1914, \S 2065, cls. 2 and 4, specifying grounds proper to be assigned on a motion to quash an indictment, section 2063, cl. 10, forbidding the quashing of an indictment for defects not prejudicing defendant's substantial rights on the merits, and section 2062, cl. 5, relating to sufficiency of indictments, defects not appearing upon face of an indictment are not raised by a motion to quash.

3. INDICTMENT AND INFORMATION \S 137(6) — MOTION TO QUASH — CERTAINTY.

Under Burns' Ann. St. 1914, \S 2065, cls. 2 and 4, specifying grounds for a motion to quash, section 2063, cl. 10, forbidding quashing of an indictment for defects not prejudicing substantial rights on the merits, and section 2062, cl. 5, relating to sufficiency of indictments, where offense is charged with such certainty that defects do not prejudice defendant's substantial rights they must be disregarded.

4. CONSPIRACY \S 28 — TO COMMIT FELONY — DEFINITION.

A "conspiracy" is a combination of two or more persons by some concerted action to accomplish an act or purpose which by statute is defined to be a felony.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

5. CONSPIRACY \S 43(4) — INDICTMENT — PARTIES FROM WHOM BRIBES WOULD BE SOLICITED — KNOWLEDGE.

In indictment predicated on Burns' Ann. St. 1914, $\S\S$ 2378, 2647, against an acting deputy prosecuting attorney for conspiring to commit a felony by soliciting bribes from persons operating gambling places, etc., in violation of law, or who might thereafter be so engaged, it was unnecessary to allege that conspirators at time of conspiracy knew of specific violations or names of persons so engaged and from whom they would solicit bribes.

6. INDICTMENT AND INFORMATION \S 101 — PROSECUTING ATTORNEY'S SOLICITATION OF BRIBES — NAMES OF PERSONS CONTRIBUTING.

That indictment under Burns' Ann. St. 1914, $\S\S$ 2378, 2647, against an acting deputy prosecuting attorney for conspiring to solicit bribes from persons then or thereafter engaged in violating the law alleged receipt of certain amount, did not necessarily show that

grand jurors knew names of those paying bribes, or that evidence before them was satisfactory, so that omission to allege their names was not fatal.

7. CONSPIRACY \S 43(5) — INDICTMENT — SOLICITATION OF BRIBES — OVERT ACT.

An indictment under Burns' Ann. St. 1914, \S 2647, for conspiring to commit a felony defined by section 2378, as the soliciting bribes by any prosecuting attorney, need not show overt acts done in pursuance of conspiracy.

8. INDICTMENT AND INFORMATION \S 101 — CONSPIRACY — PROSECUTING ATTORNEY'S SOLICITATION OF BRIBES — NAMES OF CONTRIBUTING PARTIES.

In an indictment under Burns' Ann. St. 1914, \S 2647, for conspiring to commit a felony, defined by section 2378 as the soliciting of bribes by any prosecuting attorney, if the names of the persons to be solicited were known, or if they were reasonably ascertainable by grand jury, they should have been pleaded.

9. INDICTMENT AND INFORMATION \S 71 — PARTICULARITY.

Generally, particularity in charging a crime is required in order to give identity and certainty to transactions upon which pleading is based, and thereby enable accused to plead his conviction or acquittal in bar of another prosecution for same offense, and when that is done the rule is satisfied.

10. INDICTMENT AND INFORMATION \S 101 — SOLICITATION OF BRIBES — NAMES OF PARTIES PAYING BRIBES.

An indictment under Burns' Ann. St. 1914, \S 2647, for conspiring to commit a felony defined by section 2378 as the solicitation of bribes by any prosecuting officer, where names of persons to be solicited are unknown, may so state, and will be a sufficient excuse for failing to name such persons.

11. CONSPIRACY \S 28 — SOLICITATION OF BRIBES — OFFENSE.

Under Burns' Ann. St. 1914, \S 2647, making it an offense to conspire to commit a felony, and section 2378, making any prosecuting attorney's solicitation of bribes a felony, a conspiracy by a prosecuting officer and other officers to solicit bribes is a crime, as conspirators need not be charged and tried singly under the bribery statute, section 2378.

12. CONSPIRACY \S 43(7) — PROSECUTING ATTORNEY'S SOLICITATION OF BRIBES — OWNERSHIP OF MONEY — INDICTMENT.

An indictment under Burns' Ann. St. 1914, \S 2647, for conspiring to commit a felony defined by section 2378 as a prosecuting attorney's solicitation of bribes, need not directly allege that such money, etc., was property of the persons to be solicited, in view of the well-defined and well-understood meaning of the word "bribe."

13. BRIBERY \S 1(1) — "BRIBE."

A "bribe" is any gift, advantage, or emolument offered, given, or promised to, or asked

or accepted by, any public officer to influence his behavior in office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bribe.]

14. CONSPIRACY ⚡37 — **MERGE IN CRIME COMMITTED.**

Where an indictment charges a conspiracy, as under Burns' Ann. St. 1914, § 2647, and also an overt act such as the solicitation or acceptance of bribes by a prosecuting attorney which is itself a felony under section 2378, the conspiracy is not merged in the felony, where defendant is put on trial on the charge of conspiracy only.

15. INDICTMENT AND INFORMATION ⚡125 (5½)—**CONSPIRACY—DUPLICITY.**

An indictment under Burns' Ann. St. 1914, § 2647, for conspiring to commit a felony defined by section 2378 as a solicitation of bribes by a prosecuting attorney from persons conducting various illegal businesses so classified as to bring them within prohibition of criminal statutes, was not bad for duplicity.

16. INDICTMENT AND INFORMATION ⚡71 — **CONSPIRACY TO COMMIT FELONY — CERTAINTY.**

An indictment under Burns' Ann. St. 1914, § 2647, for conspiring to commit a felony defined by section 2378 as a solicitation of bribes by a prosecuting attorney, sufficient to enable court and jury to distinctly understand the issue to be tried and to fully inform defendant of nature of charge, was not uncertain.

17. CRIMINAL LAW ⚡278(2) — **PLEA IN ABATEMENT—CHALLENGE TO GRAND JUROR.**

Under Burns' Ann. St. 1914, § 1965, cl. 7, permitting one charged with felony to challenge an individual grand juror before jury is sworn on ground that he cannot act impartially and without prejudice to defendant's substantial rights, defendant, after indictment, may not challenge a juror for such cause by plea in abatement.

18. CRIMINAL LAW ⚡281 — **DEMURRER TO PLEA IN ABATEMENT—ADMISSION.**

A demurrer to a plea in abatement admits all the facts of the plea well pleaded.

19. CRIMINAL LAW ⚡280(1) — **PLEA IN ABATEMENT—VALIDITY.**

A plea in abatement not denying the merits of a prosecution, and only tending to delay the remedy, will be upheld only after strict construction, and unaided by any intentment or presumption of law or fact, it is found to be certain and conclusive against such supposable matter as can properly be replied.

20. CRIMINAL LAW ⚡1144(10) — **APPOINTMENT OF SPECIAL PROSECUTING OFFICER—PRESUMPTION OF REGULARITY.**

Where the facts before the lower court when a special prosecuting attorney was appointed are not before appellate court, the presumption, in the absence of a contrary showing in favor of the regularity of proceedings in trial court, must prevail.

21. CRIMINAL LAW ⚡639(2) — **SPECIAL PROSECUTING OFFICER — APPOINTMENT BY TRIAL COURT.**

Though no statute expressly authorizes the appointment of a special prosecuting attorney, courts having general jurisdiction of criminal matters have the inherent power in their sound discretion to appoint attorneys to assist the prosecutor in the trial of criminal cases.

22. CRIMINAL LAW ⚡278(2)—**GRAND JURY** ⚡34 — **PRESENCE OF SPECIALLY APPOINTED PROSECUTOR.**

In view of Burns' Ann. St. 1914, § 1980, requiring prosecuting attorneys to appear before grand jury, and section 9406, requiring them to conduct prosecutions for felonies, the presence of a specially appointed prosecuting officer at deliberations of grand jury and his active insistence that defendant be indicted on testimony was unauthorized, as there must be no opportunity for the improper influences upon grand jury after investigation is closed, and it was a good ground of abatement.

Appeal from Circuit Court, Delaware County; Fred C. Gause, Special Judge.

Gene Williams was convicted on a separate trial of a felonious conspiracy to solicit bribes and sentenced to pay a fine and to imprisonment, and he appeals. Reversed, with instructions to grant a new trial, to overrule a demurrer to a paragraph of a plea in abatement, and for further proceedings.

Geo. W. Cromer and Harry Long, both of Muncie, for appellant.

U. S. Lesh, of Huntington, Elmer E. Hastings, of Washington, Ind., Edward M. White, of Indianapolis, John G. McCord, of Pineville, Wilbur Ryman and Horace G. Murphy, both of Muncie, and Ele Stansbury, of Indianapolis, for the State.

MYERS, J. This is a prosecution by the state against the appellant and six other persons upon a joint indictment charging them with a felonious conspiracy to solicit bribes. The indictment is in one count. Defendants, after severally and unsuccessfully moving to quash the indictment, filed a plea in abatement in ten paragraphs, to which a demurrer to the first nine paragraphs was sustained, and the tenth paragraph, on motion, was stricken out. Appellant's separate and several motion for an order requiring the state to file a bill of particulars was overruled. Appellant then waived arraignment and entered his plea of not guilty. His request for a separate trial was granted; trial by jury resulting in a verdict of guilty. Thereafter various motions were each overruled. Judgment followed, assessing his fine at \$200 and costs, and imprisonment from 2 to 14 years in the state reformatory. From this judgment he appeals and assigns as error: (1) The overruling of his motion to quash the indictment.

[1] This indictment is predicated on sections 2647 and 2378, Burns 1914. Section 2647 reads as follows:

"Any person or persons who shall unite or combine with any other person or persons for the purpose of committing a felony, within or without this state; or any person or persons who shall knowingly unite with any other person or persons, body, association or combination of persons, whose object is the commission of a felony or felonies, within or without this state, shall, on conviction, be fined not less than twenty-five dollars nor more than five thousand dollars, and imprisoned in the state prison not less than two years nor more than fourteen years."

The felony of which appellant is alleged to have conspired to commit is defined by section 2378, and as applicable to this case is as follows:

"Whoever, being * * * intrusted with the administration of justice or prosecuting attorney, either before or after his election, qualification, appointment or employment, solicits or accepts any such money, promise or valuable thing, to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment in any matter pending or that might legally come before him, shall, on conviction, be imprisoned in the state prison not less than two years nor more than fourteen years, fined not exceeding ten thousand dollars, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period."

This court has consistently held that an indictment, as here in question, to be good as against a motion to quash must, not only state facts showing the conspiracy, but also charge the felony with the same particularity as though the accused was to be tried for the felony alone. *Allen v. State*, 183 Ind. 37, 45, 107 N. E. 471; *Green v. State*, 157 Ind. 101, 60 N. E. 941; *Barnhart v. State*, 154 Ind. 177, 56 N. E. 212; *Smith v. State*, 93 Ind. 67; *Woodsmall v. State*, 179 Ind. 697, 102 N. E. 130.

[2, 3] Our Criminal Code, section 2065, Burns 1914, specifies the grounds or reasons proper to be assigned in support of a motion to quash an indictment or affidavit, and the specific objections pointed out by appellant are all covered by clauses 2 and 4 of that section, which provide that an indictment or affidavit must be held good unless upon its face it appears that the facts stated therein do not constitute a public offense, or that it does not state the offense with sufficient certainty.

Along with these provisions, we must keep in mind section 2063, Burns 1914, cl. 10, which provides that no indictment shall be deemed invalid or quashed for any "defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Also, section 2062, Burns 1914, cl. 5, that an indictment will

be deemed sufficient if "The offense charged is stated with such a degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case."

The indictment before us covers 20 typewritten pages of the record, and in our opinion no good purpose will be subserved by copying it into this opinion. In substance, it charges that appellant on May 1, 1914, was the duly appointed and acting deputy prosecuting attorney for Delaware county, and as such deputy had charge of all criminal prosecutions before justices of the peace, and the city court in the city of Muncie, Ind.; that said city is a city of the third class; that on and prior to May 1, 1914, there were in the city of Muncie more than 25 houses of ill fame resorted to for the unlawful purpose of prostitution and lewdness by persons, male and female, who were then and there of bad reputation for chastity and virtue; that there were more than 25 persons then and there in charge of or keeping certain rooms in the city, then and there unlawfully used for the purpose of gambling and where gaming was permitted to be carried on; that there were then and there more than 100 places kept and operated by persons for the unlawful sale of intoxicating liquors; that more than 100 gaming and gambling devices of various kinds were then and there in unlawful operation in various places, and which were then and there unlawfully running and operated for the purpose of gaming and betting; that more than 20 houses of assignation were then and there unlawfully being run and operated by various persons in said city; that, at the time the alleged offense is charged to have been committed, each and all of the persons jointly indicted with appellant were the duly elected or appointed, qualified, and acting officers of said city, and the offices so held by them were those of mayor, city police commissioners, chief of police, and a city patrolman; that appellant and the other persons named in the indictment did then and there unite, combine, conspire, and confederate with each other and in their official capacity to feloniously and corruptly ask, solicit, and demand in person, and by other persons, agents, and employes who might be hired to act for them and each of them, money and other things of value as a bribe or bribes from each and all of the persons so engaged in the various classes of business heretofore named, or who might thereafter engage in such business or businesses, and, in consideration for the money or other things of value paid or contributed by such persons, they were, by such officers, to be shielded and protected from prosecution, and permitted to run and operate their various kinds of business without molestation so long as they should or would pay a certain sum of money weekly to appellant or his co-conspirators indicted with him; that, pursuant to said unlawful and felonious combination and conspiracy and in furtherance there-

of, they and each of said conspirators personally and through others as go-betweens did solicit, from the various persons so engaged in the various classes of business aforesaid, money and other things of value as bribes, and as a pecuniary reward for protection and freedom from arrest and raids on their places of business; that they (persons named in the indictment) did then and there feloniously as such officers receive bribes and pecuniary rewards of and from persons running and operating said various illegal business and immoral places, a large sum of money, to wit, \$10,000, for the purpose of influencing each and all of them with respect to his and their official action in any matter pending, or that might legally come before him or them; that thereafter the said persons as such officers did unlawfully, feloniously, and corruptly refuse, and would not prosecute, or cause to be prosecuted, any of the parties so as aforesaid paying them said bribe and bribes, but did then and there protect and defend them, and save them and their places from raids, and the said parties from arrest and punishment for the said numerous violations of the law; that the names of the persons from whom money and other things of value were to be solicited, or who were solicited and who contributed such bribes and rewards, were to the grand jury unknown.

Appellant insists that the facts stated in this indictment are not sufficient to constitute a public offense for the reasons: (1) That it fails to show knowledge on his part of any crime which he was to conceal, or in favor of which his official acts were to be performed; (2) that it fails to disclose the name or names of the person or persons who were to be allowed to commit the crimes or crime named therein, or the places where the alleged crimes were to be committed which were to be concealed by any of the defendants; (3) that there is no crime known to the law as a conspiracy to solicit bribes; and (4) that it fails to allege the ownership of the money, or other things of value to be solicited from the various unknown persons referred to therein.

Directing our attention to the alleged defects in the indictment relied on by appellant, and applying the various statutory provisions to which attention is called, it must be conceded that, unless such defects appear upon the face of the indictment, they are not raised by a motion to quash, or if they do appear, and the offense is charged with such certainty that such defects do not tend to the prejudice of his substantial rights, they must be disregarded. *Waggoner v. State*, 155 Ind. 341, 58 N. E. 190, 80 Am. St. Rep. 237; *Selby v. State*, 161 Ind. 667, 69 N. E. 463; *Padgett v. State*, 167 Ind. 179, 78 N. E. 663.

[4] The "conspiracy" here sought to be charged may be defined as a combination of

two or more persons by some concerted action to accomplish an act or purpose which by statute is defined to be a felony. 1 *Bouvier's Law Dict.* (Rawle's 3d Ed.) 621.

[5] The indictment charges that more than 200 persons in the city of Muncie were engaged in running and operating places in that city in violation of the law. These places and the alleged violations are classified according to the character of the several alleged offenses. These allegations become important as they show an opportunity for the commission of the alleged crime. The indictment also charges that appellant and those indicted with him "did then and there feloniously and knowingly unite, combine, conspire, and confederate together" to solicit bribes from persons engaged in the various businesses specifically mentioned in the indictment or who might thereafter be thus engaged. The two dominant elements of the crime here sought to be charged are a conspiracy and a felony. In this case the conspiracy entered into did not have reference to any particular named person as a victim, but it had to do with those guilty of certain named violations. In such cases it is unnecessary to allege that the conspirators knew at the time of forming the conspiracy of specific violations or the names of persons so actually engaged and from whom they would solicit bribes. The conspiracy was complete when the unlawful confederation was formed to do a thing which it committed is defined by our statutes as a felony. *Landingham v. State*, 49 Ind. 186; *Gillett, Crim. Law*, § 310; *Eacock v. State*, 169 Ind. 488, 82 N. E. 1039; *Moore's Crim. Law*, § 653, p. 712.

[6] Appellant, in support of his second insistence, seizes upon the statement in the indictment in substance showing that \$10,000 in bribe money was actually paid to, and received by, the conspirators. From this statement appellant draws the conclusion that the grand jury must have known some of the persons, if not all, who contributed this money, and the failure to allege these names was a fatal omission. In this connection, we should consider the allegation that the conspiracy was formed to solicit bribes, not only from violators of the law then in business, but from others who might thereafter engage in such business. It will be observed from the showing made that the agreement to solicit bribes contemplated, either directly or indirectly, an interview in some form with a large number of persons in the city of Muncie.

In *McKee v. State*, 111 Ind. 378, 12 N. E. 510, it is said:

"The authorities abundantly settle the proposition that an indictment is not objectionable which charges that the object of the conspiracy is to defraud many persons, not capable of being resolved into individuals, or the public generally, instead of certain named individuals.

2 Bishop, Crim. Law, § 209; 2 Whart. Crim. Law, § 1393."

It does not necessarily follow, from the fact that money was actually paid, that the grand jurors knew the names of the persons contributing the same, or that the evidence before them on that subject was satisfactory. In such cases the general form of pleading has been recognized and sustained. *McKee v. State*, supra.

[7-10] While the allegations relied on by appellant may be considered as showing overt acts done in pursuance of the conspiracy, which are not unusual in indictments of this character, yet they are not essential. 4 Ency. P. & P. 716. By this ruling we are not to be understood as holding that particularity in charging a crime is not required, for, generally speaking, it is required. Consequently, in this case, if the names of the persons to be solicited were known, or if they were reasonably ascertainable by the grand jury, they should have been pleaded. *McKee v. State*, supra; *Padgett v. State*, 167 Ind. 183, 78 N. E. 663, supra. The rule requiring particularity in criminal pleading is to give identity and certainty to the transaction upon which the pleading is based, thereby to enable the accused to plead his conviction or acquittal in bar of another prosecution for the same offense. When this is done, the rule requiring particularity is satisfied. *Barnhart v. State*, 154 Ind. 178, 56 N. E. 212; *Fletcher v. State*, 2 Okl. Cr. 300, 101 Pac. 599, 23 L. R. A. (N. S.) 581. It is also equally well settled that where the names, as here, are unknown, the pleading may so state, and such statement will be regarded as sufficient excuse for failing to name such persons. *Ashley v. State*, 92 Ind. 559.

[11] As to appellant's third contention, we cannot agree that it is not a crime for an officer such as a deputy prosecuting attorney to solicit bribes. As deputy prosecuting attorney, it was his duty primarily to prosecute the criminal pleas of the state within his jurisdiction. He was an officer upon whom rested the duty, to the best of his ability, of using fair, honorable, and lawful means to secure the conviction of all persons charged with crime in any of the courts of his judicial circuit within the jurisdiction of his appointment, and to that extent he was an officer intrusted with the administration of criminal justice. Being intrusted with the administration of justice, he is clearly within the provisions of the statute making it unlawful for him to solicit or receive bribes to influence his official action. So also were each and all the persons so jointly indicted with him by law charged with certain official duties pertaining to the enforcement of the criminal laws of the state. It will not do to say that such persons, officers though they be, can only be

charged and tried singly under the bribery statute, and not for the crime of conspiracy to commit the same felony. True, each of the persons named as officers including appellant performed a different duty; but, when taken together, they formed the machinery or at least controlled the criminal procedure required to bring violators of the law before the court.

[12, 13] With reference to the ownership of the money, etc., to be solicited, it is not directly alleged that such money, bribes, etc., was the property of the persons to be solicited. In this connection, our attention is called to the case of *Green v. State*, 157 Ind. 101, 60 N. E. 941, where it is stated:

"In pleading a conspiracy to commit a felony, the elements of the intended felony must be fully disclosed, so that the court may see that a public offense is in fact charged."

In that case the charge was a conspiracy to commit a felony, and the felony was blackmailing. "The gist of the felony defined as blackmailing is the extortion of money, chattels, or valuable securities from a person, by threatening to expose his crimes or immoralities." It was held, as blackmailing belonged to the same general class of crimes as larceny, embezzlement, robbery, burglary, or false pretenses, the indictment must allege the ownership of the property or explain the absence of the averment. The reason assigned for this ruling is that one cannot "be guilty of larceny, nor of burglary, with respect to his own property of which he has the right of possession."

In the case at bar, the gist of the alleged felony, defined by statute as "bribery," is the soliciting of money or valuable thing by the deputy prosecuting attorney to influence him with respect to his official duty, or to influence his action in any matter pending, or that may legally come before him. *Glover v. State*, 109 Ind. 391, 10 N. E. 282. A "bribe" is defined as any gift, advantage, or emolument offered, given, or promised to, or asked, or accepted by any public officer to influence his behavior in his office. *Standard Dic.* The crime of bribery is a felony (section 2378, supra), and is one against public justice. It has to do with a public officer, and pertains to his behavior in office. As we have seen, the word "bribe" has a well-defined, and likewise a well-understood, meaning, and as in the statute, and in this indictment, used, precludes the thought that appellant had entered into a conspiracy to solicit, from the persons described, money or other valuable thing, his own property, and of which he had the right of possession.

Appellant as a public officer was charged with certain official duties for the performance of which the public generally was interested. The essential elements of this and the *Green Case* are not alike. They are not properly in the same classification of crimes.

The rule announced in that case, as to the necessity for pleading the ownership of the property, cannot be of controlling influence in determining the sufficiency of the pleading before us. For the reasons stated, we hold the indictment good, although it fails to allege the ownership of the money or other things of value to be solicited.

[14] Appellant also asserts that the indictment shows that the bribes which were to have been solicited were collected, and therefore the alleged offense was merged into the greater crime of bribery. We cannot agree to that proposition. "Where an indictment charges a conspiracy and also an overt act, which in itself is criminal, the conspiracy is not merged in the higher offense, where the defendant is placed on trial upon the charge of conspiracy only." Such is the substance of the ruling in the case of *State v. Grant*, 86 Iowa, 216, 53 N. W. 120. See, also, *State v. Madden*, 170 Iowa, 230, 148 N. W. 995. This rule is sound, and we approve it.

[15] Nor is the indictment bad for duplicity, for its language, when properly construed, refers to the persons running and operating various businesses characterized as illegal, and are so classified as to bring them within the prohibition of our statutes pertaining to specifically defined crimes. The fact that the bribe from each person was to be \$15 per week, taken in connection with the fact that the amount of the bribes to be solicited were unknown to the grand jury, appear to be contradictory; yet each of these statements are in keeping with the ultimate fact—soliciting bribes. They pertain to and are part and parcel of a single scheme.

[16] Appellant also urges for our consideration that the indictment does not state the offense with sufficient certainty. The indictment is clearly sufficient, not only to enable the court and jury to understand distinctly the issue to be tried, but it also fully informs the defendant of the nature of the offense preferred against him. Nor do we find any defects or imperfections in the indictment which would tend to the prejudice of the substantial rights of appellant, and a judgment may well be pronounced upon a conviction according to the rights of the case. These facts appearing, the indictment must be held sufficient to withstand a motion to quash on the ground of uncertainty. No more is required. *Skelton v. State*, 173 Ind. 462, 89 N. E. 860, 90 N. E. 897; *Terre Haute Brewing Co. v. State*, 169 Ind. 242, 82 N. E. 81; *State v. Feagans*, 148 Ind. 621, 48 N. E. 225; *Funk v. State*, 149 Ind. 338, 49 N. E. 266.

[17] Appellant also insists that the trial court erred in sustaining appellee's demurrer to each of the nine paragraphs of his plea in abatement. The first six of these may be considered together, as they each rely upon the same state of facts. Each para-

graph is directed to an individual juror and together challenge the competency of the entire panel. Appellant was not under prosecution for any offense at the time the grand jury was impaneled, and by his plea he tenders the cause for challenge provided by clause 7, § 1965, Burns 1914. That statute provides that—

"A person held to answer a charge for a felony or misdemeanor may challenge an individual grand juror before the jury is sworn, for one or more of the following causes only: Seventh, that such a state of mind exists on his part in reference to the party charged that he cannot act impartially and without prejudice to the substantial rights of the challenger."

It will be noticed that this section specifically provides that the cause for challenge therein mentioned is to be exercised before the jury is sworn. We have no statute making any provision for the challenge of an individual grand juror or to the array by a person called to plead to an indictment. However, such practice has been allowed and approved in this state in a proper case. *Stipp v. State*, 118 N. E. 818. But no case will be found in this jurisdiction where the rule has been extended to permit the indicted to thus challenge for favor, which is the basis of appellant's plea. Our statute has fixed the qualifications of both a grand and petit juror, and provides that he must be a resident voter of the county and a freeholder or householder. Acts 1917, p. 688; section 1674, Burns 1914. Appellant does not rest his plea on either of these statutory qualifications or facts going to the organization of the grand jury, but on bias and prejudice, and therefore the question: May appellant, after indictment, challenge a juror for this cause by a plea in abatement? This question was before the court in the case of *State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54, and in a well-considered opinion, and, after reviewing all the adjudicated cases in this country up to that time, that court held that all of the authorities were agreed:

"That objections to grand jurors, on the ground that they have formed and expressed opinions of the guilt of a person accused of crime before they were impaneled and sworn, cannot be pleaded in abatement to the indictment."

Upon an exhaustive examination of the authorities bearing upon the question being considered, we hold that the grounds for challenge presented by appellant in the first six paragraphs of his plea in abatement are unavailing after indictment. *State v. Easter*, 30 Ohio St. 542, 27 Am. Rep. 478; *People v. Borgstrom*, 178 N. Y. 254, 70 N. E. 780; *Lee v. State*, 69 Ga. 705; *Jackson v. United States*, 102 Fed. 473, 42 O. C. A. 452; *Patrick v. State*, 16 Neb. 830, 20 N. W. 121; *State v. Rickey*, 10 N. J. Law, 83; 4 Ann. Cas. 873,

note; Thompson & Merriam on Juries, § 533; Joyce on Indictments, § 85; 20 Cyc. 1300; 12 R. C. L. 1030, § 17.

Grand juries as a rule do not know who will be accused before them, and to open the door for the indicted to challenge on the ground of prejudice entertained by a juror against him or his business would lead to endless delays, as well as the possibility of having a new grand jury for every crime committed. 12 R. C. L. 1022, § 9.

[18-21] The rulings of the court in sustaining a demurrer to the seventh and ninth paragraphs of appellant's plea in abatement, and in sustaining appellee's motion to strike out the tenth paragraph, are not questioned. The eighth paragraph remains to be considered. The only part of this paragraph at all important, and on which our decision rests, reads as follows:

"That one William A. Thompson, an attorney employed to procure this indictment and to prosecute this defendant, * * * was present with the grand jury which found this indictment, during the examination of evidence, and during their deliberations in this case, for the purpose of securing this indictment against this defendant, to which this plea is pleaded; and being so present with said grand jury after all the evidence had been submitted, and at and before the finding of said indictment, he, the said William A. Thompson, did then and there counsel, request, and urge the said grand jury upon the testimony before them to find this indictment, and did procure the said grand jury to find and return said indictment." (Our italics.)

Appellant to support the sufficiency of this paragraph insists: (1) That the circuit court had no power to appoint a special prosecutor in this case for the reason, as the plea also shows that J. Frank Mann was the duly elected and acting prosecuting attorney, and at that time was in attendance upon the court and upon the grand jury which found this indictment, that Thompson was not a deputy prosecuting attorney, nor a witness before the grand jury, nor a stenographer employed by the grand jury; and (2) that the paragraph is good for the reason it shows that after all the evidence had been submitted Thompson participated in the deliberations of the grand jury, and at and before the finding of said indictment "did then and there counsel, request, and urge said grand jury upon the testimony before them to find this indictment," which acts on the part of Thompson were prohibited by section 1980, Burns 1914.

In passing, we may remark that the demurrer admits all the facts of the plea well pleaded; but, as this plea does not deny the merits of the prosecution and only tends to delay the remedy, it will be upheld only after strict construction, and unaided by any intendment or presumption of law or fact, it is found to be certain and conclusive against such supposable matter as can properly be

replied. State v. Comer, 157 Ind. 611, 62 N. E. 452; Melville v. State, 173 Ind. 352-358, 89 N. E. 490, 90 N. E. 467; State v. Cooper, 96 Ind. 331; Hardin v. State, 22 Ind. 347; Callahan Co. v. Wall Rice Co., 44 Ind. App. 372, 89 N. E. 418.

As to appellant's first contention, the plea fails to state that Thompson was not appointed specially by the court to assist the prosecuting attorney before the grand jury, and in the preparation of the indictment. This plea goes to the indictment, and in determining its sufficiency we may look to the indictment, and from which it will be seen that the appellant in this case was a deputy of Mann, the regular prosecuting attorney then in office, and who according to this plea was not responsible for Thompson's appointment. The nature and scope of the investigation then before the grand jury called for the aid and unbiased assistance from the prosecuting attorney's office. In the absence of a showing to the contrary, it is not unreasonable to assume that that office was friendly to its deputy. While there is no appearance of wrongdoing by the prosecuting attorney, yet it does not appear that he or his office was not under investigation. The facts before the court at the time the special prosecuting attorney was appointed are not before us, and, in the absence of a contrary showing, the presumption in favor of the regularity of the proceedings of the trial court must prevail. True, we have no statute expressly authorizing the appointment of a special prosecuting attorney to appear before the grand jury, or to assist the prosecuting attorney in the trial of criminal causes; yet this court has recognized the inherent power and duty of courts having general jurisdiction of criminal matters to appoint attorneys to assist the prosecutor in the trial of criminal cases. Tull v. State ex rel., 99 Ind. 238; Wood v. State, 92 Ind. 269. This court, in Board v. McGregor, 171 Ind. 634, 87 N. E. 1, 17 Ann. Cas. 333, while recognizing the expediency and desirability of the state having such assistance in important and difficult criminal causes, was impressed with the view that the duty of providing for such emergencies rests primarily with the Legislature; however, the inherent powers of the court to make such appointments was recognized, and we still adhere to the doctrine that the question is one for the sound discretion of the trial court. Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370; State ex rel. v. Ellis, 184 Ind. 307, 112 N. E. 98; People v. Northrup, 184 Ill. App. 638-646. The allegations of this paragraph in this particular are not sufficient to overcome the presumptions which may properly be indulged against it.

[22] Appellant's second insistence presents a more troublesome question. If the alleged facts could reasonably be considered as show-

ing a mere irregularity, and not calculated to injure the persons indicted we would not hesitate to declare the paragraph in question insufficient. In this particular it cannot be said that the special prosecutor was vested with more authority or greater privileges than the regular prosecuting attorney.

Conceding that he had the same rights, privileges, and authority in the particular case, it follows that the sphere of his action is circumscribed by the statutory provisions applicable to regular prosecuting attorneys. By section 9406, Burns 1914, it is made the duty of prosecuting attorneys within their respective jurisdictions to conduct all prosecutions for felonies or misdemeanors. By section 1980, supra:

"The prosecuting attorney or his deputy shall be allowed at all times to appear before the grand jury, for the purpose of giving information relative to any matter cognizable by it, or advice upon any legal matter when required; and he may interrogate witnesses before the grand jury, when the jury or he deem it necessary, *but no prosecuting attorney, officer or person shall be present with the grand jury during the expression of their opinions or in giving their votes upon any matter before them.*" (Our italics.)

By this section it was the purpose of the Legislature to exclude all persons from the presence of the grand jury during the expression of their opinions or in giving their votes, and for the obvious purpose not only to prevent the abuse of official privilege, but to leave the grand jurors free to act upon their own impressions of the evidence and law as to all matters finally submitted to them, uninfluenced by the presence or suggestions of any other person.

Appellant claims the protection of this statute, and shows that after all the evidence had been submitted, and at and before the finding of said indictment Thompson did then and there counsel, request, and urge the grand jury upon the testimony before them to find this indictment and did procure the said grand jury to find and return the same. In other words, this language can mean nothing more or less than that Thompson was present and actively insisting that appellant be indicted "upon the testimony before them." It would be a forced and unauthorized construction of the language as set forth in this plea to say that Thompson's activities occurred only during the time of investigating the charge, and prior to the time the grand jury expressed their opinions or gave their votes; but such must be the construction if this case is to be ruled by the case of *State v. Bates*, 148 Ind. 610-612, 48 N. E. 2.

The case of *Shattuck v. State*, 11 Ind. 473, which was based upon the common-law practice is cited in support of the rule in the *Bates Case*. A careful reading of the *Shat-*

tuck Case will disclose that the plea then under consideration was obscurely worded. In other words the court was not able to see from the wording thereof that the "discussion" before the grand jury by the prosecutor's assistants amounted to more than advice on questions of law, and, it not certainly appearing that such assistants took part during the time the grand jurors were expressing their opinions or giving their votes, improper action was not shown; and, as right action should be presumed, the plea was held insufficient. But it was held that the mere presence of such assistants at any time would not per se invalidate the finding. The soundness of this latter ruling has been questioned on the ground that the mere presence of such officer at the time of finding the indictment would seem to be an abuse of their official privilege, *Thompson & Merriam on Juries*, § 632. In this state since 1881, the question of the presence of the prosecuting attorney before the grand jury has been controlled by statutory enactment. Section 1668, R. S. 1881. Prior to that time, the common-law practice in this particular prevailed. We may assume that the Legislature was advised as to the ruling in the *Shattuck Case*, and its tendency to open the door to the grand jury room at a time when it should be closed, and, thus advised, it passed this statute to prevent any opportunity for suggestions or influences upon the grand jurors by mere presence of the prosecuting attorney during the prohibited period. *Commonwealth v. Berry*, 92 S. W. 936, 29 Ky. Law Rep. 234; *Lewis v. Commissioner*, 74 N. O. 194. However, the plea now under consideration goes farther than mere presence. It charges affirmative activities of the special prosecutor in procuring the indictment not only before, but at the time of finding the indictment, and upon the testimony before the grand jury. This action is condemned in the *Shattuck Case*, wherein it is said that—

"The advice given by the court, or prosecutor, could not legitimately be upon questions of fact, but was confined to questions of law; that is, neither could say to the jury that the facts were sufficient to authorize them to find a bill, no more than the judge should say to the petit jury, upon the trial, that they should return a verdict of guilty. In the one case, the inquiry is upon the question of 'a true bill' or not a true bill, and in the other, a trial of the question of 'guilty' or 'not guilty.'"

In *People v. Bright*, 157 Cal. 663, 109 Pac. 33, the court had before it section 925 of the Penal Code of that state, which has reference to who may be present during the session of the grand jury, and provides that—

"No person must be permitted to be present during the expression of their opinions, or giving their votes upon any matter before them."

In that case that statute was construed to mean that no one was permitted to be present with the grand jurors during their deliberation and voting; that the expression in the Code, "during the expression of their opinions," means the deliberation of the grand jurors subsequent to investigation, and includes all the period after the evidence has been received, to and including the time of voting on the indictment.

Section 5285, Revised Laws of Minn. 1905, provides:

"No county attorney, sheriff, or other person, except the grand jurors, shall be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them."

In *State v. Slocum*, 111 Minn. 328, 126 N. W. 1098, the Supreme Court construed this section to mean that the county attorney's presence is limited to the examination of witnesses.

In *Miller v. State*, 42 Fla. 266, 28 South. 208, it appears that counsel was before the grand jury and was present during their investigation and deliberations and at the time of voting on the bill, "and, being so present before said indictment was found, he did at such time *urge and request* [our italics] the grand jury to find such indictment." Sections 1780 and 3856, Florida Comp. Laws 1914, provide that the state's attorney, whenever required by the grand jury, shall attend them for the purpose of examining witnesses or giving advice on legal matters. The court, after referring to these sections, said:

"The statute does not contemplate that such counsel may advise the grand jury to find bills upon the testimony before them. * * * To urge and request a grand jury to find a particular bill after the examination of evidence in the case includes the view that the attorney so urging and requesting is of the opinion that the evidence justifies such conclusion, and this is clearly beyond the province of such attorney."

In *Stuart v. State*, 35 Tex. Cr. R. 440, 84 S. W. 118, it is said:

"We apprehend that 'discussing the propriety of finding a bill of indictment,' and 'deliberating upon the accusation against the defendant,' mean the same thing. Mr. Webster defines 'deliberating' as the 'act of weighing and examining the reasons for and against a choice of measures; careful discussion and examinations of the reasons for and against a proposition.'"

In the case at bar, it appears that the special prosecutor was present with the grand jury at a time prohibited by statute. This being true, he was there during such time as an unauthorized person, and his personal presence will be considered harmful, and it will not be necessary for the court to inquire as to the effect of his conduct. From our investigation of the authorities, we conclude that the great weight is upon the side

that there must be no opportunity for improper influences upon the grand jury after the investigation is closed. *United States v. Edgerton* (D. C.) 80 Fed. 374; *United States v. Rubin* (D. C.) 218 Fed. 245; *Rothschild v. State*, 7 Tex. App. 519; *United States v. Heinze* (C. C.) 177 Fed. 770; *Latham v. United States*, 226 Fed. 420, 141 C. C. A. 250, L. R. A. 1916D, 1118; *Wilson v. State*, 70 Miss. 595, 13 South. 225, 35 Am. St. Rep. 664; *United States v. Philadelphia R. Ry. Co.* (D. C.) 221 Fed. 683; *Thompson & Meriman on Juries*, § 634; 2 *Wharton, Crim. Proc.* (10th Ed.) § 1295; 16 *Col. Law Review*, 158; *Clark's Crim. Proc.* p. 113.

It cannot be said that the pleader is here relying upon conclusions and has failed to allege facts, in that he has not set forth what was said and done by the special prosecutor in the way of influencing the jury. The words "counsel, request, and urge," as used in this plea, have a well defined and understood meaning, so that, as here used, they were sufficient to inform the court that Thompson had advised the grand jurors as to their duty upon the testimony before them and of his desire that they find this indictment. This action on the part of the special prosecutor was improper, and the trial court erred in sustaining appellee's demurrer to the eighth paragraph of appellant's plea in abatement.

Judgment reversed, with instructions to grant a new trial and overrule appellee's demurrer to the eighth paragraph of appellant's plea in abatement, and for further proceedings not inconsistent with this opinion.

(188 Ind. 723)

PITTSBURGH, C., C. & ST. L. R. CO. v.
KRUGER. (No. 23339.)

(Supreme Court of Indiana. May 18, 1919.)

Appeal from Superior Court, Marion County; V. G. Clifford, Judge.

Action by William Kruger against the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company. Judgment for plaintiff, and defendant appeals. Judgment reversed, with instructions to overrule a demurrer to a paragraph of complaint.

Samuel O. Pickens, Charles W. Moores, R. F. Davidson, and Owen Pickens, all of Indianapolis, and D. F. Williams, of Pittsburgh, Pa., for appellant.

H. N. Spaan, of Indianapolis, for appellee.

LAIRY, J. This is an appeal from a judgment in favor of appellee for the sum of \$249.85. This court has jurisdiction of the appeal for the reason that a constitutional question is presented, but in view of the conclusion reached it will not be necessary to consider the question thus presented.

The complaint shows that appellee was employed by appellant as a railway conductor for

a number of years from 1905 to 1914, and seeks to recover a balance alleged to be due him as wages on the ground that appellant, during the time he was so employed, deducted from the amount due him each month the sum of \$3.75, aggregating the amount demanded in the complaint.

Appellant filed an answer in six paragraphs, and the trial court sustained a demurrer addressed separately to the fourth, fifth, and sixth paragraphs of this answer. These rulings of the court are separately assigned as error.

In the recent case of Pittsburgh, etc., R. Co. v. Miller (1918) 119 N. E. 801, this court decided that the trial court erred in sustaining the demurrer addressed to a paragraph of answer substantially the same as the sixth paragraph of answer in this case. The substance of the answer and the reasons upon which the decision is based are stated in that opinion, and need not be here repeated. For the reasons there stated the sixth paragraph of answer in this case stated facts sufficient to constitute a defense, and the demurrer addressed thereto was improperly sustained.

The judgment is reversed, with instructions to overrule the demurrer to the sixth paragraph of complaint.

(73 Ind. App. 608)

WALTZ et al. v. NOBLE et al. (No. 9797.)*

(Appellate Court of Indiana, Division No. 2.
May 6, 1919.)

1. APPEAL AND ERROR ¶907(2)—REVIEW—PRESUMPTIONS—ABSENCE OF EVIDENCE.

Where record on appeal does not contain the evidence, the presumption is that the case was tried on its merits, and properly decided under the issues.

2. APPEAL AND ERROR ¶907(2)—REVIEW—PRESUMPTIONS.

Where record does not contain the evidence, it will be presumed that the instructions were applicable thereto.

3. APPEAL AND ERROR ¶907(2)—RECORD—ABSENCE OF EVIDENCE—INSTRUCTIONS.

Instructions will not be held erroneous on appeal in absence of evidence, where they correctly state the law under any supposable state of facts provable under the issues.

4. NEW TRIAL ¶150(2) — MISCONDUCT OF JURY—AFFIDAVITS.

Motion for new trial on ground of misconduct of jury was properly denied, where affidavit in support of alleged misconduct did not state the source of affiant's information, nor time such information was received.

5. TRIAL ¶344—MISCONDUCT OF JURY—AFFIDAVIT OF JUROR.

The affidavit of a juror cannot be received to impeach the jury's verdict.

Appeal from Circuit Court, Hamilton County; Willett H. Parr, Special Judge.

Action by Peter D. Waltz and others against George Noble and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Burke G. Slaymaker, of Indianapolis, and Christian & Christian and Ralph H. Waltz, all of Noblesville, for appellants.

Joseph A. Roberts, of Noblesville, for appellees.

McMAHAN, J. The appellants filed their complaint to quiet their title to one-half of the real estate in controversy and for partition. The appellees filed a cross-complaint claiming to own the whole of the real estate, and asking that their title be quieted against appellants. The issues being closed, the cause was tried by a jury, and resulted in a verdict and judgment in favor of appellees quieting their title to the whole of the real estate.

Appellants filed a motion for a new trial, which was overruled, and the errors assigned in this court and not waived are that the court erred: (1) In overruling the motion for a new trial; and (2) in sustaining appellees' motion to strike from appellants' motion for a new trial the affidavit of Russ Eador.

The appellants in their complaint do not allege the source of their title, but the appellees in their cross-complaint allege that William Waltz and Sarah Waltz, his wife, owned the real estate as tenants by entireties; that William Waltz died, leaving the said wife surviving him; that Sarah Waltz has since died; and that the said real estate descended to her only daughter, who has since died, leaving the appellees as her only heirs.

Appellants contend that the court erred in giving instruction No. 3, tendered by appellees, which reads as follows:

"If you find from the evidence that Sarah Waltz outlived her husband, William Waltz, although for only a moment of time, then their deaths would not be simultaneous, and your verdict should be for the defendants."

It appears from the instructions given and from those tendered that the ownership of the real estate in question depended upon whether Sarah Waltz survived her husband or whether their deaths were simultaneous.

[1-3] The evidence not being in the record, the presumption is that the cause was tried on its merits, and properly decided under the issues, and that the instructions were applicable to the evidence. Where the instructions correctly state the law under any supposable state of facts provable under the issues, they will not be held erroneous. Thompson v. Miller, 182 Ind. 545, 107 N. E. 74; Abney v. Indiana, etc., Co., 41 Ind. App. 53, 83 N. E. 387.

The evidence in this case may have shown that Mrs. Waltz survived her husband for

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Transfer denied.

days or weeks. Such a fact might have been proved under the issues, but, as this court said in the recent case of *Amen v. Standard, etc., Co.*, No. 9735, 123 N. E. 7, decided April, 1919:

"We are unable to say what was proved in this case, because of the absence of evidence. We can only measure the instruction by what might have been proven under the issues, * * * and by this measurement the instruction is not wanting."

Appellants next allege that the motion for a new trial should have been sustained because of alleged misconduct of the jury. The alleged misconduct is that the jury took the written instructions of the court to the jury room when they retired to deliberate, and that they "read and re-read said instructions and unduly emphasized certain instructions setting out appellees' view of the law as stated in instruction No. 3, hereinbefore set out. This specification was supported by the affidavit of one of appellants' counsel, and was made on information and belief.

As said by the Supreme Court in *Pittsburgh, etc., R. Co. v. Collins*, 168 Ind. 467, 80 N. E. 415:

"This charge was supported by the affidavit of appellant's counsel, but the source and time of receiving such information was not stated. The sworn statement of a person, other than a juror, that the jury were guilty of misconduct in the jury room, without stating the source of his knowledge, is no better than an unverified complaint. In the absence of a showing to the contrary, the presumption is that the affiant received his knowledge from some member of the jury. The verdict of a jury cannot be impeached directly upon the affidavit of one of its members, nor may it be indirectly impeached upon information communicated by jurors and supported by the affidavit of another. *Hutchins v. State* (1898) 151 Ind. 667, 678 [52 N. E. 403]; *Stanley v. Sutherland* (1876) 54 Ind. 339, 356; *Treschman v. Treschman* (1902) 28 Ind. App. 206 [61 N. E. 961]. It follows that the court would not have been justified in granting a new trial upon this showing of alleged misconduct on the part of the jury."

[4] There was no error in overruling the motion for a new trial.

The affidavit of Russ Eador, who was one of the jurors that tried the case, was also filed in support of the alleged misconduct of the jury, but on motion of the appellees it was stricken out. The appellants excepted to this ruling of the court, and insist that it constitutes reversible error.

[5] It is a well-settled rule of law that the affidavit of a juror cannot be received to impeach the verdict of the jury. *Stanley v. Sutherland*, 54 Ind. 339; *Hutchens v. State*, 151 Ind. 667, 52 N. E. 403. There was no error in striking out the affidavit of the juror.

No reversible error appears in the record. Judgment affirmed.

(72 Ind. App. 172)
STANDARD OIL CO. v. HANDLEY.*
(No. 9744.)

(Appellate Court of Indiana, Division No. 2.
May 8, 1919.)

MUNICIPAL CORPORATIONS—§705(4)—USE OF STREETS—PERSONAL INJURY ACTIONS—VIOLATION OF CITY ORDINANCE—DRIVING VEHICLES IN PROCESSION.

Where a 6 year old child, while running after a marble that had rolled into the street from the sidewalk, was run over and injured, by a wagon hitched to defendant's automobile truck, negligence could not be predicated on the violation of an ordinance forbidding drivers of vehicles owned or controlled by any firm, person, or corporation from proceeding in procession, and requiring a distance of at least 20 feet between such vehicles; the ordinance not being applicable to vehicles used as trailers, although owned by one person.

Appeal from Circuit Court, Warrick County; Ralph E. Roberts, Judge.

Action by Frank Handley, by his next friend, James Handley, against the Standard Oil Company. Judgment for plaintiff, and from a denial of a new trial defendant appeals. Reversed, with directions to sustain motion for new trial.

John R. Brill, Frank H. Hatfield, and John W. Brady, all of Evansville, for appellant.

Geo. K. Denton, of Evansville, H. F. Hardin, of Marion, and G. V. Menzies, of Mt. Vernon, for appellee.

McMAHAN, J. This was an action by appellee to recover damages for personal injuries alleged to have occurred by the negligence of the appellant. The complaint was in one paragraph, and alleged: That appellant was a corporation engaged in the marketing and delivering of gasoline and similar products in the city of Evansville in this state. That in the delivery of said products it used a motortruck propelled by gasoline, and also a tank wagon to be drawn by horses, and that on the 21st day of September, 1914, the appellant attached said wagon by the end of the tongue to the rear end of the motortruck, and in that manner propelled said vehicles along one of the streets in said city. That said street was thickly populated, being built up with dwelling houses, and was frequently used by small children for play and recreation, all of which was well known to appellant. That on said day, appellee was a minor under 6 years of age, and resided with his parents on said street where said vehicles were being propelled, and was at said time engaged in playing a game of marbles with a small brother, using the front

yard of his father's dwelling and the sidewalk and street adjacent thereto in playing said game. That said vehicles were in charge of an employé of appellant, who was driving said vehicles for appellant and in the line of his employment. That appellant by said employé was driving said vehicles attached together, with no space between them, in violation of an ordinance of said city, then in force and effect, and which reads as follows:

"The drivers of vehicles owned or controlled by any firm, person or corporation, shall not proceed in procession, and a distance of at least twenty feet (20) must be between such vehicles."

That the driver was seated on the front end of said motortruck and was propelling said vehicles, and that there was no one on said tank wagon to observe the street or to warn any one of danger, and that appellant was negligently and carelessly driving said vehicles along said street in said manner, when appellee in playing said game shot his marble out into the street and into the track of said motortruck, which passed over his marble; that appellee followed after his marble, when he waited for the truck to pass over said marble, and, not seeing or realizing, in his intentness on the game, that the tank wagon was attached to and was following the motortruck, was struck and injured by the tank wagon.

It is also alleged that because of his tender years appellee was not capable of realizing and appreciating the danger; that the said driver of the motortruck saw the boys playing marbles, and saw appellee run out into the street, and realized his danger, and that it was the duty of the said driver to have warned appellee of his danger, and to have observed said tank wagon when passing along said street in close proximity to said children, and to see that no one was injured thereby, but that said driver negligently and carelessly failed to do so, and negligently and carelessly failed to look back to said tank wagon when passing said children.

It is further alleged that if there had been a driver on said rear vehicle, or if said vehicles had not been attached together, or if there had been proper space between them, the appellee would not have been injured, but that appellant negligently failed to have a driver on said rear vehicle, and negligently attached said vehicles together, and negligently propelled them along the street in said manner, well knowing that said street was used by children for play, and that it was dangerous to said children to do so at said time and in said manner, and that appellee's injuries were caused solely by the alleged negligence of appellant.

The appellant filed an answer of general denial. There was a trial by jury, which re-

sulted in verdict and judgment for appellee.

The appellant filed a motion for a new trial, assigning as reasons therefor that the court erred in giving on its own motion instructions Nos. 1 and 2, in refusing to give instruction No. 4 requested by appellant, in giving each of the instructions Nos. 1 to 10 requested by appellee; that the verdict of the jury is not sustained by sufficient evidence, is contrary to law, and that the damages assessed are excessive.

The only error assigned is that the court erred in overruling the motion for a new trial.

The facts, as shown to exist by the contradicted evidence, are: That on September 21, 1914, there was in force and effect in the city of Evansville an ordinance as stated in the complaint and that on said day one of appellant's tank wagons was at a blacksmith shop for repairs, and that one of appellant's servants went after it with a motortruck, and attached the tank wagon by the end of the tongue to the rear end of said truck, and in that manner was taking the tank wagon along the street where the accident happened, to the appellant's plant, which was a distance of $2\frac{1}{2}$ or 3 blocks from the blacksmith shop. That the appellee was less than 6 years old, and was playing marbles in the front yard, and on the sidewalk in front of his home, with his 12 year old brother and another boy of about the same age, and that the marble with which he was playing rolled out into the street as the said truck with the said tank wagon in the rear was passing; that the appellee ran after the marble, and ran in between the truck and wagon, and was run over by the wagon and injured. The truck at the time of the accident was going at a speed of about five miles an hour, and had passed appellee when he started in behind it to get his marble. When the driver of the truck reached the place where the boys were playing, they were standing in the yard a few feet from him, and he saw them at that time, but did not see the appellee when he started to run into the street, and did not know he was injured until some one called to him. There was no conflict in the evidence, except as to the extent of appellee's injuries.

The court, in instruction No. 9, given at the request of the appellee, told the jury that, if there was not at least 20 feet between the tank wagon and the motortruck which appellant was propelling along the street, the appellant was violating the ordinance set out in the complaint and that the violation of said ordinance constituted negligence, and if, as a result of such violation of such ordinance and as the proximate result thereof, the appellee was injured, their verdict should be for the appellee.

The appellant was driving the tank wagon

and the motortruck in procession, and there was not a distance of 20 feet between them. The ordinance provides that:

"The drivers of vehicles owned by any person, firm or corporation, shall not proceed in procession, and a distance of at least twenty feet must be between every such vehicle."

It is evident to us that the framers of this ordinance, at the time of its passage, did not have in mind any such a condition as is shown by the evidence in this case. The words, "drivers of vehicles," both "drivers" and "vehicles" being plural in form, indicate to us that they had in mind a procession of vehicles, owned by some person, firm, or corporation, each vehicle being in charge of its own driver. The intention doubtless was to prevent a procession of such vehicles unnecessarily interfering with or impeding pedestrians in crossing the streets of the city. Any other construction would absolutely prohibit the use of trailers as now used in connection with automobiles and trucks. If an automobile should "go dead," as they will at times, without compunction as to time or place, the ordinance, if given the construction contended for by appellee, would prohibit the owner from towing it along the streets with another automobile or truck owned by him, unless he had a tow line or cable at least 20 feet long, while he could employ the owner of another automobile or truck to haul him in and use a cable of any length desired. The construction which appellee asks us to place upon this ordinance would prohibit the farmer fastening his buggy behind his wagon and bringing it to the city for repairs, or taking it home, unless it was so attached to the wagon as to have a distance of 20 feet between each vehicle.

Such ordinances should receive "a reasonable construction consistent with the purpose of their enactment and the practical difficulties that arise in their application to particular cases." *Conder v. Griffith*, 61 Ind. App. 218, 111 N. E. 816.

The giving of said instruction No. 9 was reversible error. The appellant complains of instruction No. 7, given at request of appellee, for the reason that it is inconsistent with No. 9, give at the request of appellee. In view of the fact that we have held the latter instruction erroneous, it is not necessary for us to give any consideration to No. 7, further than to say that it does not meet with our approval, for the reason that it is not limited to the negligence alleged in the complaint.

We do not deem it necessary for us to discuss any of the other alleged errors.

Judgment reversed, with direction to sustain the motion for a new trial and for further proceedings not inconsistent with this opinion.

(71 Ind. App. 180)

TRAVELERS' PROTECTIVE ASS'N v. BRAZINGTON. (No. 9836.)*

(Appellate Court of Indiana, Division No. 1.
May 9, 1919.)

1. INSURANCE \S 791(2)—FRATERNAL INSURANCE—"LOSS OF FOUR FINGERS ON EITHER HAND BY SEVERANCE."

Constitution of fraternal beneficiary association providing for indemnity "in case of loss of four fingers on either hand by severance" construed to require payment where there is loss by severance of any material part of each of the four fingers on one hand, whenever because of such severance each of the fingers is practically useless.

2. APPEAL AND ERROR \S 1184—DISPOSITION—DEATH OF APPELLEE.

Where appellee dies after submission of cause on appeal, cause will be affirmed as of date of submission.

Appeal from Circuit Court, Delaware County; Frank Ellis, Judge.

Action by Alvah C. Brazington against the Travelers' Protective Association. Judgment for plaintiff, and defendant appeals. Affirmed.

White & Haymond, of Muncie, for appellant.

Miller, Dailey & Thompson, of Indianapolis, for appellee.

ENLOE, J. This was an action upon a policy of insurance. The appellant, as appears from the record, is a fraternal beneficiary association, and the appellee was a member thereof. On July 18, 1914, the appellee received an injury to his right hand, resulting in the severance of the little and ring fingers of said hand at the knuckle joint; the severance of the middle finger at the middle joint; the first or index finger was cut and crushed between the first joint and the distal end of the finger, to the extent that the nail of said finger was crushed, or torn off, the side of the finger so cut and crushed that the bone was exposed to view, and the distal end of said finger, at least so far as muscular tissue is concerned, was also crushed off, to the extent that the same was hanging only by some shreds of skin and flesh. The surgeon, in dressing this finger, cut off about three-fifths, or an inch, of the distal end of the bone of the finger, stitched back the flesh of the distal end that had been crushed off, but not entirely severed, and which flesh so stitched back in due time united with the body of the finger.

At the time of the accident appellee was in good standing in appellant society, and no question is made on this appeal as to the sufficiency of any of the pleadings.

The only error assigned and not waived is the action of the court in overruling appellant's motion for a new trial. This assignment challenges the sufficiency of the evidence to support the verdict, and also the action of the court in giving certain instructions and in refusing to give certain other instructions tendered by appellant.

At the time appellee was injured one of the articles in appellant's constitution was as follows (section 2, art. IX):

"Whenever a member in good standing shall, through external, violent and accidental means, under the provisions and limitations of the constitution and amendments thereto, receive bodily injuries which shall, independently of all other causes, result in the loss of his legs, arms or eyes, within six months from the date of said accident, he shall be entitled to indemnity as follows: \$5,000.00 in case of loss of both legs or both arms by severance; \$2,500.00 in case of loss of one hand or one foot by severance above the wrist or ankle; \$1,800.00 in case of loss of four fingers on either hand by severance."

[1] This entire controversy turns upon the construction to be given to the above-quoted section. It will be noted that as to the fingers no place of severance is fixed, as is done as regards severance of hand or foot, as provided above. It will also be noted that the article of the constitution above quoted does not limit the liability by declaring a total loss to be requisite. The loss must come by severance; by some act which separates at least some part of each of four fingers on the same hand; it must also be caused by violent, external, and accidental means. Considering this section of the constitution, the object of the parties, the relation of the parties, and the language employed, we think that a fair and reasonable construction of said section is that the appellant would pay the sum named in those cases where, through loss by severance of any material part of each of the four fingers on one hand, and because of such severance, each of said fingers was left in such a condition that it was thereafter practically useless. The loss of the use of the fingers was the thing against which indemnity was sought.

In this case there is no contention as to any of the fingers of the appellee, except the first, or index, finger. As to this finger, there is and can be no contention but what a portion thereof was lost "by severance," but it is contended that, as the testimony shows that appellee had some use of this finger, it was not a "loss" within the terms of the contract.

The court submitted to the jury, at the request of the appellant, certain interrogatories covering, among other things, the extent of plaintiff's injuries, and which interrogatories and answers thereto were as follows:

"No. 5. After plaintiff's injury was the little finger and the third, or ring, finger of his right hand amputated at the last joint? Answer: Yes.

"No. 6. Was the second finger of plaintiff's right hand, after the injury on July 18, 1914, amputated at the second joint from the distal end? Answer: Yes.

"No. 7. On July 18, 1914, at the time of plaintiff's injury, was the end of the index or fore finger injured to such an extent that a small portion of the bone was removed and a small portion of the flesh and nail removed? Answer: Yes.

"No. 8. Has the nail on plaintiff's index finger since the injury grown out completely? Answer: No.

"No. 9. Does plaintiff have the free use of each joint of the index finger? Answer: No.

"No. 12. Does plaintiff now have the full use of his index finger, with the exception that the time is not quite as sensitive to touch as it was prior to the injury? Answer: The finger is practically useless.

"No. 13. If you answer interrogatory No. 12 'No' or in the negative, then state as your answer to this interrogatory the extent of the injury to plaintiff's index finger and what use plaintiff is able to make of said finger at the present time. Answer: The finger is practically useless."

The jury also returned answers to interrogatories submitted by appellee as follows:

"No. 1. Was the end of the index finger of plaintiff's right hand cut off as far back as the root of the nail by the accident and injury except a little bit of skin on the inside of said finger? Answer: Yes.

"No. 2. As the result of the injury sustained by the plaintiff on the 18th day of July, 1914, has he lost substantially the use of the index or front finger of his right hand? Answer: Yes."

Interrogatories numbered 5, 6, and 7 submitted by appellant, each called for the finding of fact as to the extent of the loss of each of said fingers physically by severance, and Nos. 8, 12, and 13 were each directed to the extent of loss of use of the index finger, and were so understood by the jury, and while the answers to Nos. 12 and 13 are not categorical in form, yet each question is sufficiently answered. In No. 1 of the interrogatories submitted by the appellee the jury found that the end of appellee's index finger, as far back as the root of the nail, had been cut off by the accident in question, and in No. 2 they find that appellee has lost substantially the use of this finger.

The appellant cites the case of *Wiest v. United States, etc., Co.*, 186 Mo. App. 22, 171 S. W. 570, and insists that it is decisive of the case at bar. In that case the policy provided for loss by severance *at or above the wrist joints* (our italics), and a severance of the thumb, first, second, and third fingers, and a portion of the palm of the hand, was

held not to be within the condition of the policy.

The case of *Newman v. Standard Accident Ins. Co.*, 192 Mo. App. 159, 177 S. W. 803, also cited and insisted upon by appellant, is not in point; for in this case also the point of severance was fixed as to its minor limits, and plaintiff was held, as to his injury, not to be within the terms of the policy, the severance having been below the point fixed in the policy.

The views we have expressed as to the meaning of the clause of the constitution of appellant society (section 2, art. IX) finds support in the following cases: *Sneck v. Insurance Co.*, 88 Hun, 94, 84 N. Y. Supp. 545; *Sheanon v. Pacific, etc., Ins. Co.*, 77 Wis. 618, 46 N. W. 799, 9 L. R. A. 685, 20 Am. St. Rep. 151; *Beber v. Brotherhood, etc.*, 75 Neb. 183, 106 N. W. 168, 121 Am. St. Rep. 782.

Complaint is also made of the action of the court in giving certain instructions and the refusal to give others tendered by appellant. The instructions given, taken as a whole, fairly state the law, and are in harmony with the views herein expressed. There was no error in refusing to give the tendered instructions which were refused.

We find no reversible error in the record.

[2] The death of appellee since the cause was submitted having been suggested in the record, the cause is therefore affirmed, as of the date of the submission.

Judgment affirmed.

PITTSBURG, C. C. & ST. L. RY. CO. v. MARBALE. (No. 9838.)*

(Appellate Court of Indiana. May 15, 1919.)

COURTS ⇨220(5)—APPELLATE COURT—FAILURE OF JUDGES TO CONCUR—TRANSFER TO SUPREME COURT—STATUTE.

Where four judges of the Appellate Court failed to concur in an opinion, the cause must be transferred to the Supreme Court under *Burns' Ann. St. 1914, § 1399*.

Appeal from Circuit Court, Clark County; James W. Fortune, Judge.

Action by Nathaniel Marbale against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From judgment for plaintiff, defendant appeals. Cause transferred to the Supreme Court.

M. Z. Staunard and Jonas G. Howard, both of Jeffersonville, for appellant.

Frank S. Roby, of Indianapolis, H. W. Phipps, of Jeffersonville, and Burdette C. Lutz, of Charlestown, for appellee.

PER CURIAM. Four judges failing to concur in an opinion in this cause the same is hereby transferred to the Supreme Court, under the provisions of section 1399, *Burns R. S. 1914*.

(70 Ind. App. 203)

DELASKI v. KOVACICH et ux. (No. 9854.)

(Appellate Court of Indiana, Division No. 2. May 14, 1919.)

1. APPEAL AND ERROR ⇨1002 — QUESTIONS FOR JURY.

Where there is a sharp conflict in the evidence, a finding of the jury thereon is binding on the Appellate Court.

2. HUSBAND AND WIFE ⇨208 — ACTION BY WIFE FOR SERVICES.

Burns' Ann. St. 1914, §§ 255, 7867, is permissive, and does not prohibit a husband joining with his wife in the prosecution of an action to recover compensation for her services rendered on her sole and separate account.

Appeal from Superior Court, Lake County; Virgil S. Reiter, Judge.

Action by Peter Kovacich and Helen Kovacich, his wife, against Louis Delaski, alias Lavi Delewski. Judgment for plaintiffs, and defendant appeals. Affirmed.

McMahon & Conroy, of Hammond, for appellant.

Merritt D. Metz, of Hammond, for appellee.

McMAHAN, J. Action by appellees, Peter Kovacich and his wife, Helen Kovacich, against the appellant for compensation for the care and support of Louise Delaski, an 8 year old child of the appellant.

The appellees in their complaint allege that appellant expressly agreed to pay them for the care and support of said child, and that he has failed and refused to do so. The issues were closed by a general denial. Trial by jury, verdict and judgment for appellees. Appellant filed a motion for a new trial, which was overruled.

[1] The appellant contends that the verdict is contrary to law. There was a sharp conflict in the evidence as to whether there was an agreement on the part of appellant to pay for the care of said child, but that was a question for the jury, and they, by their verdict, found that there was, and that finding is binding on us.

The evidence shows that the appellant is the stepfather of the appellee Helen. Appellant's wife who was the mother of Helen and Louise, died in July, 1911, leaving four

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Transferred to Supreme Court. See 124 N. E. 393. Superseded by opinion 126 N. E. 849. Rehearing denied.

children, the fruit of her marriage to appellant to wit: Louise aged about 4, another girl aged about 12, and two boys, aged 6 and 15. The appellees were married and living in Hegewish, Ill.

On the day appellant's wife was buried, appellant had a talk with appellee Helen in the presence of her husband about the care of the children, in which appellant told Helen to take Louise, and he would pay her, to which Helen agreed. Appellant and appellee Peter had no talk or conversation relating to the care or pay for keeping the child. The conversation was between the appellee Helen and the appellant in the presence of appellee Peter. Following this conversation the appellees took the child home with them, and boarded and clothed her for a period of nearly 5 years, and have received no compensation for such service.

[2] The appellant insists that the agreement proved was an agreement between appellant and the appellee Helen, and that there is therefore a variance between the pleadings and the proof; that proof of an agreement to pay one of the appellees will not support a verdict in favor of both of them.

Section 255, Burns' R. S. 1914, provides that a married woman may sue alone when the action concerns her personal property. Section 7867, Burns' 1914, provides that a married woman may carry on any trade or business and perform any labor or service on her sole and separate account, and the earnings and profits of any married woman accruing from her trade, business, service, or labor other than for her husband or family shall be her sole and separate property.

If the services and labor which appellee Helen performed for the appellant were rendered on her sole and separate account, the earnings became her sole and separate property, and she might have maintained an action in her own name therefor under said section 255.

The language of the statute is permissive, and does not prohibit the husband joining with her in the prosecution of an action to recover compensation for her services. As said by the Supreme Court in *Martindale v. Tibbetts*, 16 Ind. 200:

"This statute we regard as rendering it optional to bring the suit in the name of the wife alone, or that of the husband and wife, where the action concerns her separate property."

See, also, Ohio, etc., *Ry. Co. v. Cosby*, 107 Ind. 32, 7 N. E. 873; *Roller v. Blair*, 96 Ind. 203; *City of New Albany v. Lines*, 21 Ind. App. 380, 51 N. E. 346.

There was no error in overruling the motion for a new trial.
Judgment affirmed.

(70 Ind. App. 183)

BROWN v. FARMER'S STATE BANK et al.
(No. 10842.)

(Appellate Court of Indiana, Division No. 2.
May 13, 1919.)

1. INSURANCE — 586 — RIGHT OF BENEFICIARY — VESTED INTERESTS.

The beneficiary in a life insurance policy has a vested interest which cannot be changed without his consent.

2. INSURANCE — 206 — ORAL ASSIGNMENT.

Where a husband or parent takes out a policy of insurance payable to his estate, he can make an assignment thereof either orally or in writing.

3. FRAUDULENT CONVEYANCES — 92 — INSURANCE — 214 — INFORMAL ASSIGNMENT.

Where insured and his father, the beneficiary, talked about changing policy so as to make insured's wife the beneficiary, but, on suggestion of the cashier of a bank holding the policy as collateral security that it would be better not to make any change until after the note which the bank held was paid, nothing was done, on death of insured the money belonged absolutely to the father, although he had told insured that in case of insured's death he would sign the insurance over to the wife, and the father could not, after insured's death, make a gift of such proceeds to insured's wife to the detriment of the father's creditors.

Appeal from Circuit Court, Wells County;
Wm. H. Eichhorn, Judge.

Action by the Farmer's State Bank against Edith Brown, supplemental to, execution against Thomas M. Brown. From an adverse judgment Edith Brown appeals. Affirmed.

Jacob F. Denney, of Portland, for appellant.

A. W. Hamilton, of Buffton, for appellees.

McMAHAN, J. The appellee, the Farmer's State Bank of Ossian, Ind., filed its verified complaint supplemental to execution against the appellee Thomas M. Brown. It was alleged in the complaint that the appellant and the appellee People's State Bank had property and money in their possession belonging to Thomas M. Brown, and asked that they be required to answer concerning the same. The appellees Beatty & Doan Company and Fred N. Sharpe were also named in said complaint as having judgments against Thomas M. Brown, and they were required to appear and answer as to their interests in said money and property. The appellees Beatty & Doan Company and Fred N. Sharpe appeared and filed separate verified cross-complaints supplemental to execution against Thomas M. Brown, and also asking that appellant and the People's State Bank be required to answer as to certain money alleged to be in their

hands which belonged to Thomas M. Brown.

The cause was tried by the court which found that the appellee Thomas M. Brown was indebted to the Farmer's State Bank in the sum of \$241.32, to Fred Sharpe in the sum of \$385.55, and to Beatty & Doan Company in the sum of \$412 on the several judgments mentioned in the complaints; that the appellant had prior to the filing of the several complaints received and then had in her possession and under her control \$1,546.15 in cash belonging to said Thomas M. Brown; that \$796.17 of said money had been deposited by appellant, and was then on deposit in the said People's State Bank, and that an amount sufficient to pay and satisfy said judgments should be paid into court for that purpose. Judgment was rendered in accordance with the findings.

The appellant filed a motion for a new trial on the grounds that the decision of the court was not sustained by sufficient evidence and was contrary to law. The overruling of this motion is the only error assigned.

The facts are in substance as follows: On the 16th day of December, 1913, the Farmer's State Bank of Ossian recovered a judgment for \$304.56 against Thomas M. Brown and Fred N. Sharpe on a promissory note executed by Thomas M. Brown and Irvin Brown and indorsed by said Sharpe. The said bank on the same day recovered a judgment against Thomas M. Brown and Beatty & Doan Company for \$381.17 on a note executed by Thomas M. and Irvin Brown and indorsed by Beatty & Doan Company; that said bank on the same day also recovered a judgment against Thomas M. Brown for \$124.27 on a note executed by Thomas M. and Irvin Brown; that on the 6th day of May, 1914, said bank recovered a judgment against Thomas M. Brown for \$154.50 on a note executed by Thomas M. and Irvin Brown. Irvin Brown died intestate August 28, 1913, leaving as his only heirs one child and the appellant who is his widow. All of said notes were filed as claims against the estate of Irvin Brown, said estate was settled as insolvent, and nothing was paid by said estate or by Thomas M. Brown on said notes or judgments.

Beatty & Doan Company, on April 5, 1915, paid the judgment based on the note indorsed by them, the amount so paid by them being \$411.32, which included the costs.

Fred N. Sharpe on April 5, 1915, paid the judgment based upon the note signed by him, the amount so paid by him being \$328.69.

Irvin Brown some years prior to his death and prior to his marriage to appellant had obtained two insurance policies upon his own life, each calling for \$1,000 and being payable in case of death to appellee Thomas M. Brown. Thomas M. Brown and Irvin Brown executed a note to the Wells County Bank, and said insurance policies were assigned to said bank as collateral security. The in-

debtedness to the Wells County Bank was owing and unpaid when Irvin Brown died, and the amount due on said policies were afterwards paid to the Wells County Bank. After paying the note to the Wells County Bank there was \$1,546.71 left of the proceeds arising from said insurance policies, which the appellee Thomas M. Brown turned over to the appellant, receiving nothing therefor.

A short time before his death and while the policies were so held by the bank, Irvin Brown and the appellee Thomas M. Brown had talked about having the policies signed over to the appellant. Appellee Thomas M. Brown at that time told his son Irvin that in the event of the latter's death he would pay the money over to appellant. Shortly thereafter Irvin and Thomas M. Brown had a conversation with the cashier of the bank about having the transfer made. The cashier advised them to do nothing until the note was paid, and at this time Thomas M. Brown also told Irvin that in case the latter should die he would assign the insurance over to the appellant. No further action was ever taken toward changing the beneficiary named in said policies. Thomas M. Brown was a householder during all this time, entitled to an exemption as such, and did not have any property subject to execution.

Appellant, after the death of her husband, promised Thomas M. Brown that she would pay the debts of her husband, and when Mr. Brown turned the proceeds arising from said insurance over to appellant he understood and believed that she would do so. All of the said notes and judgments were for the debts of Irvin Brown and for which Thomas M. Brown was surety.

Appellant contends that under the facts there was an oral assignment of the policies and a constructive delivery of them to her.

[1] The policies in question were ordinary life insurance policies in which the beneficiary had a vested interest, and which could not be changed without his consent. *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Mutual, etc., Co. v. Guller*, 119 N. E. 173.

Appellant's husband, Irvin Brown, was not the owner or beneficiary named in the policies, he did not have possession of them, and he could not assign them to appellant. In *Wilburn v. Wilburn*, 83 Ind. 55, the Supreme Court said:

"In truth, the policy is not the property of the insured in any sense, but is the property of the beneficiary from the day of its issue, for from that time he has the whole beneficial interest."

[2] The case at bar is different from those cases wherein a husband or parent takes out a policy of insurance payable to his estate. In the policies payable to his estate, the insured can make an assignment, either orally or in writing. *State v. Tomlinson*, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335;

Stewart v. Gwynn, 41 Ind. App. 820, 82 N. E. 1000, 83 N. E. 758.

[3] Appellant's husband had talked about changing the policies so as to make the appellant the beneficiary, but at that time the policies had been assigned to the Wells County Bank as collateral security and on the advice and suggestion of the cashier that it would be better not to make any change until after the note which the bank held was paid, nothing was done in relation to changing the beneficiary in the policies.

Our conclusion is that the proceeds of the two policies were the absolute property of Thomas M. Brown, and that he could not, after the death of the insured, make a gift of such proceeds to appellant to the detriment of his creditors. There was no error in overruling the motion for a new trial.

Judgment affirmed.

(71 Ind. App. 209)

NICHOLAS v. BALDWIN PIANO CO.*
(No. 9834.)

(Appellate Court of Indiana. May 15, 1919.)

1. INNKEEPERS ⇐13—COMMON-LAW LIEN—GOODS IN POSSESSION OF GUEST.

By adoption of common law as part of law of Indiana, innkeepers acquired right to assert their common-law lien on goods brought into the inn by a guest for board and lodging furnished the latter at his request, though the goods were not the property of the guest, provided the innkeeper was not aware of the fact, a proviso not applicable under all circumstances where the guest was the agent or servant of the owner.

2. STATUTES ⇐239—CHANGE IN COMMON LAW—PRESUMPTION.

It will be presumed that the Legislature does not intend by the enactment of a statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication.

3. STATUTES ⇐239 — ABOGATION OF COMMON LAW—SUBSTITUTION OR REPUGNANCY.

An abrogation of the common law will be implied where a statute is enacted which undertakes to cover the entire subject treated and is clearly designed as a substitute, or where the two laws are so repugnant that both in reason may not stand.

4. INNKEEPERS ⇐13 — LIEN ON PROPERTY NOT OWNED BY GUEST — ABOGATION OF COMMON LAW.

The enactment of Burns' Ann. St. 1914, §§ 7848-7850, by implication abrogated the common-law lien in favor of innkeepers in Indiana, so that an innkeeper had no lien on a piano and stool which was not owned by his guest.

Appeal from Circuit Court, Rush County; Will M. Sparks, Judge.

Action by the Baldwin Piano Company against Samuel W. Nicholas. From judgment for plaintiff, defendant appeals. Affirmed.

Wm. W. Lowry, of Indianapolis, and Samuel L. Trabue, of Rushville, for appellant. John H. Kiplinger and Donald L. Smith, both of Rushville, for appellee.

BATMAN, P. J. This is an action in replevin commenced by appellee against appellant to recover the possession of a piano and stool. The complaint is in the usual form for such an action, and was answered by a general denial. On the trial the court made a special finding of facts, and stated its conclusion of law thereon in favor of appellee. From a judgment rendered in accordance therewith, appellant has appealed, claiming that the court erred in its conclusion of law on the facts found. Appellant contends that the finding of facts shows that he had a common-law lien as an innkeeper on the property in question, which gave him a right to the possession thereof, and, that the court erred in its conclusion of law to the contrary. Appellee, on the other hand, asserts that there is no common-law lien in Indiana in favor of innkeepers, and that the conclusion of law was properly stated.

[1-3] The common law gives an innkeeper a lien upon the goods brought into his inn by his guest, for board and lodging furnished the latter at his request, although the goods may not be the property of said guest, provided the innkeeper is not aware of such fact. This proviso, however, is not applicable under all circumstances where the guest is the agent or servant of the owner of the goods. 22 Cyc. 1090. By the adoption of the common law, as a part of the law of this state, innkeepers doing business therein acquired the right to assert such a lien in all proper cases, and such right still exists unless they have been deprived thereof by legislative enactment. It is well settled in this state that it will be presumed that the Legislature does not intend by the enactment of a statute to make any change in the common law beyond what it declares, either in express terms or by unmistakable implication. Chicago, etc., R. Co. v. Luddington (1910) 175 Ind. 35, 91 N. E. 939, 93 N. E. 273. An abrogation of the common law will be implied, where a statute is enacted which undertakes to cover the entire subject treated and was clearly designed as a substitute for the common law in that regard, or where the two laws are so repugnant that both in reason may not stand. 8 Cyc. 376; 26 A. & E. Ency. of Law, 665; 1 O. J. 991; 5 R. C. L. 815; Boston Ice Co. v. Boston, etc., Ry. Co., 77 N. H. 6, 88 Atl. 356, 45 L. R. A. (N. S.) 835, Ann. Cas. 1914A, 1090; Drady v. District Court, 126 Iowa, 345, 102 N. W. 115;

Graves v. I. O. R. Co., 126 Tenn. 148, 148 S. W. 239; Raleigh County Bank v. Poteet, 74 W. Va. 511, 82 S. E. 332, L. R. A. 1915B, 928, Ann. Cas. 1917D, 359; Young v. Kansas City, etc., Ry. Co., 33 Mo. App. 509. In 1897 the Legislature of this state enacted a statute for the protection of owners and keepers of hotels, inns, restaurants, boarding and eating houses, which is still in force. It contains three sections, the first of which provides a penalty for obtaining food, lodging, entertainment, or other accommodations, at any of the places named above, with intent to defraud the owner or keeper thereof. The second prohibits any person boarding or lodging, or who has boarded or lodged, at any of the places named above, from removing any trunk, valise, or other baggage therefrom, which he may have therein, "until all claims for bills, lodging, entertainment or accommodations have been fully paid and satisfied in accordance with the regular advertised or special contract rates" thereof, and provides a penalty for its violation. The third section provides in part as follows:

"The owner or keeper of any hotel, inn, restaurant, boarding or eating house, as provided in this act, shall, after demand for payment be made of the person or persons owing any such claims or bills, as set out in the preceding section of this act, have a lien against the personal property and the wages due of any person or persons who may owe said owner or keeper for food, lodging, entertainment or other accommodation, to the extent only of his said claim and the property may be sold to satisfy such claim, by said owner or keeper after obtaining judgment for the same in any court of competent jurisdiction and posting a written notice on the outer door of his hotel, inn, restaurant, boarding or eating house, at least ten days before the day of sale at public outcry to the highest bidder," etc.

Sections 7848-7850, Burns' 1914.

[4] We will now consider whether, under the foregoing facts, a common-law lien has existed in this state in favor of innkeepers since the enactment of the statute cited. It will be observed that this statute not only designates who shall be entitled to such a lien, but also specifies the services for which such lien may be had, the property to which, and the condition on which it may attach, and the manner of its enforcement; that it goes beyond the scope of the common law, by including persons not entitled to a lien thereunder, and by designating services for which a lien may be had, and property to which it may attach, not specified therein. It thus appears that the entire subject to

which the statute relates is fully covered thereby. It will also be observed that, unlike the common law, it does not give the innkeeper a lien on all property brought into his inn by a guest, unless he is aware that the guest is not the owner thereof, but restricts the property to which the lien may attach, by limiting it to the property of the person indebted for the services specified. This may be taken as indicative of a legislative intent to repeal or abrogate the common law respecting innkeeper's liens. *Boston Ice Co. v. Boston, etc., Ry. Co.*, supra; *In re Lord & Polk Chemical Co.*, 7 Del. Ch. 248, 44 Atl. 775. In view of these facts it is apparent that the statute creates a remedy in favor of an innkeeper which did not exist before, by giving him a lien against the property of a boarder as well as a guest, where such boarder is indebted to him for the services specified therein. 22 Cyc. 1090; 14 R. C. L. 539. It also defines a right which theretofore existed in his favor by enlarging it in some respects and restricting it in another. For the reasons stated it appears clear to us that the Legislature in enacting the statute in question intended to cover the whole subject of the lien of innkeepers, and other persons mentioned therein, to provide a uniform right of lien for all of such persons, to define the same, and to supply an easy and adequate remedy for its enforcement. We therefore conclude that the enactment of the statute in question, by implication, abrogated the common-law lien in favor of innkeepers in this state. This conclusion finds support in the well-considered case of *Wyckoff v. Southern Hotel Co.*, 24 Mo. App. 382, wherein the facts are strikingly similar, and in which the court said:

"It would bring confusion and uncertainty into the law, to hold that a statute of this character can coexist with the rule of the common law in respect to the lien of an innkeeper."

Appellant does not make any contention that he had a statutory lien as an innkeeper on the goods in question, and an examination of the special finding of facts discloses that any such contention would be unavailing. We therefore conclude that the court did not err in its conclusion of law, and that the judgment of the trial court must be sustained.

Judgment affirmed.

DAUSMAN, C. J., and NICHOLS and REMY, JJ., concur.

McMAHAN and ENLOE, JJ., concur in result.

(70 Ind. App. 200)

SEITZ v. KOTHE-WELLS & BAUER CO.
(No. 9830.)(Appellate Court of Indiana, Division No. 1.
May 14, 1919.)**APPEAL AND ERROR ¶151(1)—MATTERS REVIEWABLE—ABSTRACT QUESTION.**

In order that a person may appeal or sue out a writ of error, he must be aggrieved or prejudiced by the judgment or decree.

Appeal from Superior Court, Marion County; W. W. Thornton, Judge.

Action by the Kothe-Wells & Bauer Company against Charles Seitz and another, to foreclose a chattel mortgage. From an adverse judgment, the named defendant appeals. Affirmed.

Wm. G. White and Arthur J. Jones, both of Indianapolis, for appellant.

Wm. A. Pickens, Lanton A. Cox, and Earl R. Conder, all of Indianapolis, for appellee.

ENLOE, J. This action was begun by the Kothe-Wells & Bauer Company, appellee, to foreclose a chattel mortgage, executed by one Daniel E. Rogers, January 6, 1915, to secure the payment to appellee, when it should become due, of a certain promissory note of even date, for the sum of \$206.68 due in 30 days, and upon payment of which a default had been made.

In June, 1914, appellant had loaned to said Rogers the sum of \$500 and had also indorsed a certain promissory note in the amount of \$700 for said Rogers, and to secure the appellant in the matter said Rogers had executed to appellant a chattel mortgage upon the same property afterwards covered by the mortgage in suit.

The appellant was made a defendant in this suit to answer to his interest in and to the property in question, and he filed an answer in three paragraphs: First, general denial; second, alleging that the mortgage to appellee was void under the provisions of the Bulk Sales Law of this state (Acts 1909, p. 122); and, third, setting up a claim under the mortgage of June, 1914, and asked that his mortgage be decreed a prior lien to that of appellee.

To the above-mentioned second and third paragraphs of answer demurrers were filed, and sustained as to second and overruled as to the third paragraph, and reply in general denial by appellee closed the issues.

A trial was had before the court, which made a general finding in favor of appellee, and against appellant, and that appellant had no interest in or lien upon the property in question, and judgment was rendered accordingly, and property ordered sold to pay appellee's debt.

The appellant then filed his motion for a

new trial, assigning various reasons therefor, but as the action of trial court in overruling same is not challenged on this appeal, the same need not be set out.

The only error complained of in this case is the action of the trial court in sustaining the demurrer to the appellant's second paragraph of answer, and in thereby refusing to hold said mortgage to appellee void.

If the appellant had any lien upon, or interest in, the property covered by the mortgage to the appellee, so that he was injured, as to his property, by said decision, he might be in a situation to complain; but here he is not complaining of the action of the court in finding and decreeing such want of interest. He is in the attitude of confessing that the decree is right, and that he has no interest in the property, yet is seeking to question the correctness of the ruling of the court upon the demurrer. If he had no interest in the property, he was not harmed, and he has no legal right to complain.

In 2 R. C. L. p. 52, it is said:

"In addition to the requirement of a substantial interest in the subject-matter of the litigation, it is essential, in order that a person may appeal or sue out a writ of error, that he shall be aggrieved or prejudiced by the judgment or decree. Appeals are not allowed for the purpose of settling abstract questions, however interesting or important to the public generally, but only to correct errors injuriously affecting appellant"—citing authorities. *McFarland v. Pierce*, 151 Ind. 546, 45 N. E. 706, 47 N. E. 1; *Gavin v. Board*, etc., 81 Ind. 480.

We have, however, considered said second paragraph of answer. There was no error in sustaining the demurrer thereto.

Judgment is affirmed.

(70 Ind. App. 161)

DEEP VEIN COAL CO. v. WARD.
(No. 9754.)(Appellate Court of Indiana, Division No. 1.
May 9, 1919.)**1. APPEAL AND ERROR ¶231(2)—REVIEW—BRIEF—SUFFICIENCY—OBJECTIONS TO COMPLAINT.**

Where objections to the complaint which were presented by appellant's brief were not specified in appellant's memorandum filed with the demurrers, they cannot be considered on appeal. *Burns' Ann. St. 1914, § 344, cl. 5.*

2. TRIAL ¶256(10)—INSTRUCTION—PROOF—IMMATERIAL ALLEGATIONS OF COMPLAINT.

An instruction in a personal injury case that it is not necessary for the plaintiff to prove any immaterial allegations of the complaint, though incomplete in form, is not reversible error, in absence of request for instruction correctly stating the issues.

3. MASTER AND SERVANT §291(1)—INJURY TO SERVANT—EMPLOYER'S LIABILITY ACT—INSTRUCTION AS TO APPLICATION OF ACT.

In an action under Employers' Liability Act of 1911, an instruction that act applied if defendant was employing five or more men in its business of coal mining *held* not subject to the objection that the employment of five men was the only prerequisite for the application of the act, where the evidence showed the operation of a mine employing 250 men, and other instructions informed jury that under the act there could be no recovery for employé's death, unless it was shown by the evidence that he met his death as a result of defendant's negligence.

4. MASTER AND SERVANT §291(6)—INJURY TO SERVANT—INSTRUCTIONS—NEGLIGENCE.

An instruction that, if defendant had in its employ men to remove loose slate from the roof of the mine where deceased lost his life, then their negligence was the negligence of defendant *held* responsive to the allegations of negligence on the part of defendant, though negligence on the part of the mine boss was also alleged.

5. TRIAL §260(1)—INSTRUCTIONS—REFUSAL OF REQUESTS.

Although refused requested instructions stated the law correctly, yet where such law was covered by other instructions given, which, taken as a whole, fairly state the law of the case, their exclusion was not error.

6. TRIAL §129—MISCONDUCT OF COUNSEL—RETALIATORY STATEMENTS.

Where appellee's counsel made statement outside the evidence in his closing argument to the jury, but the record shows that such statement was made in response to equally objectionable remarks made by appellant's counsel, such misconduct is not reversible error.

7. APPEAL AND ERROR §1170(7)—AFFIRMANCE—CORRECT RESULT—STATUTE.

Where there is evidence to support every material averment of the complaint, and it fully appears from the record that the cause was fairly tried and the correct result reached, the judgment will be affirmed under Burns' Ann. St. 1914, §§ 407, 700, regardless of error in rulings as to evidence.

Appeal from Superior Court, Vigo County; Fred W. Beal, Judge.

Action by Anna E. Ward, administratrix of the estate of William Ward, against the Deep Vein Coal Company. Judgment for plaintiff, motion for new trial overruled, and defendant appeals. Judgment affirmed.

C. C. Whitlock, A. R. Owens, and P. O. Colliver, all of Terre Haute, for appellant.

P. M. Foley, Thos. J. Roach, Felix Blankenbaker, Thos. F. O'Mara, and J. T. Walker, all of Terre Haute, for appellee.

REMY, J. On July 12, 1911, appellee's decedent, William Ward, was in the employ of the Deep Vein Coal Company, appellant here-

in in the operation of what is known as a cutting machine. The machine was run by electric power, and was used to cut under the face of the coal in the mine so as to expedite the removal of the coal. While appellee's decedent and a helper were in the line of their employment operating said machine, at a point in the mine as directed by chalk marks placed there by appellant, a large piece of rock or slate forming the roof of the mine at said point fell, instantly killing said decedent. This action is to recover for the death of said employé which it is claimed resulted from appellant's negligence. The complaint is based upon the Employers' Liability Act of 1911 (Laws 1911, c. 236). Separate demurrers to the three paragraphs of complaint were overruled, and the issues joined by appellant's answer in denial. A trial by jury resulted in a verdict for appellee for \$3,000. The alleged errors relied on for reversal are: (1) The action of the trial court in overruling the separate demurrers to the several paragraphs of the complaint; and (2) the overruling of the motion for a new trial.

[1] The objections to the complaint which are presented by appellant in its brief were not specified in its memorandum filed with the demurrers, and therefore cannot be considered on appeal. Section 344, cl. 5, Burns 1914. Jackson Hill, etc., Co. v. Van Hentenryck, 120 N. E. 664.

[2] Error is predicated upon the action of the court in giving to the jury on its own motion instruction No. 1, also on the giving of 21 several instructions at the request of appellee, and on the refusal of the court to give twelve several instructions tendered by appellant.

Instruction No. 1 given by the court on its own motion, told the jury "that it is not necessary for the plaintiff, in order to recover, to prove any immaterial allegations of the complaint." The instruction in the form given is incomplete, but incompleteness in an instruction presents no reversible error. Appellant should have presented, and requested the court to give, an instruction correctly stating the issues. *Vandalia Coal Co. v. Coakley*, 184 Ind. 661, 111 N. E. 426; *Jackson Hill, etc., Co. v. Van Hentenryck*, *supra*.

[3] Instruction No. 8, given by the court at appellee's request, to which objection is specially urged, is as follows:

"I instruct you that if you find that the Deep Vein Coal Company was employing five or more men on July 12, 1911, in its alleged business of coal mining, the provisions of the Employers' Liability Act of 1911 applies to this case."

It is urged that by this instruction the jury were told that the only prerequisite to the application of the Employers' Liability Act to the case was the employment of five or more men on the day of the accident, with-

out regard to whether the appellant was engaged in business, trade, or commerce as required by the act, and without regard to whether decedent's death resulted in whole or in part from the negligence of appellant or its representatives, or by reason of any defect, mismanagement, or insufficiency due to its negligence. There was no reversible error in the giving of this instruction. The uncontradicted evidence shows that at the time in controversy, appellant was operating a large coal mine, and had in its employ in the mining and marketing of its coal employees to the number of 250 or more; and by other instructions the jury were fully informed that under the Employers' Liability Act there could be no recovery, unless it was shown by a preponderance of the evidence that appellee's decedent met his death as a result of appellant's negligence as averred in the complaint. In fact the court read to the jury, as a part of his instructions, sections 1, 2, and 3 of the Employers' Liability Act. The jury could not have been misled by the instruction.

[4] Objection is made to instruction No. 31, given by the court at appellee's request. This instruction told the jury that if they found from the evidence that appellant company had in its employ certain day men whose duties were to remove loose slate and other material from the roof of that part of the mine where appellee's decedent was required to work, and where he lost his life, and that such men were in its employ at the time of, and immediately before, the accident, then the negligence of such day men was the negligence of appellant company. It is the contention of appellant that the complaint proceeds upon the theory that the only negligence charged is the negligence of the mine boss, and that it was error to charge the jury that appellee could recover if the evidence showed that the negligence was that of fellow servants. Appellant would give to the complaint too narrow a construction. Each paragraph proceeds upon the theory that the negligence charged was the negligence of appellant. The instruction is within the issues, and the giving of it was not error.

[5] We have examined the other instructions of which complaint is made; also all instructions tendered by appellant, and which were by the court refused. The requested instructions which stated the law correctly were covered by others given by the court. The instructions given by the court, when taken as a whole, fairly state the law of the case.

[6] It is claimed by appellant that a new trial should have been granted on the ground that appellee's counsel was guilty of misconduct in making a statement outside the evidence in his closing argument to the jury. It appears from the record that the alleged

objectionable statement was made in response to remarks, equally objectionable, which had been made by appellant's counsel. Misconduct arising under such circumstances is not reversible error. *Haskell & Barker Car Co. v. Timm*, 122 N. E. 788, decided by this court April 14, 1919.

[7] Appellant asserts that the verdict of the jury is not sustained by sufficient evidence, and also complains of numerous rulings of the trial court as to the admission and exclusion of evidence. We have carefully examined the evidence, and inasmuch as there is evidence to support every material averment of the complaint, and since it fully appears from the record that the cause had been fairly tried and a correct result reached, no good purpose would be subserved by extending this opinion to discuss in detail the many rulings of the court on the admission and rejection of evidence. Even though we should find errors, they would have to be disregarded. *Harris v. Randolph County Bank*, 157 Ind. 120, 138, 60 N. E. 1025. No rule of law is more important, and none is more binding on this court, than the rule fixed by the correct result statutes (sections 407, 700, *Burns* 1914), which requires an affirmance if it appears from the record that the decision of the trial court has resulted in substantial justice. We find no reversible error.

Judgment affirmed.

FERRELL v. HUNT. (No. 9801).*

(Appellate Court of Indiana. May 15, 1919.)

COURTS ~~6~~—220(5)—APPELLATE COURT—FAILURE OF FOUR JUDGES TO CONCUR—TRANSFER TO SUPREME COURT—STATUTE.

Where four judges of the Appellate Court do not concur in determining an appeal submitted to the entire court, the case must be transferred to the Supreme Court under *Burns'* Ann. St. 1914, § 1399.

Appeal from Circuit Court, Marion County; Louis B. Ewbank, Judge.

Action by Albert H. Hunt against Samuel C. Ferrell. From judgment for plaintiff, defendant appeals. Cause transferred to the Supreme Court.

James W. Noel and Hiram B. Patten, both of Indianapolis, for appellant.

Samuel D. Miller, Frank O. Dalley, and Wm. H. Thompson, all of Indianapolis, for appellee.

PER CURIAM. This appeal having been submitted to the entire court and four judges thereof not concurring in the result,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Transferred to Supreme Court, see 124 N. E. 745. Rehearing denied.

the case is transferred to the Supreme Court under section 15 of "An act concerning appeals," etc. Acts 1901, p. 565, § 1337o; Burns' R. S. 1914, § 1399.

(74 Ind. App. 527)

LAPP v. MERCHANTS' NAT. BANK OF INDIANAPOLIS. (No. 9869).*

(Appellate Court of Indiana, Division No. 2.
May 15, 1919.)

1. BILLS AND NOTES — 338, 365(1)—"BONA FIDE HOLDER"—DEFENSES.

Where payee for value received, in due course of business and before maturity of a note, assigned and transferred it to plaintiff, plaintiff was a "bona fide holder" in due course without notice, in view of Burns' Ann. St. 1914, §§ 9089z1, 9089d2, and 9089e2, and holds the note free from defenses available to prior parties among themselves.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bona Fide Holder.]

2. BILLS AND NOTES — 373—BONA FIDE PURCHASER—FRAUD IN INCEPTION.

Fraudulent representations inducing the execution of a note do not constitute a defense against a bona fide purchaser, under Burns' Ann. St. 1914, §§ 9089z1, 9089d2, 9089e2.

Appeal from Superior Court, Marion County; W. W. Thornton, Judge.

Action by the Merchants' National Bank of Indianapolis against John A. Lapp. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward R. Lewis, of Indianapolis, for appellant.

Charles A. Dryer, of Indianapolis, for appellee.

NICHOLS, J. The complaint in this case, by the appellee against the appellant, was filed October 16, 1916, and is upon a promissory note executed by the appellant August 5, 1915, and due in six months after date, negotiable and payable at the appellee's bank in Indianapolis, Ind., and to the order of the Federal Loan Society, Incorporated.

It is averred in the complaint that the payee for value received, in due course of business and before the maturity of such note, assigned and transferred it to the appellee, and that it was past due and unpaid. To this complaint the appellant answered in two paragraphs; the first being a general denial, and the second being an affirmative answer charging fraud against the payee named in the note in procuring the execution thereof. There is no charge in the

second paragraph of answer that the appellee had notice of such fraud. The appellee filed its demurrer to said second paragraph of answer, with memoranda, which demurrer was sustained by the court, to which ruling the appellant excepted. Thereupon appellant withdrew his first paragraph of answer, being the general denial, refused to plead further, and elected to stand upon his second paragraph of answer. Judgment was rendered in favor of the appellee.

[1, 2] The negotiable instrument statute was put in force April 30, 1913. Section 9089z1, of such statute provides:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That the instrument is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

It is provided by section 9089d2 of such statute that, to constitute a notice of an infirmity in the instrument or defect in the title of person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. Section 9089e2 provides that a holder in due course holds the instrument free from any defect or title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. By its averments that the payee for value received, in due course of business and before its maturity, assigned and transferred said note to the appellee, such appellee avers that it had no notice of any infirmity in the instrument or defect in the title of the person negotiating it, and that it purchased the same in good faith for value. Such a holder, under the statute, holds the note free from defenses available to the prior parties among themselves. The appellant's second paragraph of answer averring fraudulent representations in the procuring of the execution of this note, without any averments of knowledge by the appellee of the alleged fraud, was insufficient, and the demurrer thereto was properly sustained.

There was no error in sustaining the demurrer to the second paragraph of answer. The judgment is affirmed.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 124 N. E. 707. Dissenting opinion 124 N. E. 890. Transfer denied.

(72 Ind. App. 207)

SPICKELMEIR v. HARTMAN. (No. 9711.)*(Appellate Court of Indiana, Division No. 1.
May 15, 1919.)**1. APPEAL AND ERROR** \S 1064(4) — **HARMLESS. ERROR—INSTRUCTIONS—OMISSION OF OBVIOUS WORDS.**

An instruction that "negligence, whether on the part of the plaintiff or on the part of the defendant, may be defined as the doing or failing to do some act or thing, which, under the circumstances, it was the duty of the 'plaintiff' to do or to leave undone," while erroneous, could not have misled jury.

2. TRIAL \S 191(7) — **INSTRUCTIONS — ASSUMPTION OF FACT.**

In an action for injuries received in collision between vehicles on a street, an instruction, expressly conditioned on the jury finding for the plaintiff under rules given, one of which was an instruction stating that in order to enable plaintiff to recover she must establish by a fair preponderance of the evidence that she received some part of injuries as alleged in complaint, does not assume the fact of plaintiff's injuries.

3. MUNICIPAL CORPORATIONS \S 706(8) — **STREETS — COLLISIONS — ACTION — INSTRUCTION—PROXIMATE CAUSE.**

In an action for personal injuries resulting from collision of vehicles on a street, an instruction that if the defendant was not guilty of negligence charged in the complaint the verdict should be in his favor was complete without any reference to the question of proximate cause.

4. TRIAL \S 296(3) — **INSTRUCTIONS — MATTERS COVERED BY OTHER INSTRUCTIONS.**

In an action for injury received in street collision, defendant was not harmed by the omission of the question of proximate cause from an instruction, where the subject was covered by another instruction given.

5. MUNICIPAL CORPORATIONS \S 706(8) — **STREETS — COLLISIONS — INSTRUCTIONS — NEGLIGENCE—SIGNALS.**

In an action for personal injuries received in a collision between vehicles upon a street, an instruction, in effect that the defendant had the right to assume that plaintiff would obey a city ordinance providing for and requiring signals before turning, and to operate his automobile in absolute reliance thereon under all the circumstances, was properly denied.

6. MUNICIPAL CORPORATIONS \S 706(8) — **STREETS — COLLISION — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE—SIGNAL ORDINANCES.**

In an action for personal injuries resulting from collision of vehicles upon a street, defendant's requested instruction was properly denied, where it was subject to the construction that if plaintiff failed to signal that she was going to turn as required by ordinance the jury should return a verdict for defendant, regardless of whether such failure contributed to plaintiff's injury.

7. MUNICIPAL CORPORATIONS \S 706(8) — **STREETS — COLLISIONS — NEGLIGENCE — INSTRUCTIONS.**

In action for personal injuries resulting from collision of vehicles on street, the court did not err in refusing a requested instruction that if the jury found the horse which plaintiff was driving backed into the appellant's automobile, and this was the proximate cause of her injuries, she could not recover, although defendant may have been guilty of the negligence charged in the complaint, and such negligence was the proximate cause of the horse backing.

8. EVIDENCE \S 155(1) — **CONVERSATION — RIGHT TO INTRODUCTION OF WHOLE CONVERSATION—IMPEACHMENT OF WITNESS.**

The rule that where a party opens the door by introducing a part of a conversation, the opposing party has a right to all that was said therein, is without application, where the opening party confines his examination to purpose of laying a foundation for impeachment.

9. MUNICIPAL CORPORATIONS \S 706(7) — **STREETS — COLLISION — PERSONAL INJURY — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE.**

In an action for personal injuries received in a street collision between vehicles, evidence of plaintiff's failure to indicate the direction in which she was going to turn her automobile as required by city ordinance held insufficient to require the court to instruct a verdict for defendant.

10. TRIAL \S 28(3) — **STREETS — COLLISION — VIEWING VEHICLE—DISCRETION OF COURT.**

Burns' Ann. St. 1914, § 504, reposes discretionary power in the court to permit an inspection of an automobile in an action for injuries resulting from its collision with another vehicle on a street; and where the facts could be accurately described by the witnesses, and it is questionable whether an inspection would have served any useful purpose, it was not error to refuse appellant's request therefor.

11. APPEAL AND ERROR \S 1001(1)—**VERDICT — CONCLUSIVENESS—SUPPORTING EVIDENCE.**

Where there is some evidence tending to support each essential element necessary to plaintiff's right of recovery, the verdict of the jury determined the weight and value thereof, and its decision thereon for plaintiff is not subject to review on appeal.

12. APPEAL AND ERROR \S 761 — **ASSIGNMENTS AS GROUNDS FOR NEW TRIAL—WAIVER—PROPOSITIONS OR POINTS.**

Reasons assigned as grounds for new trial are waived by a failure of appellant to make any specific reference thereto in his propositions or points.

Appeal from Superior Court, Marion County; James L. Leathers, Judge.

Action by Mary Hartman against John W. Spickelmeir. Verdict and judgment for plaintiff, motion for new trial overruled, and defendant appeals. Affirmed.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Transfer denied.

Charles F. Williams and Wm. E. Belley, both of Indianapolis, for appellant.

Noble H. Wible and Charles K. McCormack, both of Indianapolis, for appellee.

BATMAN, P. J. This is an action by appellee against appellant to recover damages for personal injuries alleged to have been received by her by reason of the negligence of appellant in operating an automobile. The specific acts alleged and relied on are that appellant negligently operated said automobile along a certain street in the city of Indianapolis at a high and dangerous rate of speed, without sounding a horn, or giving appellee any warning of his approach, and as a proximate result thereof appellee's buggy was violently struck by said automobile, causing her serious injury. The complaint is in a single paragraph, and was answered by a general denial. The cause was tried by a jury, resulting in a verdict in favor of appellee on which judgment was duly rendered. Appellant filed a motion for a new trial, which was overruled, and this action of the court is the sole error assigned and relied on for reversal.

[1] Appellant contends that the court erred in giving instructions Nos. 7, 10, 11, and 12. He bases his contention as to said instruction No. 7 on the following sentence therein:

"Negligence, whether on the part of the plaintiff or on the part of the defendant, may be defined as the doing or failing to do some act or thing, which, under the circumstances, it was the duty of the plaintiff to do or to leave undone."

It has been held that where a mistake in the use of words in an instruction is so obvious that the jury could not have been misled, the error will be deemed immaterial. *Cleveland, etc., R. Co. v. Clark* (1912) 52 Ind. App. 646, 99 N. E. 777; *Pittsburgh, etc., R. Co. v. Carlson* (1899) 24 Ind. App. 559, 56 N. E. 251; *Anderson v. Anderson* (1890) 128 Ind. 254, 27 N. E. 724. The same rule should be applied where the omission of one or more words is so obvious that it is manifest that the jury could not have been misled thereby. In the instant case it is clear that the jury could not have understood from the language used in said instruction that it should determine appellant's negligence from appellee's conduct, but must have understood that the negligence of each party was to be determined from his or her own acts or omissions.

[2] Appellant contends that the court erred in giving instruction No. 10, for the reason that it is assumed therein that appellee suffered the injuries alleged in the complaint. We do not agree with this contention. The jury was told by instruction No. 5 that before plaintiff is entitled to recover she must establish, by a fair preponderance of the evi-

dence, that she received the injuries, or some part thereof, as alleged in the complaint. Instruction No. 10 is expressly based on the condition that the jury find for the plaintiff under the rules given, which would include the rule stated in said instruction No. 5. Such a finding would therefore necessarily imply that appellee received at least some part of the injuries alleged. Hence there is no assumption of the fact of appellee's injuries as claimed by appellant.

It is urged that instruction No. 11 is erroneous, as it assumes that the failure of appellant to sound the horn, or give appellee any warning of the approach of his automobile, was negligence, and that appellee's injuries were the proximate result thereof. An examination of said instruction discloses that it is not subject to the infirmities claimed, and that the court did not err in giving the same.

[3, 4] Appellant claims that instruction No. 12 is erroneous because it omits the element of proximate cause. By this instruction the court informed the jury in effect that, if it found that appellant was not guilty of the negligence charged in the complaint, its verdict should be in his favor. The instruction was complete without any reference to the question of proximate cause. But in any event appellant was not harmed by such omission, as the subject-matter in question was covered by another instruction given. *Cullman v. Terre Haute, etc., Co.* (1915) 60 Ind. App. 187, 109 N. E. 52.

[5, 6] Appellant also predicates error on the action of the court in refusing to give instructions Nos. 1 and 2 requested by him. Said instruction No. 1 is as follows:

"If you find from the evidence that at the time of the collision there was an ordinance in full force and effect in the city of Indianapolis, which provided and required drivers of vehicles to indicate by hand or whip the direction in which they were going to turn, then I instruct you that the defendant had a right to rely and assume that the plaintiff in this case would signal him by hand or whip the direction in which she was about to turn, if she was about to turn at the time of the collision; and you may take into consideration the fact that she failed to give such a signal, if you find that she did fail to give said signal, as to whether or not she was guilty of contributory negligence. And if you so find your verdict should be for the defendant."

This instruction, if given, would have had the effect of informing the jury that appellant had the right to assume that appellee would obey said ordinance, and to operate his automobile in absolute reliance thereon, under all circumstances. This is not in accord with the well-settled rule in that regard. *Louisville, etc., Co. v. Lottich* (1915) 59 Ind. App. 426, 106 N. E. 903; *Cole Motorcar Co. v. Ludorff* (1915) 61 Ind. App. 119, 111 N. E. 447; *Elgin Dairy Co. v. Shepherd* (1915) 183

Ind. 466, 108 N. E. 234, 109 N. E. 353. Said instruction is also objectionable because it is reasonably open to a construction which would have misled the jury. It will be observed that the concluding sentence is as follows:

"And if you so find your verdict should be for the defendant."

The jury might have very readily understood from this that, if it found that appellee failed to give the signal provided in the ordinance, it should return a verdict for appellant, regardless of the fact as to whether such failure contributed to her injury. This is clearly not the law. For the reasons stated the instruction was properly refused.

[7] It is not clear from the record whether said instruction No. 2 was given or refused, but, assuming that it was refused, the court did not err in so doing, as it would have informed the jury, in effect, that if it found that the horse which appellee was driving backed into appellant's automobile, and this was the proximate cause of her injuries, she could not recover, although appellant may have been guilty of the negligence charged in the complaint, and such negligence was the proximate cause of the horse backing.

[8] The record discloses that appellant introduced Charles Slagle as a witness in his behalf. On direct examination the witness stated that he saw the accident, and described how it occurred. On cross-examination he testified that at the time he observed the accident he was not sitting directly in front of the barber shop, but "was just a little piece on the other side of the creamery." Appellee then asked the witness if he had not said to Mr. McCormick out there one evening, about the time of the trial at the police court, that he was sitting in front of his barber shop; but she made no inquiry as to any other portion of such conversation. Later, on redirect examination, appellant asked the witness to state what took place between him and McCormick in that conversation, and, upon an objection being interposed, offered to prove by the witness, among other things, what the witness had stated to McCormick in that conversation as to how the accident occurred and the cause thereof. It is obvious that appellee, by her inquiry of the witness, was merely attempting to lay the foundation for impeachment, while appellant's inquiry went beyond the subject-matter thereof, and sought to elicit other portions of such conversation not connected therewith. Appellant insists that he had a right to call for other portions of such conversation under the rule that where a party opens the door by introducing a part of a conversation, the opposing party has a right to all that was said therein. This rule, however, has been held to have no application where the party opening up the conversation, as in the instant

case, confines his examination to questions propounded for the purpose of laying the foundation for impeachment. *Brown v. State* (1915) 184 Ind. 254, 108 N. E. 861, 111 N. E. 8. The court did not err in excluding the offered evidence.

[9] It is contended that the uncontradicted evidence shows that appellee turned into the path of appellant's automobile, without indicating the direction in which she was going to turn, as required by the city ordinance in evidence, and thereby received her injuries. Based on this contention appellant claims that the court erred in refusing to instruct the jury, at the close of all the evidence, to return a verdict in his favor. We cannot agree that the uncontradicted evidence establishes the facts claimed by appellant. A number of witnesses testified that the horse and buggy were headed or going toward the west at the time of the accident. Appellant's son, who was an occupant of the automobile, testified that appellee had not even started to turn down Bellefontaine street; while appellant stated that they had passed the horse's head when they stopped, and if she had been pulling around the machine, he would have struck the horse. Nor does the evidence show conclusively that appellee violated the ordinance in question, as it is silent as to whether the required signal was given in one of the two ways specified therein. Under these circumstances appellant's contention cannot be sustained.

[10] Appellant asserts that the court erred in denying his request to permit the jury to inspect his automobile in question, in front of the courthouse, at the close of all the evidence, and cites section 564, Burns, in support of his contention. It has been held that this statute reposes discretionary power in the court, and that it would be an exceptional case where this court would reverse a cause for an abuse of such discretion. *Chicago, etc., T. Co. v. Loer* (1901) 27 Ind. App. 245, 60 N. E. 319. In the instant case the facts could be accurately described to the jury by the witnesses, and it is questionable whether an inspection of the automobile could have served any useful purpose. Under the circumstances disclosed by the record the court did not err in refusing appellant's request.

[11] It is claimed by appellant that the verdict is not sustained by sufficient evidence a verdict, we have passed upon the principal and is contrary to law. In determining whether the court erred in refusing to direct questions urged by appellant in regard to the sufficiency of the evidence. We need only add that there is some evidence which tends to support each essential element necessary to appellee's right of recovery. The verdict of the jury determined the weight and value thereof, and its decision thereon is not subject to review on appeal. *Portland, etc.,*

Mach. Co. v. Gibson (1915) 184 Ind. 342, 111 N. E. 184. We find no ground for holding that the verdict is contrary to law.

[12] Other reasons assigned as grounds for a new trial are waived by a failure of appellant to make any specific reference thereto in his propositions or points. *Buffkin v. State* (1914) 182 Ind. 204, 106 N. E. 362.

We find no reversible error in the record. Judgment affirmed.

(71 Ind. App. 399)

H. LOHSE CO. v. LOHSE (No. 10490)*

(Appellate Court of Indiana. May 13, 1919.)

Appeal from Industrial Board.

Proceedings by Hans Lohse against the H. Lohse Company, under the Workmen's Compensation Act (Laws 1915, c. 106), for personal injuries resulting in an award of compensation by the Industrial Board, and the defendant appeals. Affirmed.

J. W. Hutchinson, of Indianapolis, for appellant.

Durre & Curry, of Evansville, for appellee.

PER CURIAM. It appears from the record that the appellee while in the employ of appellant received an injury by accident arising out of and in the course of his employment. The usual proceeding resulted in an award of compensation at the rate of \$12.38 per week during the period of total disability, not exceeding 500 weeks.

The appellant has presented nothing for the consideration of this court. Therefore the award is affirmed, and by virtue of the statute the amount is increased 5 per cent.

(233 Mass. 32)

REYNOLDS v. MISSOURI, K. & T. RY. CO.
et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 19, 1919.)

1. GARNISHMENT \Leftrightarrow 114—TRUSTEE PROCESS— ASCERTAINMENT OF INDEBTEDNESS.

The indebtedness of a trustee to the principal defendant is to be ascertained as of the date when it was due and payable.

2. GARNISHMENT \Leftrightarrow 130—TRUSTEE PROCESS— RIGHT OF TRUSTEE TO SET OFF CLAIMS— STATUTE.

Under Rev. Laws, c. 189, § 25, one attached by trustee process may deduct all demands against the creditor defendant, which, if there had been no summons as trustee, would have been available by way of set-off in an action by the creditor; all moneys or demands being open to retention or set-off except claims for unliquidated damages for wrongs or injuries.

3. GARNISHMENT \Leftrightarrow 148—TRUSTEE PROCESS— STATEMENTS IN ANSWER AND INTERROGATORIES.

Statements in the answer of defendant trustee, as well as its answers to interrogatories, being under oath, are to be considered as true.

4. GARNISHMENT \Leftrightarrow 130—TRUSTEE PROCESS— TRUSTEE'S RIGHT OF SET-OFF AGAINST PRINCIPAL DEFENDANT—OVERPAYMENTS.

Express company sued as trustee of defendant railway company held entitled to set off, as against the railway company, the principal defendant, its creditor, certain monthly overpayments for business done over the lines of the railway during the years 1909-1911, when the amount actually due depended on the outcome of litigation involving express charges or rates then pending in Oklahoma.

Appeal from Superior Court, Suffolk County; Frederic H. Chase, Judge.

Suit by Thomas M. Reynolds against the Missouri, Kansas & Texas Railway Company and others, and the American Express Company and others, trustees. The bill was dismissed as to the Express Company as defendant, but not as trustee, and plaintiff was allowed to change the suit into an action at law, with leave to file a declaration. Plaintiff recovered judgment against defendant railway company, and from decision charging the trustee, it appeals. Trustee ordered charged in a less amount.

Austin M. Pinkham, of Boston, for trustee.

Tyler, Tucker, Eames & Wright, of Boston, for plaintiff on appeal by American Express Co. from order charging it as trustee.

BRALEY, J. [1] The plaintiff originally brought a bill in equity in a writ of summons and attachment by trustee process as provided in R. L. c. 159, § 8, service of which, as well as of a subpoena subsequently issued to appear and answer the bill, "and to show cause why an injunction should not issue," was made upon the trustee. But an interlocutory decree having been entered dismissing the bill in so far as the trustee was a defendant, the plaintiff under R. L. c. 159, § 6, was allowed to amend the suit into an action at law with leave to file a declaration. The pleadings having been completed, a trial followed in which the plaintiff recovered judgment against the railway company, hereafter called the company, and the only question remaining is the amount for which the trustee should be charged. *Reynolds v. Missouri, Kansas & Texas Ry.*, 228 Mass. 589, 117 N. E. 913. The date of service on the trustee was August 31, 1915, and in the amended answer filed and allowed in substitution of the original answer, the trustee admits that it is chargeable for a balance due the defendant of \$10,997.55; but

the trial court having fixed the amount at \$50,754.09, the case is before us on the trustee's appeal. The trustee on the record undoubtedly was a debtor of the company on August 31, 1915, and its indebtedness then due and payable is to be ascertained as of that date. *Koontz v. Baltimore & Ohio Railroad*, 220 Mass. 285, 107 N. E. 973, L. R. A. 1915D, 838; R. L. c. 189, § 12.

[2] By section 25 it is given the right to deduct all demands against the company which if it had not been summoned as trustee would have been available by way of set-off in an action by the company. The scope and effect of this section enables the trustee to "retain or set off" in any lawful mode of adjustment between himself and his principal without regard to technical forms any or all moneys or demands except claims for unliquidated damages for wrongs or injuries. "It is the balance only after all just and equitable allowances, for which he is charged." The plaintiff's rights are no greater than those of the original creditor, and if the company could not have recovered more than the amount admitted, the trustee is not chargeable for anything more. *Nutter v. Framingham & Lowell Railroad*, 132 Mass. 427, and cases cited; *Hopedale Mfg. Co. v. Clinton Cotton Mills*, 224 Mass. 193, 197, 112 N. E. 879.

[3] The statements in the answer, as well as the answers to the interrogatories, being under oath, are to be considered as true, and whatever indebtedness the trustee had incurred arose from its contracts with the company which in all essential particulars were similar to the copy of the contract annexed to the interrogatories.

[4] The agreement provides in substance for payment to the company for transacting the business of the trustee of a percentage based on the gross revenue received, and at the time of service it was accountable to the company for the months of May to and including August, 1915. The excess revenue during this period with the guaranty for the month of August amounted to \$62,112.84, and if \$11,358.75, coming to the trustee for "baggage messenger service" and incidental expenses concerning which there is no dispute, is deducted, the sum of \$50,754.09 remains for which the plaintiff contends the trustee should be charged. But the trustee claims that a further deduction of \$39,756.54 should be allowed for overpayments on account of business transacted during the years 1909-1911. *Richards v. Stephenson*, 99 Mass. 311. While these payments had been made, the amount actually due depended upon the outcome of litigation involving its express charges or rates then pending in the state of Oklahoma, which had not been determined at the date of service, or of filing the original answer. The proceedings, however, having terminated, the amended answer recites in detail the various

phases of the litigation which resulted in the trustee being compelled to refund certain charges levied and collected in excess of the rates established by the local law. Of this sum, \$77,565.20 had been collected for business done over the lines of the company, and the overpayment under the old rates amounted to \$39,756.54. And as shown by the answers to interrogatories 50 and 51 that amount was accepted by the company "without protest or reserve" as the basis of the final settlement. If the trustee is entitled to this credit it is chargeable only for \$10,997.55. The plaintiff's principal contentions although variously phrased are, that the contract absolutely required the trustee to make the payments now claimed to have been in excess, or if there were overpayments, yet the payments having been voluntarily made, the trustee if it had sued the company could not have recovered, and the alleged right of set-off cannot be maintained. It is true that by the contract the percentage of "fifty-five" per cent., subsequently reduced to 52½ per cent. rests on the gross revenue received by the trustee on all business it transacts upon the lines embraced in the agreement. But the answer which is not materially modified by the answers to the interrogatories states that these payments were made during the pendency of the litigation on the basis of the rates it had fixed for the transaction of business in Oklahoma, and before it had been required under the order of the Corporation Commission, and the judgment thereon, to refund the excess charges. It was not contemplated that either the trustee or the company should derive a profit from violations of law. By article 14 the "agreement is subject to all existing and future federal and state laws, and to all rules and orders by any board, commission or body having competent authority to regulate either of the parties hereto, and the traffic covered by this contract." And the company as well as the trustee was bound by the change in rates in any future accounting. It is plain that during the period in question the "gross revenue" called for by the contract is not the amount received on the old rates, but the amount stipulated in accordance with the rates ordered by the commission. The contract also expressly provides in article 10, that if the sum paid by the trustee shall exceed "fifty-five per cent." of the gross monthly revenue, then the company will repay the amount of such excess, unless such payment would reduce the total amount for the period of 12 months below "the guaranteed sum of three hundred and seventy-two thousand dollars," and in such event payment is limited to any excess above that amount. The trustee doubtless acted with full knowledge of the fact that if it was defeated in the litigation over rates the payments exceeded its liability. But the word-

ing of article 10, especially when read with article 14, does away with any implication that the trustee intended to waive its rights to an adjustment at the end of the yearly period, when the monthly statements and payments for that year were to be reviewed, revised and restated. The trustee manifestly did not intend, nor was it required to relinquish its right to a full accounting at the close of the year, when all errors, which would include monthly overpayments, were to be corrected, and the balance due from either party to the other was to be ascertained and adjusted. The amended answer having stated that, "At the time of the service of the plaintiff's writ the express company had paid the railway company allotments due for the months prior to May, 1915, and its proportional part of the guaranteed amount for all months prior to August, 1915, but had paid no part of the guaranteed amount for the month of August, 1915," the plaintiff's further contention, that the trustee has failed to show that it is entitled to any adjustment because no payment had been made in excess of the amount guaranteed, need not be further considered. The trustee if at the date of the attachment it had been sued by the company in our courts accordingly could have maintained its set-off. *Sheldon v. Kendall*, 7 Cush. 217; *Commonwealth v. Phoenix Bank*, 11 Metc. 129, 136; *Green v. Nelson*, 12 Metc. 567, 573; *Lawrence v. Carter*, 16 Pick. 12, 16; *R. L. c. 174, § 1*. It follows that none of the plaintiff's contentions in support of the larger amount can be sustained, and the trustee should be charged in the sum of \$10,997.35.

So ordered.

(233 Mass. 69)

RIDDELL v. FUHRMAN et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 21, 1919.)

1. WAR §10(2)—EFFECT ON PROBATE PROCEEDINGS—ALIEN HEIR AT LAW—STATUTE AND HAGUE CONVENTION.

Despite the Hague Convention of 1907, c. 1, § 2, art. 23h, proceedings for proof of the will of a Massachusetts decedent need not be suspended because one of the heirs at law becomes an alien enemy pending the proceedings; Act Cong. Oct. 6, 1917 (U. S. Comp. St. 1918, §§ 3115½a-3115½j), defining regulating, and punishing trading with the enemy, in section 7b (section 3115½d) not prohibiting prosecution of the petition for probate to final decision.

2. TREATIES §7—SUPREME LAW.

Treaties of the United States are the supreme law of the land.

3. INTERNATIONAL LAW §1—ADMINISTRATION IN UNITED STATES.

International law is a part of the law of the United States, and must be administered

whenever involved in causes presented for determination, though in a state court.

Appeal from Supreme Judicial Court, Suffolk County.

Petition by Elizabeth Riddell, executrix, for proof and allowance of the will of Catherine Crass, contested by Sophie V. Fuhrman and others. The will was admitted to probate, contestants appealed to a single justice of the Supreme Judicial Court, which affirmed, and E. M. Shanley, in behalf of Susanna Merkel, one of the contestants, appeals from an order denying his motion in limine. Decree affirmed.

E. M. Shanley, of Boston, for appellant.
George M. Heathcote, of Boston, for executrix.

RUGG, C. J. This is a petition filed on the 11th day of February, 1916, for the proof and allowance of the will of Catherine Crass, late of Boston, who died on the 31st of January, 1916. The petitioner is alleged to be a resident of Cambridge in our county of Middlesex. It is averred in the petition that Susanna Merkel, resident in Ossenheim, Germany, is a daughter who, with a son and four other daughters of the deceased all resident within this commonwealth, constituted her heirs at law and next of kin. It was agreed at the argument that the case had proceeded and should be considered on the footing that on the 15th of April, 1916, appearance was entered in the probate court by an attorney at law for Susanna Merkel and at least one of her sisters, and that on the 1st of June, 1916, another attorney at law entered his appearance in the probate court for Susanna Merkel and two of her sisters as respondents to the petition. A decree was entered by the probate court on the 28th of May, 1918, allowing the will, from which appeal was taken and entered in the Supreme Judicial Court for Suffolk county by Mr. Norton as attorney for Susanna Merkel and two of her sisters. On October 29, 1918, a motion in limine was filed by another attorney at law, setting out that Susanna Merkel "is a resident of Hessen, Germany, and a subject of the Imperial German government and domiciled therein," that a state of war has existed between the United States and the "Imperial German government" since April, 1917, "whereby the said Susanna Merkel became an alien enemy and unable to assert her rights or to be heard in the courts of this commonwealth," and suggesting that "it is in derogation of the sovereignty and contrary to the law and comity of nations" that litigation touching the validity of the will should go forward, but that it ought to be suspended until the cessation of hostilities. An interlocutory decree denied the motion and final decree established the will.

The record shows beyond peradventure that the probate court acquired complete jurisdiction of the cause and of all parties, including the nonresident heir at law, who subsequently became an enemy alien, prior to the time when the United States was a nation participating in the war. The sole question presented is whether as matter of law the state of war existing between the United States and Germany made imperative the continuance of the proceeding at bar for hearing until the suspension of hostilities.

[1-3] It is provided by an act of Congress entitled "An act to define, regulate, and punish trading with the enemy, and for other purposes," approved on October 6, 1917 (40 Stat. 416, c. 106, § 7b [U. S. Comp. St. 1918, § 3115½d]), that—

"Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or an ally of an enemy prior to the end of the war: * * * And provided further, that an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

If it be assumed in favor of the appellants, but without so deciding, that a petition for the proof and allowance of a will of a deceased citizen of this commonwealth is "a suit or action at law or in equity" (Peters v. Peters, 8 Cush. 529), and that the Trading with the Enemy Act is binding upon the courts of this commonwealth because enacted pursuant to the war powers of the federal government (Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856), it is plain that the words of that act not only do not prohibit the prosecution of this petition to a final decision, but expressly authorize the one of the appellants who is an alien enemy to appear and defend her rights through counsel. Manifestly there is nothing in that act which supports the motion in limine.

The question must be decided on general principles of the common law. Every practical consideration is against the allowance of the motion. It is of public concern that proceedings for the proof of wills of deceased residents of this commonwealth, at the petition of those domiciled here, should go forward to a conclusion as speedily as possible. The creditors of the estate, the commonwealth as possibly entitled to inheritance taxes, as well as heirs and legatees, all are interested in having determined as soon as may be the validity of an instrument offered for proof as the last will and testament of a deceased resident.

The authorities are clear and unanimous, so far as we are aware, to the effect that the utmost extent of the inhibition against the appearance of alien enemies in courts is that they cannot be parties plaintiff. They are thus prohibited on the grounds shortly stated

that our courts will give no assistance to proceedings which, if successful, would lead to the enrichment or profit of an alien enemy and hence be an aid and comfort to his country in the prosecution of its war; and also that one confessing himself hostile to our country and in a state of war with it cannot be heard if he sues in our courts to invoke in aid of his rights the benefit and protection of the laws of our nation, which in another field he is seeking to overthrow. As was said in *Daimler Co. v. Continental Tire & Rubber Co.*, [1916] 2 A. C. 307, 344, this in common with other rules against trading with the enemy "is a belligerent's weapon of self-protection." It is at bottom a principle of public policy. Even that principle has been somewhat relaxed recently in England, where for the benefit of British subjects it seemed necessary to join with them as plaintiffs an alien enemy. *Rodriguez v. Speyer Brothers*, [1919] A. C. 59. This principle and the grounds upon which it rests fall utterly of application when the enemy alien is a defendant and not an active petitioner in our courts. Therefore it was said in *Watts, Watts & Co., Ltd., v. Unione Austriaca Di Navigazione*, 248 U. S. 9, 21, 39 Sup. Ct. 1, 2 (63 L. Ed. —):

"A suit may be brought in our courts against an alien enemy."

That statement is rested on the authority of *McVeigh v. United States*, 11 Wall. 259, 267, 20 L. Ed. 80, and of *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617, in both of which decisions the question was discussed and definitively settled. The matter was reviewed at length in a comprehensive and exhaustive judgment by Lord Chief Justice Reading, speaking for the court of appeal in *Porter v. Frendenberg*, [1915] 1 K. B. 857. The history of the common law on the subject there is treated fully, as well as in *Rodriguez v. Speyer Brothers*, [1919] A. C. 59. It would be superfluous to go over the older decisions in view of the complete analysis of them in these recent judgments. There is not a shred of authority to support the contention that in general an alien enemy cannot be a party defendant or respondent in our courts in time of war. This conclusion is in harmony with *Hutchinson v. Brock*, 11 Mass. 119, where an enemy alien was demandant in a writ of right and was therefore in the position of a party plaintiff.

It is plain that there is no reason for suspending proceedings for the proof of the will of a deceased resident of this commonwealth because one of the heirs at law happens to be an alien enemy. In the case at bar the one now an enemy alien retained counsel a considerable time before the declaration of war. There is nothing on the record to indicate that her rights have not been adequately protected or that she has been denied the fullest opportunity to present evidence. No appli-

cation for continuance was made on the ground of difficulty by reason of the war in securing evidence or witnesses. The implications from the nature of the proceeding are all against that idea. But it is enough to say that no such contention was raised at the hearing before the single justice. There is no room for the suggestions regarded as pertinent in *The Kaiser Wilhelm II*, 246 Fed. 786, 159 C. C. A. 88, L. R. A. 1918C, 795, and *Watts, Watts & Co., Ltd., v. Unione Austriaca Di Navigazione*, 248 U. S. 9, 39 Sup. Ct. 1, 63 L. Ed. —, as reasons for continuance.

It has been argued that the Hague Convention of 1907 prohibits the prosecution of this petition until after the end of the war. In that connection reference is made to chapter I, section II, "Hostilities"; chapter I, "Means of Injuring the Enemy, Sieges, and Bombardments," article 23(h), wherein—

"it is especially forbidden: * * * To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party." 36 U. S. Stats. at Large, part 2, "Treaties and Conventions," pp. 165, 166 (pages 2301, 2302).

Treaties of the United States are the supreme law of the land. *Tellefsen v. Fee*, 168 Mass. 188, 46 N. E. 562, 45 L. R. A. 481, 60 Am. St. Rep. 379. "International law is a part of our law" and must be administered whenever involved in causes presented for determination. *The Paquete Habana*, 175 U. S. 677, 700, 20 Sup. Ct. 290, 299 (44 L. Ed. 320). It has been held, after examination of its history and collocation, that this paragraph of the Hague Convention simply forbids—

"any declaration by the military commander of a belligerent force in the occupation of the enemy territory, which will prevent the inhabitants of that territory from using their courts of law in order to assert or protect their civil rights." *Porter v. Frendenberg*, [1915] 1 K. B. 857, 878.

However that may be, it is too plain for discussion that there is nothing in that paragraph which gives any color to the notion that an enemy alien may not be held and treated as a respondent in a petition for the proof of the will of a deceased resident of this commonwealth.

Decree affirmed.

(233 Mass. 81)

TUCKER v. STETSON.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 21, 1919.)

1. PHYSICIANS AND SURGEONS ⇨18(8)— NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against a surgeon for negligent treatment of plaintiff, who had been injured,

the injury resulting in paralysis of his arm, evidence held to warrant finding that defendant surgeon was negligent in failing to operate, or in failing to advise plaintiff seasonably to procure surgical relief elsewhere.

2. PHYSICIANS AND SURGEONS ⇨18(8)— NEGLIGENCE — DETERMINATION OF LIABILITY.

Liability of surgeon for negligence in failing to operate on plaintiff, or in failing to advise him seasonably to procure surgical relief elsewhere, was not to be determined by jury on consideration of contingent, speculative, and possible results of operation, but on proof by fair preponderance of evidence that it was reasonably probable such beneficial result would follow operation performed by defendant surgeon with ordinary skill of surgeons practicing in towns such as that where defendant undertook to practice.

Exceptions from Superior Court, Suffolk County; Lloyd E. White, Judge.

Action for personal injuries by Reginald Tucker against Halbert G. Stetson. Verdict for plaintiff, and defendant excepts. Exceptions sustained.

Charles J. Martell and William Flaherty, both of Boston, for plaintiff.

Sawyer, Hardy, Stone & Morrison, of Boston (Edward C. Stone, of Boston, of counsel), for defendant.

PIERCE, J. In June, 1915, the plaintiff met with an accident while operating a motorcycle, which came into collision with a team that was coming around a curve on a cross-road. He was taken to a hospital in Greenfield where he was treated by the defendant. As a result of this collision he sustained a broken collar bone and a severe injury to the set or network of nerves around the shoulder and neck called the brachial plexus, which resulted in a paralysis of his arm. He remained in the hospital three weeks, during which the defendant saw him every morning. During the time he was in the hospital his arm and shoulder was bandaged up. He could move his fingers a little but could not move his arm; and since that time he has never been able to make any other movement with the fingers or arm. At the end of three weeks he left the hospital at the defendant's suggestion. "The defendant directed him to see a Dr. Hodskins every day or so, telling him that he thought that his arm would come on all right in a couple of months or so." The plaintiff "went to Dr. Hodskins every other day or so" and had his arm rubbed with a liniment of some kind, and then put back in its bandage, the doctor telling him to massage it himself once or twice a day, which he did, but noticed no change in the feeling or sensation of his arm as he followed this course of treatment. After six weeks of treatment his arm began to wither up. He

then went to the Massachusetts General Hospital and was operated upon unsuccessfully; the arm at the time of the trial was useless.

The claim of the plaintiff, as set out in the declaration, is "that the defendant carelessly and negligently failed to operate upon the injured parts of the plaintiff's body seasonably and that he failed to exercise that judgment which he professed to possess in the treatment of the plaintiff's injuries." At the close of the evidence the presiding judge refused to direct a verdict for the defendant, and the defendant excepted.

We think the ruling was right. The defendant is a physician and surgeon. He testified that he had been practicing surgery since 1895; that in 1901 he had become an examining physician and surgeon for the important railroads in Greenfield; that he "had done some post-graduate work that was devoted to surgery"; that he "had a large, wide and varied experience with almost every ordinary class of case, such as comes within the ordinary everyday work of a good surgeon"; that "he had been a busy man and was on the staff of the Franklin County Hospital"; that "he had never performed an operation to relieve any trouble with the brachial plexus, though he knew what it was and appreciated the effects of injury to it and considered himself competent to pass upon whether the brachial plexus had been affected, and was satisfied in his own mind the following day after the accident that the plaintiff had trouble with the brachial plexus and treated him keeping that fact in mind, so that the mere setting of the collar bone was not all he had in mind to do for the plaintiff"; and "that as compared to the injury to the brachial plexus, the collar bone was a simple and trivial part, and what * * * [he] was treating the plaintiff for as far as he was able was for the brachial plexus as well as for the broken arm." The testimony fully warranted the jury in finding that ordinary surgeons in the town where the defendant practiced his profession had the skill and ability to successfully perform the surgical operation of "cutting down upon the nerves and suturing or sewing them together as far as possible in their normal position."

[1] The conflicting testimony warranted a finding that such an operation upon the plaintiff, performed within a few days after the injury and before the nerves had lost their functional activity, would probably have restored the use of the arm or some of the loss of the use of the arm. It also warranted a finding that the defendant did nothing for the plaintiff except to have a sand bag placed on his shoulder, have an X-ray taken, dress the arm with cotton bandages,

and keep him in bed on his back during the ten days the plaintiff was at the hospital and until he was discharged, without advice that an operation was desirable or a suggestion that he could or should obtain the services of the best surgeons at the Massachusetts General Hospital. The foregoing facts if believed warranted a finding that the defendant was negligent in failing to operate or in failing to advise the plaintiff seasonably to procure elsewhere surgical relief if the defendant felt himself incompetent to act.

[2] We think there was prejudicial error in the charge when the presiding judge told the jury:

"Now in sustaining the burden of proof upon a matter of this kind, the possibilities may first be dealt with. Was it possible for good results or better results to come from an operation? If it was not possible, why, then you will go no further with the case. Upon this Dr. Pierce says there were excellent probabilities, and the doctors on the other side say that they were dealing with a mere hope; Dr. Porter, who is or appears to be by the counsel on both sides the highest authority in Massachusetts upon this, tells you of his result in fifteen or eighteen cases upon which he has operated and that it is a mere hope; and Dr. Lothrop says—you have heard what he said. Whether there was any possibility—the doctor says there was; and from the evidence of the other doctors it may be competent for you to find that so far as they are concerned that there was a possibility not of entirely remedying the condition of the nerves, but mitigating the consequences in some degree by an operation."

As also in that part of the charge where the jury were instructed:

"If after considering all the evidence in the case, the possibilities, the probabilities and the high degree of probabilities, you shall still say that you are left to a guess, of course you cannot found a verdict on a guess. The burden of proof, as I told you, is upon the plaintiff, and you can take these matters into consideration in saying whether he has proved his case."

The liability of the defendant was not to be determined by the jury upon consideration of contingent, speculative and possible results of an operation which might be performed upon the plaintiff to remedy or mitigate the consequence of the injury to the nerves, but upon proof by a fair preponderance of evidence that it was reasonably probable that such a result would follow an operation, performed by the defendant with the ordinary skill and ability of surgeons practicing in towns similar to the one where the defendant undertook to practice his profession. *Small v. Howard*, 128 Mass. 131, 135, 35 Am. Rep. 363.

Exceptions sustained.

(128 Ind. 477)

O'DANIEL v. STATE. (No. 23507).*

(Supreme Court of Indiana. May 15, 1919.)

1. ARSON §5—CHARACTER OF PROPERTY.

Under indictment for arson, the state should show a burning of the building, of that which was a part of the structure belonging to the realty, and not defendant's personalty or his trade fixtures in the building which he had a right to remove.

2. ARSON §30—DEFECTIVE PROOF—STIPULATION.

Conviction under an indictment charging arson by setting fire to and burning, on December 10, 1916, a building used for residence, manufacturing, and commerce, of the value of \$50,000, and the property of a named person, must be reversed, where only proof of ownership and value of building on specified date was a stipulation as to such matters which did not fix any date of ownership.

3. ARSON §31—EVIDENCE—MOTIVE—INSURANCE.

In prosecution for burning the building of another, evidence concerning insurance which defendant had on his own personal property in his business which was carried on in the building held competent to show motive, though arson statute provides it shall be a crime to burn one's own property to defraud an insurance company, a crime not charged.

4. INDICTMENT AND INFORMATION §119 — ARSON—VALUE OF BUILDING—SURPLUSAGE.

One who burns any dwelling house, etc., of \$20 or upwards in value, is guilty of arson, denounced by Burns' Ann. St. 1914, § 2260, and under the statute may be fined not exceeding double the value of the property burned, or attempted to be burned, subject to Const. art. 1, Bill of Rights, § 16, prohibiting excessive fines, so that an allegation as to the amount of damage done the building, whose value is given by the indictment as over \$20 is surplusage.

Appeal from Criminal Court, Marion County; James A. Collins, Judge.

John F. O'Daniel was convicted of arson, and he appeals. Judgment reversed, with instructions to grant new trial.

Thomas D. McGee, of Indianapolis, for appellant.

Ele Stansbury and Dale F. Stansbury, both of Indianapolis, for the State.

TOWNSEND, J. Appellant was indicted for arson. Section 2260, Burns 1914. He was tried by the court and found guilty, fined \$1,000, and sentenced.

The substance of the indictment necessary to be considered in this opinion is that appellant on the 10th day of December, 1916, did set fire to and burn a certain building used for residence, manufacturing, and commerce, known as 122 East Ohio street, in the city of Indianapolis; that the building was

of the value of \$50,000 and was the property of Samuel E. Rauh; that the damage done to the building by the burning was \$500.

The questions arise on motion for a new trial:

(1) Error in permitting evidence of insurance and proof of loss concerning certain personal property which appellant had in the building.

(2) That the evidence does not show in dollars and cents what damage was done to the building, and therefore did not authorize a fine of \$1,000.

(3) That the ownership and value of the building on the 10th day of December, 1916, is not shown by the evidence.

[1] The evidence shows that in certain rooms of this building appellant had an engraving establishment; that on the 10th day of December, 1916, a fire occurred which destroyed the personal property belonging to appellant. It is not clear from the evidence that there was any burning of the building; but, if this were the only question presented as to the sufficiency of the evidence, it would be difficult to hold that there was not some evidence from which the court could infer that there was some burning of a part of the building in question. The state should show clearly, under the indictment here, that there was a burning of the building; a burning of that which was a part of the structure that belonged to the real estate, and not appellant's personal property or his trade fixtures in the building, which he had a right to remove.

[2] But appellant presents a further question that is very clear from the record. At the outset of the evidence there was a stipulation as follows:

"It is hereby stipulated and agreed by the parties herein that a certain building situated in Marion county and used for the purpose of residence, manufacture, and commerce, commonly known as 122 East Ohio street in the city of Indianapolis, Marion county, Ind., was of the value of \$50,000 and was the property of one Samuel E. Rauh."

This is the only evidence of the ownership and value of the building. It will be observed that this stipulation does not fix any time of ownership. For aught that appears from the evidence, appellant himself may have been the owner of the building on December 10, 1916. He is charged here with burning the building of another. Therefore the lack of evidence as to the ownership and value of the building at the time in question is fatal, and for this reason the judgment must be reversed.

[3] Another question presented by appellant is that the court erred in permitting evidence concerning insurance which appellant had on his personal property in his en-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
123 N.E.—16

*Rehearing denied 124 N. E. 492.

graving business, because appellant says that the arson statute provides that it shall be a crime to burn one's own property to defraud an insurance company, and, that not being the charge here, this evidence proved a different and distinct crime. This evidence was competent to show motive.

[4] Appellant's other contention is that, there being no evidence of the damage to the building, the court was not authorized to inflict a fine of \$1,000. Appellant bases his contention upon decisions of this court, the first one being the case of *Ritchey v. State*, 7 Blackf. 168, the second being *Kinningham v. State*, 120 Ind. 322, 22 N. E. 313. The case in the 7 Blackf., *supra*, was decided under section 25, c. 53, R. S. 1843, and the penalty then was imprisonment and fine "not exceeding double the value of the property destroyed." 120 Ind., *supra*, turned on the proposition of an attempt to burn, and was under Acts 1881, p. 174 (section 1927, R. S. 1881). The proposition was that the statute as then worded did not provide for an attempt to burn. At the next session of the Legislature after that decision the act was amended. Acts 1891, p. 402. This act, with a few enlargements and changing of the wording as to the things burned or attempted to be burned, is our present act. Acts 1905, p. 584, § 371; section 2260, Burns 1914. The act now is:

"Whoever willfully and maliciously burns or attempts to burn any dwelling house, * * * the property so burned or attempted to be burned, being of the value of twenty dollars or upwards, and being the property of another, or being insured against loss or damage by fire, and the burning or attempt to burn being with intent to prejudice or defraud the insurer, is guilty of arson, and, on conviction, shall be imprisoned in the state prison not less than two years nor more than twenty-one years, and fined not exceeding double the value of the property burned or attempted to be burned; and should the life of any person be lost thereby, such offender shall be deemed guilty of murder in the first degree, and shall suffer death or be imprisoned in the state prison during life."

We understand appellant's point to be that, unless there is destruction of the building to the extent of \$20 worth, the crime of burning is not made out. We hold that the crime of burning is made out if any part of the building is burned, and that it is only necessary that the value of the thing be in excess of \$20, not the damage by the burning. We also hold that it is necessary to show some burning of the structure. A burning, however slight, would be sufficient. The amount in dollars and cents of the damage done is immaterial.

As the law now stands, the fine may be double the value of the structure; subject always, however, to section 16 of the Bill of Rights (article 1, § 16, Constitution of Indi-

ana), against excessive fines. Therefore the allegation in the pleading that \$500 worth of damage was done is surplusage under the present statute. It would be sufficient to show that some burning was done. As we said before, it is difficult to tell from the evidence that there was any burning of anything other than appellant's personal property and trade fixtures. But, however this may be, there is a total failure of proof of the ownership and value of the building at the time of the fire.

The finding is therefore not sustained by sufficient evidence, and the judgment is reversed, with instructions to grant a new trial.

(70 Ind. App. 214)

INDIANA TRAVELERS' ACC. ASS'N v. DOHERTY. (No. 9850.)

(Appellate Court of Indiana, Division No. 1. May 15, 1919.)

1. APPEAL AND ERROR ⇨82(3) — DECISIONS REVIEWABLE—"FINAL JUDGMENT."

Order that application and motion to set aside default and judgment "be, and the same is now hereby, dismissed" put an end to the controversy so far as could be done, and was a "final judgment" from which appeal lies.

[Ed. Note:—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. APPEAL AND ERROR ⇨78(4)—DECISIONS REVIEWABLE—"FINAL JUDGMENT."

An order of the court dismissing a cause is a final judgment from which an appeal may be taken.

3. JUDGMENT ⇨136—DEFAULT—VACATION—STATUTE—LIBERAL CONSTRUCTION.

Burns' Ann. St. 1914, § 405, with reference to relieving a party from default, is remedial, and should be liberally construed and applied.

4. JUDGMENT ⇨138(1)—SETTING ASIDE DEFAULT—RIGHT.

Under Burns' Ann. St. 1914, § 405, it is the imperative duty of the court to set aside default and permit a trial upon the merits, when it appears from the uncontradicted facts of the application for relief that the defaulted party has a meritorious defense, and that his failure to appear and defend was due to his excusable neglect.

5. JUDGMENT ⇨151 — SETTING ASIDE DEFAULT—PLEADING.

If it was necessary that proceeding for relief from default and judgment should be by complaint or petition, where the application for relief was filed after term, defendant's application for relief, to which plaintiff appeared after due notice, must be treated as such pleading.

6. JUDGMENT ⇨151 — DEFAULT — SETTING ASIDE—APPLICATION—SUFFICIENCY.

Undisputed facts set forth in defendant's application for relief from default held to show

a meritorious defense, and that failure to appear and defend was due to excusable neglect within Burns' Ann. St. 1914, § 405, as to relieving a party from default judgment.

7. JUDGMENT ~~6~~162(4) — DEFAULT — SETTING ASIDE.

What constitutes excusable neglect within Burns' Ann. St. 1914, § 405, as to relief from default is to be determined from the facts of the particular case, and where there is any doubt as to the sufficiency of the showing, the doubt should be resolved in favor of the application.

Appeal from Superior Court, Vigo County;
Fred W. Beal, Judge.

On rehearing.

Superseding former opinion, 121 N. E. 90.

Wm. S. McMaster, Elmer E. Stevenson, and Thomas D. Stevenson, all of Indianapolis, for appellant.

Stinson, Stinson, Hamill & Davis, of Terre Haute, for appellee.

REMY, J. As the beneficiary named in an insurance policy issued by appellant association, appellee recovered a judgment against appellant for \$5,000 for the alleged accidental death of the insured, who was her husband. The judgment was rendered by default. At a subsequent term of court appellant filed its motion, supported by affidavits of its secretary and its attorney, for relief from said judgment, which motion was based upon the claim that the judgment was taken through appellant's mistake, inadvertence, surprise, and excusable neglect. In opposition to appellant's said motion for relief, appellee filed the counter affidavit, of one of its attorneys. Subsequent to the filing by appellee of the counter affidavit, and before the court passed upon appellant's application for relief from the judgment, appellee filed her motion to dismiss said application, which motion was sustained by the trial court on November 18, 1915, and entry of the action of the court was made by the clerk of the court. On December 28, 1915, the cause was formally dismissed, the court's order of dismissal being as follows:

"Come again the parties, and, the court having heretofore sustained plaintiff's motion to dismiss defendant's application and motion to set aside the default and judgment heretofore rendered in this cause, it is now therefore ordered by the court that the said application and motion of defendant, Indiana Travelers' Accident Association, to set aside the default and judgment heretofore rendered in this cause on December 18, 1914, be, and the same is now and hereby, dismissed, to which order of the court of dismissal the defendant, Indiana Travelers' Accident Association, at the time objects and excepts."

[1] From this order appellant has appealed to this court. Appellee has moved to dismiss

this appeal on the ground that the entry from which the appeal was taken is not a final judgment from which, under the statute, an appeal will lie.

[2] It is well settled that an order of the court dismissing a cause is a final judgment from which an appeal may be taken. *Koons v. Williamson*, 90 Ind. 599; *McGraw v. Nick-ey*, 47 Ind. App. 159, 93 N. E. 1003. A final judgment has been defined as "one which determines the rights of the parties to the suit or a distinct or definite branch of it, and reserves no further question or direction for further determination." *Ewbank's Manual*, § 83. The test is that it puts an end to the particular case, or branch of it, as to all the parties and all the issues. While the entry of the court in the case at bar does not formally state that the dismissal is "ordered, adjudged, and decreed" by the court, nevertheless the court by the entry specifically orders that appellant's application and motion to set aside the default and judgment "be, and the same is now hereby, dismissed." This put an end to the controversy between the parties so far as the court could end it, and was a final judgment. *Koons v. Williamson*, supra. Appellee's motion to dismiss the appeal is overruled.

Appellant's application to set aside the default was prepared and filed in accordance with the provisions of section 135 of the Code of Civil Procedure of this state (section 405, Burns 1914), which provides:

"The court may also, in its discretion, allow a party to file his pleadings after the time limited therefor; and shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceedings, on complaint or motion filed within two years."

[3] This statute is remedial in its character, and must be liberally construed and applied, to the end that no advantage shall be obtained by one party to the litigation by reason of any mistake, inadvertence, or excusable neglect of the other party. *Dennis v. Scanlon* (Ind. App.) 118 N. E. 370, and cases cited.

[4] Under this statute it is the imperative duty of the court to set aside the default, and permit a trial upon the merits, when it appears from the uncontradicted facts of the application for relief that the defaulted party has a meritorious defense, and that his failure to appear and defend was due to his excusable neglect. *Bush v. Bush*, 46 Ind. 70; *Daub v. Van Lundy* (Ind. App.) 118 N. E. 140. Appellant asserts that the undisputed facts set forth in its application were such that it was not within the court's discretion to deny it the relief asked, and that the dismissal of its application and motion was reversible error. On the other hand, appellee contends that her motion to dismiss the ap-

plication for relief from the judgment was properly sustained.

[5] It is especially urged by appellee that, inasmuch as appellant's application for relief was filed at a time subsequent to the term of court when the default and judgment were taken, such application should have been by formal complaint and not by motion, citing *Brumbaugh v. Stockman*, 83 Ind. 533. It appears from the record that appellant at a subsequent term appeared in the court where the default had been taken, and, having moved that the original cause be redocketed, filed its proceeding for relief, giving notice to appellee, who appeared and filed a counteraffidavit, and later the motion to dismiss. The statute specifically provides that the application may be "by complaint or motion filed within two years." It is admitted that the proceeding was begun within the period fixed by the statute. The *Brumbaugh Case*, supra, was a case very similar to the case at bar; and, while the Supreme Court in that case stated that, if the proceeding was commenced at a term of court after the judgment was rendered, the proper practice was by complaint or petition, nevertheless the court held that the application was sufficient, and so held on the ground that it amounted to a petition supported by affidavit to which there was an appearance after notice. So in the instant case, if it could be said that the law required the proceeding to be instituted by complaint or petition, then, under the holding of the *Brumbaugh Case*, appellant's application to which appellee appeared after due notice must be treated as such a pleading. See, also, *Lake v. Jones*, 49 Ind. 297.

[6] The remaining question for our consideration is: Do the uncontradicted facts pleaded in appellant's application for relief from the default and judgment show that appellant has a meritorious defense, and that its failure to appear and defend was due to its excusable neglect? The affidavits filed with appellee's application for relief are specifically referred to in the application as being filed with and in support of it, and must therefore be treated as a part of the application. The material facts set forth in the application, and which are not contradicted by appellee's counter affidavit, are as follows: The original action was commenced October 29, 1914, in the superior court of Vigo county, Ind., and summons was on said day issued and directed to the sheriff of Marion county in said state, commanding such sheriff to summon appellant to appear November 10, 1914, and answer appellee's complaint. The service was by copy left at appellant's offices, but instead of summons to appear in the Vigo superior court, it was erroneously copied, directing appellant to appear in the Vigo circuit court. Upon investigation appellant through its attorney learn-

ed that the cause was not pending in the Vigo circuit court, but was pending in the superior court of that county, and notified the clerk of the Vigo superior court, and also appellee's attorney, of the mistake in the summons. Whereupon said attorneys caused a second summons to issue, which, when served by said sheriff of Marion county, showed the same mistake to have been made. The said sheriff had by mistake left a copy of summons which commanded appellant to appear in the Vigo circuit court, but made return, showing service of appellant to appear in the superior court of that county. Thereupon appellant's attorney who resided in Indianapolis, not knowing that a mistake had been made in the second summons, but believing the cause might have been refiled in the Vigo circuit court, immediately called the clerk of said court by long distance telephone, advising said clerk of the character of the last summons; and in response said clerk stated that doubtless a mistake had been made in his office, he being the clerk of both of the said courts of said Vigo county. Appellant's attorney also wrote two letters to appellee's attorneys, advising them that appellant's service was to appear in the Vigo circuit court, and in the last letter asked if the action had been refiled in that court. Appellee's attorneys, on December 17, 1914, replied that the cause had not been refiled in the circuit court, and on the following day took the default judgment in the Vigo superior court, knowing at the time that appellant had not been summoned to appear in that court, and knowing that appellant was at the time relying upon the integrity of the sheriff's certificate that the instrument served was the true and correct copy of the original writ as it came into his hands.

[7] Appellant's application for relief further shows that appellant had meritorious defenses to appellee's complaint, in that the policy sued on indemnified only against disability or death sustained through accidental means, and that the insured named in the policy came to his death by suicide, and that no notice or proof of death of the insured had been made to appellant in accordance with the terms of the policy. That appellant's application for relief shows a meritorious defense is not controverted. What is excusable neglect within the meaning of the statute is to be determined from the particular facts of each case (*First Nat. Bank v. Stilwell*, 50 Ind. App. 226, 98 N. E. 151); and, where there is any doubt as to the sufficiency of the showing of excusable neglect and inadvertence, the doubt should be resolved in favor of the application (*Masten v. Indiana Car Co.*, 25 Ind. App. 175, 57 N. E. 148). The uncontradicted facts show that appellant was never summoned to appear in the court where the cause was pending, and that appellee's attorneys knew that fact

when the default was taken and judgment rendered. We conclude that the trial court erred in dismissing appellant's application for relief from the judgment, and that justice requires that the default and judgment be set aside, and appellant be permitted to be heard.

Judgment reversed, with instructions to set aside said default and judgment, to permit appellant to answer the complaint in the original action, and for further proceedings therein.

(72 Ind. App. 245)

WILLIAMS v. HARRISON et al. (No. 9764.)*

(Appellate Court of Indiana, Division No. 2
May 15, 1919.)

1. APPEAL AND ERROR ¶640, 660(1), 766 —
MATTERS REVIEWABLE — COMPLIANCE WITH COURT RULE.

Where the rules of the Appellate Court concerning the preparation of transcript, writ of certiorari, and brief have been substantially complied with, and court is fully able to comprehend issues from brief, the purpose of the rules has been served.

2. JUDGMENT ¶956(2)—**RES JUDICATA—EVIDENCE AS TO ISSUES—PLEADINGS.**

The facts in issue in a former action must be determined from the pleadings, in determining as to what matters are res judicata.

3. JUDGMENT ¶740—**CONCLUSIVENESS—MATTERS NOT IN ISSUE.**

An adjudication in an action for partition of land, brought by a trustee, wherein no issue was tendered by trustee to beneficiary as to possession or title of proceeds of sale going to trustee, was not binding on the beneficiary, so far as it undertook to determine the title or possession of such fund.

4. ESTOPPEL ¶91(2) — **ACQUIESCENCE—PARTITION DECREE—INJURY.**

A beneficiary of a trust was not estopped to recover the funds due her by acquiescing in a partition decree brought by the trustee to divide the estate of the testator, by accepting the income instead of demanding the corpus of the trust to which she was entitled, where no one except herself was injured; the judgment in the partition suit, so far as it undertook to determine title or possession of such trust funds, being coram non judge and void.

5. WILLS ¶524(9)—**TESTAMENTARY TRUST—UNBORN CHILDREN.**

Where property was left by will in trust for children born or to be born to a certain person, each child's share not expended, on coming of age of such child to be paid over to it, children born after date that one or more children reached age at which they were entitled to distribution, must be excluded from participation in the distribution of the estate.

Appeal from Superior Court, Marion County; Linn D. Hay, Judge.

Action by Marthena Harrison Williams against Russell B. Harrison, trustee, and others. From a ruling of the court sustaining demurrer to her complaint, and a judgment rendered on such ruling, plaintiff appeals. Reversed, with instructions.

H. P. Doolittle, of Indianapolis, for appellant.

Wm. L. Taylor, Jackson Carter, and Russell B. Harrison, all of Indianapolis, for appellees.

McMAHAN, J. This was an action by appellant, as devisee and cestui que trust under the will of Benjamin Harrison, deceased, grandfather of appellant, against appellee Russell B. Harrison, trustee under the will of said deceased and as guardian of William Henry Harrison, and his codefendant, the Union Trust Company of Indianapolis, trustee by appointment of the superior court of Marion county, Ind., under the will of said deceased, to recover the possession of a trust fund now in the hands of said Union Trust Company.

The complaint was in one paragraph, the substance of so much thereof as is necessary for this decision being as follows:

Appellant is a resident of Norfolk, Va., and is a granddaughter of Benjamin Harrison, formerly of Indianapolis, Ind., who made and published his last will and testament dated April 20, 1890, with codicil thereto dated February 13, 1901. He died March 13, 1901. Following his death his will was duly admitted to probate, and the Union Trust Company, executor, has taken possession of the estate for its settlement and distribution. Among other bequests, devises, and legacies he devised and bequeathed a portion of his estate as follows:

"Item Twenty-Two. All the rest and residue of my estate I give, devise, and bequeath as follows: Said estate shall be divided into as many equal shares as I shall leave children surviving me, and one additional share for the issue of any child that may have died leaving issue surviving me. One such share I give, devise, and bequeath to my son Russell B. Harrison in trust for his children, Marthena Harrison and William Henry Harrison, and any other child or children that may hereafter be born to him, to be applied and used for the support and education of such children or the survivor or survivors of them. Such portion of each child's share as may not have been before expended for its benefit shall, on the coming of age of such child or its marriage, be paid over to it, and, in the event of the death of one of my grandchildren before its share is distributed to it, such share shall go equally to the survivors under the same trust and conditions. If said Russell shall die before me, or before he has executed his trust or shall resign, his wife, Mary Saunders Harrison, is hereby appointed trustee of his trust. Said trustees shall neither of them be required to give any bond. * * *

June 1, 1910, appellee Russell B. Harrison, as

trustee, filed suit No. 80,940, in room 2 of the superior court of Marion county, Ind., against said executor, this appellant, and others, for partition and sale of certain real estate comprised in the estate of said Benjamin Harrison, deceased.

July 1, 1911, said court entered an order in said cause No. 80,490 for the sale and distribution of the proceeds of said real estate, which, among other things, directed and provided as follows:

"One-sixth thereof to the Union Trust Company of Indianapolis as trustee for Marthena Harrison, and to provide against any loss or harm to the rights or interests of any child or children which may hereafter be born to Russell B. Harrison, said trustee to receive, hold, invest, and preserve the principal of said sum until there shall have been born to said Russell B. Harrison, child or children, if any such child or children shall be born to him, or until the possibility of issue to him shall have become extinct, and in the meantime to pay the income arising therefrom to said Marthena Harrison.

"In the event there shall be after-born child or children to said Russell B. Harrison, then said trustee shall hold said funds for the benefit of said Marthena Harrison, and such after-born child or children, according to their several respective rights under the will of said Benjamin Harrison, deceased.

"In the event there shall be no after-born child or children, then, when possibility of issue to said Russell B. Harrison shall have become extinct, said trustee shall pay said principal sum, together with all accumulations of interest, to said Marthena Harrison, subject to all the provisions of said item twenty-second of said will."

Said order also substituted the said Union Trust Company for said Russell B. Harrison as trustee of the fund in controversy. Pursuant to said order and sale, said Union Trust Company received and now holds, as trustee for appellant, in accordance with the provisions of said item 22, about \$4,700. Appellant is the daughter of said Russell B. Harrison, and is the same person as Marthena Harrison, named in said will. She was born January 18, 1888, became of age on January 18, 1909, and was married to Harry A. Williams, Jr., of Norfolk, Va., on February 5, 1912. Under and in accordance with the provisions of said item 22 of said will, she avers that she became entitled to the possession and enjoyment of the share of said estate left her through Russell B. Harrison, as trustee, on or about January 18, 1909, and is now entitled to receive and enjoy the same. She has demanded the same from Union Trust Company, but the same has been refused her. No children, other than appellant and William Henry Harrison, have been born to Russell B. Harrison, and no rights in said estate have accrued, or can accrue, to any children that may be born hereafter to said Russell B. Harrison.

Appellant prays that the court construe said order of the superior court, making said Union Trust Company trustee in respect to the proceeds of the property devised under said item 22 of said will, and in accordance with the terms of said will, and determine the rights of appellants thereunder, and that the trust be terminated as to appellant, and that said trustee be ordered to pay over to appellant said

sum and any other sums which it may hold as trustee under said order of the superior court.

Said Union Trust Company by answer admits the averments of said complaint, says that it is ready to obey the order of the court with reference to said funds so held by it in trust, and awaits direction.

Appellee Russell B. Harrison, trustee, demurred to the complaint, with memoranda, for want of facts to constitute a cause of action and to warrant the relief sought. The demurrer was sustained, to which ruling of the court the appellant excepted, and refusing to plead further, judgment was entered against her. From the ruling of the court in sustaining the demurrer to her complaint, and from the judgment rendered on such ruling, appellant prosecutes this appeal.

[1] Appellee earnestly insists that this court has no right to consider the appeal, for the reason that appellant has not complied with certain necessary well-defined rules of the court in the preparation of her transcript of the record, of the writ of certiorari, and of her brief. We hold, however, that the rules of this court, as applied to the facts to be presented, have been substantially complied with. We are fully able to comprehend the matters in issue from the brief, and the purpose of the rule has been served. *Repp v. Indianapolis, etc., Traction Co.*, 184 Ind. 675, 111 N. E. 614; *Howard v. Adkins*, 167 Ind. 184, 78 N. E. 665; *Foote v. Foote*, 53 Ind. App. 673, 102 N. E. 393; *Berkey v. Rensberger*, 49 Ind. App. 226, 96 N. E. 32; *Gelsendorff v. Cobbs*, 47 Ind. App. 573, 94 N. E. 236. The motion to dismiss heretofore filed is overruled. The case will be considered on its merits.

[2-4] Appellee insists that "the real issue in this case is whether a consent and agreed decree of judgment entered in cause No. 80,490 is binding and effective on all parties who appeared and answered the complaint upon which said judgment or decree was the finality." Numerous authorities are cited by appellee to sustain his contention that a judgment by consent or agreement is binding though there be errors in the prior proceedings or defects in the pleadings. On this assumption appellee analyzes the authorities cited by appellant and distinguishes them from the case in suit. We have, however, carefully examined the complaint in this cause, the validity of which is questioned by demurrer, and we can find no suggestion that the judgment entered in cause No. 80,940 was a consent and agreement judgment. As to this proposition appellee's authorities and argument are not in point. As appears by the complaint in question, cause No. 80,940 was for the sale of real estate in a partition proceeding and for distribution of the proceeds of sale. No other issues were involved, as far as appears by the complaint, and the facts in issue in the former suit must be determined by the pleadings. *Mitten v. Cas-*

well, etc., 52 Ind. App. 525, 99 N. E. 49; Finley v. Cathcart, 149 Ind. 470, 48 N. E. 586, 49 N. E. 381, 63 Am. St. Rep. 292. The title or possession of the fund in controversy was not put in issue by the pleadings in the former suit; hence such title or possession could not be determined by the judgment entered in such suit. *Habig v. Dodge*, 127 Ind. 31, 25 N. E. 182; *Duncan v. Holcomb*, 26 Ind. 378; *Stephenson v. Boody*, 139 Ind. 60, 38 N. E. 381; *Wilbridge v. Case*, 2 Ind. 36; *Allen v. Rice*, 16 Ind. App. 572, 45 N. E. 800; *Finley v. Cathcart*, supra. There was no issue in cause No. 80,940, tendered by the appellee herein to the appellant, as to the possession or title of the proceeds of the sale in that case which now constitute the funds in controversy in this cause, and without such an issue therein appellee is certainly not in position now to invoke against the appellant the doctrine of *res adjudicata*. *Finley v. Cathcart*, supra; *Guyer v. Union Trust Co.*, 55 Ind. App. 484, 104 N. E. 87; *Jones v. Vert*, 121 Ind. 140, 22 N. E. 882, 16 Am. St. Rep. 379. We hold that so much of the judgment in cause No. 80,940, if any, as undertakes to construe the will of Benjamin Harrison, deceased, or as undertakes to determine the title or possession of the funds in controversy in this case, was *coram non iudice* and void. Appellee contends that acceptance of the income from the fund in controversy by appellant, and her delay in bringing this suit, was such an acquiescence in the partition decree as would bar her right now to a recovery. But appellant has not been entitled to the income of the fund by virtue of the decree of partition, but by virtue of the terms of the will, so long as the fund continues to be held in trust. No one's rights have intervened, and we can see no reason why her acquiescence in conditions should work an estoppel against her. No one except herself has been injured by the funds continuing in the hands of the trustee.

[5] In his memoranda filed with his demurrer to the complaint, appellee says that there is no allegation in the complaint that the possibility of issue to Russell B. Harrison has become extinct. It is true that no such averment appears in the complaint, and, if it is a necessary averment, then the demurrer to the complaint was properly sustained. If not a necessary averment, then, having hereinbefore determined the issue of *res adjudicata* in favor of appellant, the demurrer should have been overruled. As to this matter the complaint says that no children other than appellant and William Henry Harrison have been born to Russell B. Harrison, and that no rights in said estate have accrued, or can accrue, to any children that may be

born hereafter to said Russell B. Harrison. By the express terms of the will it is provided that such portion of each child's share as may not have been expended for its benefit shall, on the coming of age of such child or its marriage, be paid over to it. It appears by the complaint that the appellant became of age January 18, 1909, and that she was married to Harry A. Williams February 5, 1912. We hold that under the settled law, both of this country and of England, either of the events aforesaid first occurring in the life of the appellant fixed the time of distribution of the estate, at which time she was entitled to the possession thereof. Any other provision of the will must yield to this specific direction, and any child or children that may be born after the date of distribution must be excluded from participation in such estate. Such a construction necessarily follows from the inconvenience of withholding the funds for a contingency, or, upon the happening of such contingency after distribution has been made, of the probable litigation and confusion that would grow out of any attempt to require repayment to any subsequently born child or children. We cite the following cases as fully sustaining this principle: *Thomas v. Thomas*, 149 Mo. 426, 51 S. W. 111, 73 Am. St. Rep. 406; *Helise v. Markland*, 2 Rawle (Pa.) 274, 21 Am. Dec. 445; *Ellison v. Airey*, 1 Ves. 111; *Whitebread v. Lord St. John*, 10 Ves. 152; *De Veaux v. De Veaux*, 1 Strob. Eq. (S. C.) 283; *Hubbard v. Lloyd*, 6 Cush. (Mass.) 522, 58 Am. Dec. 55. The case of *Thomas v. Thomas*, supra, contains a full discussion of the doctrine and its history, and a review of many authorities pertaining thereto. It is directly in point. The plaintiff in that case was a child born after the eldest beneficiary involved became of age, which was decided to be the time of distribution, and the court in closing its lengthy opinion says:

"That plaintiff answers the description of one of the class to whom the gift was devised could not be questioned, if he had been born prior to the majority of his eldest brother, but he was not born until after three of said children had reached their majority. We do not feel at liberty to reject a rule so long asserted and maintained by the highest courts of England and America, nor to discard the reasoning upon which those decisions stand."

In that case the judgment which was against the plaintiff was affirmed. In harmony with the same doctrine, we hold that in this case it was error to sustain the demurrer to the complaint.

The judgment is reversed, with instructions to the trial court to overrule the demurrer to the complaint.

(70 Ind. App. 223)

ELMORE v. BRINNEMAN et al. (No. 9855.)(Appellate Court of Indiana, Division No. 2.
May 15, 1919.)**1. STATUTES** \S 222—**CONSTRUCTION—REFERENCE TO COMMON LAW.**

In the construction of statutes, the court is to look to the meaning attached to the same words and terms by the common law, and they are deemed to be employed in their known and defined common-law meaning.

2. BROKERS \S 43(1)—**WRITTEN CONTRACT—EXCHANGE OF LAND—"PURCHASER."**

A broker cannot recover a commission for bringing about an exchange of land, under Burns' Ann. St. 1914, \S 7463, unless his contract is in writing; a "purchaser" including one who acquires title to land in an exchange of lands.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Purchaser.]

Appeal from Circuit Court, Wells County;
Wm. H. Eichhorn, Judge.

Action by Daniel T. Brinneman and William H. Davis against Charles A. Elmore. Judgment for plaintiffs, and defendant appeals. Reversed, with directions.

Frank W. Gordon, of Bluffton, for appellant.

Alram Simmons and Charles G. Daily, both of Bluffton, for appellees.

NICHOLS, J. This was an action brought by the appellees against the appellant to recover commission for the exchange of real estate owned by the appellant, for other real estate which appellees, as brokers, had for exchange. The complaint was in two paragraphs, to each of which the appellant filed a demurrer, which demurrers were each overruled, and to which ruling the appellant excepted. Appellant then filed a general denial, and, the cause being at issue, was submitted to a jury for trial, and there was a judgment in favor of the appellees for \$100. After motion for a new trial, which was overruled, the appellant now prosecutes this appeal.

The errors relied upon for reversal are: (1) Overruling the demurrer to the first paragraph of complaint; (2) overruling the demurrer to the second paragraph of complaint; (3) overruling the motion for a new trial.

The substance of the second paragraph of complaint, so far as is necessary for this decision, is as follows: The appellant was the owner of certain real estate in Wells county, Ind., in the complaint described, which he was desirous of exchanging for other real estate situate in Wells county, in

the complaint described. Appellant placed his real estate with the appellees, and directed them to exchange the same for the real estate which he desired as above mentioned, a cash difference to be paid to appellant of \$500. Appellant agreed to pay appellees \$100 if they were able to induce the owner of the second mentioned tract to exchange the same for appellant's lands upon the terms stated. The appellees induced such owner so to trade his farm for the one owned by the appellant paying the cash difference of \$500, and such exchange actually took place as the result of the efforts of the appellees. The complaint alleges nonpayment, and that the amount agreed upon is due and unpaid. The first paragraph of the complaint is substantially as the second, though not so specific.

The appellant contends that under section 7463, R. S. 1914, the contract, being an oral contract, is not valid, and that there can be no recovery upon it. This section was originally enacted March 5, 1901, at which time it was as follows:

"That no contracts for the payment of any sum of money, or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another shall be valid, unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative." Laws 1901, c. 67, \S 1.

The section was amended by the act of March 14, 1913 (section 7463, R. S. 1914), by adding a proviso thereto, which, however, does not affect it as to the question involved in this action. If this section covers a sale or purchase of real estate for a money consideration only, the demurrers were properly overruled, but if it includes also an exchange of real estate, then the demurrers should have been sustained. Before the enactment of this section, the Supreme Court of this state, in the case of Falley v. Gribbling, 128 Ind. 110, 26 N. E. 794, had adopted Washburn's definition of the word "purchase" (see 3 Washburn's Real Property, 401), which defines it as including every mode of acquiring an estate known to the law, except that by which an heir, on the death of his ancestor, becomes substituted in his place, as owner, by operation of law. At the time of such enactment, Webster's Dictionary defined a purchaser as being one who acquires an estate in lands by his own act or agreement, or who takes or obtains an estate by any means other than by descent or inheritance. See, also, Roberts v. Shroyer, 68 Ind. 68.

[1, 2] The term "sale" and "purchase" are correlative terms. By the statute of frauds (section 7462, R. S. 1914) any contract for the sale of lands, to be valid, must be in

writing, and signed by the party to be charged therewith. Under this section it was held, in the case of *Bradley v. Harter*, 156 Ind. 499, 506, 60 N. E. 139, that an oral agreement to accept conveyances of other lands in consideration for lands sold is open to the objection of the statute of frauds. The Legislature is presumed to have had these holdings of the court in mind at the time of the enactment of the section of the statute here involved, and to have used the words therein with a meaning in harmony with that given by the courts. In the construction of statutes and in determining the meaning of the words and terms employed, we are to look to the meaning attached to such words and terms by the common law, and they are deemed to be employed in their known and defined common-law meaning. *Truelove v. Truelove*, 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 27 L. R. A. (N. S.) 220, 139 Am. St. Rep. 404. Under this interpretation of the law, the Legislature must have intended that the finding of a purchaser for real estate included, not only the finding of some one who would pay a money price for the real estate offered for sale, but as well any one who by his own act was ready to acquire title to such real estate, by the payment of a valid consideration therefor, whether in money or other thing of value. It has recently been held by this court, in the case of *Boyd v. Greer*, 123 N. E. 122, that a sale of land may take the form of an exchange, and that when that is done in the absence of fraud, it has the same legal effect as if the agreed value thereof has been paid in money. In the case of *Herr v. McConnell*, 119 N. E. 496, the following contract, omitting caption and signatures, was involved:

"I hereby agree to pay to John McConnell \$2.50 per acre for trading my 615-acre farm at Hopkins Park, Ill., for garage at Hopestown, Ill., when deal is closed"

—and the court, in speaking of it, said that the section involved, being said section 7463, provides that contracts of the kind involved in that case shall not be valid unless the same shall be in writing and signed by the owner of such real estate. Under these authorities it is clear that the Legislature intended that the purchaser may be, not only one who was ready to pay a money consideration for real estate conveyed to him, but that he may as well be one ready to exchange his real estate, or other property in consideration therefor.

With this view of the law we hold that an action cannot be maintained upon the oral contract which was the basis of this action.

The judgment is reversed, with instructions to the trial court to sustain the demurrer to each paragraph of the complaint.

(70 Ind. App. 192)

INDIANAPOLIS & CINCINNATI TRACTION CO. v. HARDWICK.
(No. 9841.)(Appellate Court of Indiana, Division No. 2.
May 14, 1919.)

1. APPEAL AND ERROR ⇨254—FAILURE TO EXCEPT TO RULING—WAIVER.

Where defendant failed to except to ruling of trial court overruling its demurrer to the complaint, it waived the question, and such ruling will not be reviewed.

2. TRIAL ⇨359(2) — REVIEW — MOTION FOR JUDGMENT.

In passing on motion for judgment on answers to interrogatories notwithstanding the general verdict, the court looks only to the general verdict, the issues, and the answers to the interrogatories.

3. TRIAL ⇨343—GENERAL VERDICT—EFFECT.

The general verdict finds every material allegation of the complaint against the losing party.

4. APPEAL AND ERROR ⇨930(3)—REVIEW—MOTION FOR JUDGMENT ON ANSWERS TO INTERROGATORIES—PRESUMPTION IN FAVOR OF GENERAL VERDICT.

All presumptions are in favor of the general verdict if the pleadings will admit evidence to overcome the answers to special interrogatories.

5. CARRIERS ⇨847(3)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In action against interurban railway for death of a passenger waiting to take a car at a stopping place, under the averments of the complaint that it was the custom to enter on the track and swing a light to stop cars, and that decedent was killed because a lighted car approached with cinder trucks unlighted ahead of it, whether decedent was negligent held for the jury.

6. APPEAL AND ERROR ⇨757(1), 762—BRIEF—INSTRUCTIONS.

Where it does not appear by appellant's brief that the instructions were filed with the clerk, they are not in the record, and the omission cannot be supplied in the reply brief.

7. APPEAL AND ERROR ⇨273(5)—QUESTIONS REVIEWABLE — CORRECTNESS OF INSTRUCTIONS.

Where it is admitted that some of the instructions given were correct, and the exceptions taken were joint, there is no question presented as to the instructions.

Appeal from Circuit Court, Morgan County; Nathan A. Whitaker, Judge.

Action by Cora B. Hardwick, administratrix of the estate of John Hardwick, deceased, against the Indianapolis & Cincinnati Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Kittinger & Diven, of Anderson, Morgan & Morgan, of Indianapolis, and Kivett & Kivett, of Martinsville, for appellant.

C. E. Fenstermacher and L. W. Curry, both of Indianapolis, and H. L. McGinnis, of Martinsville, for appellee.

NICHOLS, J. This was an action brought by the appellee against the appellant to recover damages for the death of her husband, John Hardwick who was killed by being struck by one of appellant's work trains. The complaint was in one paragraph, to which a demurrer was filed by appellant and overruled by the court. Appellant filed a general denial to the complaint, and the cause was submitted to the jury for trial. There was a general verdict for \$2,500, with answers to interrogatories. The appellant made its motion for judgment in its favor on the interrogatories and answers thereto which was overruled, to which ruling the appellant excepted. Judgment was entered on the general verdict in favor of the appellee in the sum of \$2,500 and costs. From this judgment this appeal is prosecuted.

Errors relied upon for reversal are: (1) The court erred in overruling appellant's demurrer to the complaint. (2) The court erred in overruling appellant's motion for judgment in its favor upon the interrogatories answered by the jury notwithstanding the general verdict. (3) The court erred in overruling appellant's motion for a new trial.

The substance of the complaint, so far as is necessary for this decision, is as follows: The appellee is the administratrix of the estate of John Hardwick, deceased. The appellant, at the time of the accident resulting in the death of appellee's decedent, operated a street railway from the city of Indianapolis to the city of Connersville, Ind., as a common carrier of passengers for hire. Stop 33 was one of its stopping places, at which it stopped upon signal given to the motorman in charge of the car. In order to give such a signal after dark, it was customary for intended passengers to enter upon the track at said stopping place and swing a light across the track in front of the approaching car; such custom was well known to the defendant company. On November 27, 1911, it was, and had been for a long time prior thereto, the custom, and the schedule time, of the defendant company to run one of its passenger cars in a westerly direction passing stop 33 at about 6:00 p. m., which car, upon signal given, would stop to take passengers, all of which was well known both to the deceased and the appellant. About 6:00 p. m. of said day, being after dark, the deceased went to said stop 33 for the purpose of taking passage on appellant's car due to pass about that time, and, while deceased was waiting for such car to arrive, the appellant carelessly and negligently approached said stop from the east with a work

car which looked like, and had the appearance of, a passenger car which was then about due at said stop, which car was equipped and lit with electric lights in the same manner as such passenger cars, and carelessly and negligently had attached to the front end of said car four cinder trucks, which trucks were about five feet lower than the said work car, and extended about two hundred feet in front of said work car. Appellant carelessly and negligently placed lights in said work car, and carelessly and negligently failed to place any light or lights or signal of warning on said cinder trucks, and carelessly and negligently failed to give warning to the deceased of the position of said cinder trucks. On account of the darkness, and of the negligence of the defendant as aforesaid, said cinder trucks could not be seen by a person standing near said track at said stop in time to avoid being struck by them. On said November 27, 1911, as the defendant approached said stop with said work car, and said cinder trucks in front of said work car, deceased, believing it was one of its passenger cars that was about to pass said stop aforesaid, went upon the track with a lighted lantern in his hand to signal such car to stop for the purpose of taking passage on the same, and while he was in the act of signaling said car to stop he did not know of said cinder trucks, and could not see them in time to avoid being struck by them. The defendant carelessly and negligently approached and carelessly and negligently ran its cinder trucks against and over the deceased and thereby killed him. The complaint further avers that the deceased left surviving him the appellee as his widow and seven minor children, all dependent upon him for support and maintenance. There is a prayer for damages in the sum of \$10,000.

[1] The appellant failed to except to the ruling of the court in overruling its demurrer to the complaint, and has thereby waived the question, and such ruling will not be reviewed. *Young v. McLane*, 8 Ind. 357. We do not need to cite other authorities; this rule is elementary.

So far as is material to this decision, the jury found in substance: That the decedent and his daughter had gone to stop 33 after dark, for the purpose of taking passage on one of appellant's cars to Rushville. The decedent lived about one-half mile from said stop for eight months before the accident. He was 57 or 58 years of age, his hearing and eyesight were good, and he could read. He had frequently boarded and alighted from cars at this stop, and was acquainted with the surroundings and location, and knew that work trains, freight trains, and passenger cars passed said stop both in the daytime and nighttime; that the train that killed decedent consisted of a motor car and four cinder trucks pushed in front of it, and ex-

tending in front about 135 feet, and over the rails of the track at the side about 24 inches; that there was a platform on the front of the cinder trucks about 4 feet wide and 4 feet 4 inches above the rails of the track, the bed of the cinder trucks being about 4 feet above this platform, making the trucks 8 feet 4 inches high; that the track was straight for about a mile, and the ground level for a distance of about a mile east. There was no obstruction along the track east except a pole line on the north side of the track 3 feet and 11 inches north of the north rail of the track. There was a shelter house on the north side of the tracks about 4 feet therefrom, and a cinder platform between the shelter house and the north rail of the track. The decedent was killed about 5:40 p. m., and the next passenger car was due to arrive at 5:58 p. m., which was after dark. There was no lantern carried on the front end of the cinder trucks which struck decedent. There was nothing to prevent decedent from seeing a light on the front end of the train as it approached stop 33, if a light had been there. The decedent was in the shelter house on the north side of the track, and left it to go partially between the rails of the track, for the purpose of signaling a car which he knew was approaching, and tried to signal it by waving the lighted lantern across the tracks. He could have seen the car from the north side of the tracks, but voluntarily straddled the rail to signal it. If he had stood north of the tracks more than two feet from the north rail he would not have been injured. The train of cars made a noise as they approached. At about the time the decedent went upon the track his daughter said to him, "watch out, Papa!" The approaching train whistled at about 1,400 feet from the stop, and the decedent heard it, and upon hearing it went out of the shelter house, and, after looking, called for the lantern, which was handed him by his daughter, and then went partially into the middle of the track. After the whistle, the train continued to approach stop 33.

[2-5] In passing upon the motion for judgment upon the answers to interrogatories notwithstanding the general verdict, the court looks only to the general verdict, the issues, and the answers to interrogatories. The general verdict finds every material allegation of the complaint against the losing party. *Tippecanoe Loan, etc., Co. v. C., C. & St. L. R. Co.*, 57 Ind. App. 644, 654, 104 N. E. 866, 106 N. E. 739; *Stoy v. Louisville, etc., R. R. Co.*, 160 Ind. 144, 66 N. E. 615. All presumptions are in favor of the general verdict, if the pleadings will admit evidence to overcome the

answers. *Williams v. Lowe*, 62 Ind. App. 357, 113 N. E. 471. In this case the jury has found by its general verdict that the appellant was guilty of negligence that resulted in the death of appellee's decedent, and that the decedent was not guilty of contributory negligence. It is averred in the complaint that stop 33 was a stop where the appellant's cars stopped on signal; that it was the custom for passengers intending to board a car to enter upon the track at such place, and swing a light across the tracks, which custom was well known to the appellant, and acquiesced in and recognized by it, by stopping its cars upon such signals; that near the time decedent's car should arrive a car came from the east with four cinder trucks in front of it; that the car was equipped with electric lights, but the cinder trucks were not lighted at all; that no warning was given of the position or location of such cinder trucks, which were lower than the car, and decedent could not see them because of the darkness, and decedent believed the car to be the regular passenger car which would stop on signal; that, so believing, he went upon the track to signal with a light, as was the custom at said stop, and was killed by the cinder trucks. Evidence was admissible to prove these averments, and the answers to interrogatories are not inconsistent with them. Under such averments it was for the jury to say whether decedent was guilty of contributory negligence. *C., R. I. & P. Co. v. Sharp*, 63 Fed. 532, 11 C. C. A. 337; *Deister v. A. T. & S. Co.*, 99 Kan. 525, 162 Pac. 282, L. R. A. 1917C, 784. The motion for judgment on the answers to interrogatories in favor of appellant was properly overruled.

[6] It does not appear by the appellant's brief that the instructions were filed with the clerk; hence they are not in the record. *Suloj v. Retlaw*, 57 Ind. App. 302, 107 N. E. 18; *Hotmire v. O'Brien*, 44 Ind. App. 694, 90 N. E. 33. This omission cannot be supplied in the reply brief. *Decker et al. v. Mahoney et al.*, 116 N. E. 57; *Fox v. State* (Sup.) 116 N. E. 295.

[7] There is no question presented as to the instructions, as it is admitted that some of the instructions given were correct, and the exceptions taken were joint. *Inland Steel Co. v. Smith*, 168 Ind. 245, 80 N. E. 538; *Kelly v. John*, 18 Ind. App. 579, 41 N. E. 1069.

The evidence substantially sustains the averments of the complaint, and this is sufficient to support the verdict of the jury.

We find no reversible error. The judgment is affirmed.

(75 Ind. App. 456)

WILEY et al. v. WILEY et al. (No. 9924.)*

(Appellate Court of Indiana, Division No. 2.
May 13, 1919.)**1. MARRIAGE §54—VALIDITY—COLLATERAL ATTACK.**

A void marriage is good for no legal purpose, and its invalidity may be shown in any court in any proceeding between any parties, either in the lifetime of the ostensible husband and wife, or after the death of either or both of them.

2. MARRIAGE §7—INSANE PERSONS—VALIDITY.

Under the common law, a ceremonial marriage of an insane person was absolutely void.

3. MARRIAGE §2—LEGISLATIVE CONTROL.

The relations, duties, obligations, and consequences flowing from the marriage contract are so important to the peace and welfare of society that the Legislature may prescribe who may marry, the age at which they may marry, the procedure and form essential to constitute marriage, the duties and obligations created by marriage, the effect on the property rights of the parties, and the causes which shall be regarded as sufficient for its dissolution.

4. STATUTES §190—CONSTRUCTION—"VOID."

In determining the legislative intent in using the word "void" nothing is to be gained by comparing numerous statutes and decisions in which the word "void" is inaccurately used in the sense of "voidable," for in each instance the real meaning must be determined from the context and the nature of the subject-matter involved.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Void.]

5. MARRIAGE §1—NATURE OF CONTRACT.

The marriage contract is unlike any other contract, except as to the element of consent, being much more than a contract in respect to property, the evident purpose of Burns' Ann. St. 1914, § 8357, declaring marriage to be a civil contract, being to place the subject of marriages under the control of the civil authorities, to the exclusion of the ecclesiastical.

6. MARRIAGE §7—INSANE PERSONS—VALIDITY.

Under Burns' Ann. St. 1914, § 8360, the ceremonial marriage of an insane person is absolutely void, and not merely voidable, despite section 1060, relating to the manner of annulling marriages.

7. MARRIAGE §57—ANNULMENT.

To the extent that Burns' Ann. St. 1914, § 1060, relates to the matter of adjudging a marriage void, it is purely remedial, and is not intended to prevent the courts from granting relief from the presumptive consequences of void marriages in whatever form and between whatever parties the matter may be presented.

8. MARRIAGE §60(3)—ANNULMENT—INHERENT POWERS OF COURT.

Courts of equity jurisdiction have an inherent power, independent of any statute, to adjudge marriages void which in truth are void.

9. MARRIAGES §58(3)—ANNULMENT—INSANITY—"WANT OF AGE OR UNDERSTANDING."

The words "want of age or understanding," in Burns' Ann. St. 1914, § 1060, providing that when either party to a marriage shall be incapable, from want of age or understanding, to contract, such marriage may be declared void on application of the incapable party, must be held to refer only to that want of understanding which is presumed to be the concomitant of a child under the minimum age prescribed by law at which marriage may be entered into, and not to marriages by insane persons.

10. STATUTES §159—REPEAL—INCONSISTENT ACTS.

Where two statutes are seemingly inconsistent, it is the duty of the court to construe the two so that, if possible, both may stand.

11. STATUTES §142—AMENDMENT—IMPLICATION.

A statute may not be amended by implication, under Const. art. 4, § 21.

12. MARRIAGE §37, 40(4)—INSANITY—RATIFICATION—PRESUMPTION.

A marriage void by reason of insanity cannot be ratified, but should the insane party be restored to sanity, and thereafter the two should live together as husband and wife for a long period of time, the presumption may arise that the parties actually entered into a new marriage; there being a distinction between a common-law marriage and ratification.

13. MARRIAGE §61—ANNULMENT—RELIEF.

In an action to declare a marriage void, the real purpose of the proceeding being to determine property rights, it is entirely proper that the status of a child, the fruit of the alleged void marriage, be determined, so that conflicting claims may be settled without other litigation.

Appeal from Circuit Court, Decatur County; John W. Donaker, Judge.

Action by Mack H. Wiley against Emma Bagby Wiley and others. From judgment in favor of some of the defendants, plaintiff and other defendants appeal. Reversed.

This action was instituted by appellant Mack H. Wiley against appellee Emma Bagby Wiley and 28 others for the primary purpose of having an ostensible marriage adjudged void. The complaint as filed consisted of two paragraphs, but the second paragraph was dismissed, and throughout the opinion we will refer to said first paragraph as "the complaint."

The following facts are averred in the complaint:

"One Hugh F. Wiley died intestate at the county of Decatur on the 19th day of January,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Transfer denied.

1916. He left an estate consisting of real property of the value of \$15,000 (particularly described) and personal property of the value of \$1,000. He left surviving a sister, two brothers, eight nieces, six nephews, and four grand-nieces. Said surviving relatives are the deceased's sole heirs at law, and inherited his entire estate by virtue of the laws of Indiana, if the marriage assailed in this action is void. After the death of said Hugh F. Wiley his sister conveyed to the appellant Mack H. Wiley the portion of the real estate which she claims to have inherited from the deceased, being an undivided one-seventh, and that he is now the owner thereof. The personal property is sufficient to pay all claims against the estate and costs of administration.

"On May 11, 1911, the said Hugh F. Wiley was adjudged to be an insane person by a duly constituted legal tribunal, and was committed by said tribunal to the Southeastern Hospital for the Insane at Madison, Ind., in which institution he was confined for two months. At no time after his confinement in said hospital was said Hugh F. Wiley, by any court or by any proceeding known to the law, adjudged to be a person of sound mind, and from the time of his said commitment continuously to the time of his death he was an insane person.

"On April 19, 1915, a pretended marriage was solemnized between the said Hugh F. Wiley and one Emma Bagby, who is here designated by the name Emma Bagby Wiley. From the date of said pretended marriage until May 11, 1915, the said Hugh F. Wiley and Emma Bagby Wiley lived together as husband and wife, but did not so live together at any time thereafter. At the time of said pretended marriage Hugh F. Wiley was 71 years of age, and his mind and memory were so impaired that he was wholly incapable of entering into a contract of marriage. At the time of the marriage he was the owner of the property aforesaid.

"At the time of said pretended marriage, and for more than two months prior thereto, and continuously thereafter until his death, the said Hugh F. Wiley was an insane person and had not sufficient mental capacity during any of said time to understand the nature and obligations of the marriage contract, and during all of said time was incapable, from want of understanding, of contracting marriage, and continuously after said pretended marriage he was incapable, because of his want of understanding, of ratifying said pretended marriage. The said Emma Bagby Wiley at the time of the said pretended marriage, and for some days prior thereto, knew that said Hugh F. Wiley was an insane person and incapable of entering into a marriage contract.

"At the time of said pretended marriage the said Emma Bagby Wiley was a woman of bad moral character, lewd, and unchaste, and was the mother of a bastard child three years of age.

"The first meeting and the first acquaintance of said Emma Bagby Wiley and said Hugh F. Wiley was on the afternoon of April 15, 1915, and not prior thereto. At the time of said meeting, and at the time of said pretended marriage, the said Emma Bagby Wiley was enceinte, and on December 20, 1915, she was delivered of a fully developed nine-months child, who is now living, and whose name is Ethel Pauline Wiley.

The said Ethel Pauline Wiley was not begotten by the said Hugh F. Wiley and is not his child. The said Ethel Pauline Wiley was begotten by another man before the said Emma Bagby Wiley ever saw or met the said Hugh F. Wiley. At the time of said pretended marriage and prior thereto the said Hugh F. Wiley did not know, nor did he have mind enough to realize, that said Emma Bagby Wiley was pregnant, and that the said Emma Bagby Wiley then and there well knew of her physical condition and knew that she was pregnant on April 15, 1915. Said Hugh F. Wiley at no time ever acknowledged said Ethel Pauline Wiley as his child.

"Said pretended marriage was brought about and caused to be consummated through and by reason of a conspiracy entered into, planned, schemed, and formed by the said Emma Bagby Wiley, Dr. Cecil G. Harrod, Herman Borchert, and others unknown to this plaintiff, all of whom were well aware of the irresponsible mental condition of the said Hugh F. Wiley, with the fraudulent intent, purpose, and motive to acquire the property and estate of the said Hugh F. Wiley, and for the further fraudulent purpose, object, and intent of overreaching the said Hugh F. Wiley into acknowledging, when born, the then unborn illegitimate child with which the said Emma Bagby Wiley was then pregnant. The said Hugh F. Wiley at that time was insane, and was induced and influenced to enter into said pretended marriage by the concerted action and connivance, the particulars of which are not known to this plaintiff, of said conspirators, for the fraudulent and unlawful purpose of cheating and defrauding said Hugh F. Wiley out of his property, and for the fraudulent and unlawful purpose of cheating and defrauding the natural and legal heirs of said Hugh F. Wiley out of any property of which he might die the owner, and for the fraudulent and unlawful purpose of securing for themselves the property of said Hugh F. Wiley which he owned and of which he might die seized. Said Herman Borchert was and is a man of bad moral character and of long acquaintance with the said Emma Bagby Wiley, and for many months prior to said pretended marriage he was intimately acquainted with both the said Emma Bagby Wiley and the said Dr. Cecil G. Harrod.

"On April 17, 1915, said Emma Bagby Wiley and her coconspirators induced said Hugh F. Wiley to accompany her to the office of the clerk of the Decatur circuit court, where application was made for a marriage license. The clerk refused to issue a license, for the reason that a proceeding was then pending in said court for the purpose of having said Hugh F. Wiley adjudged a person of unsound mind. Thereupon said application was taken to the judge of said court, who sustained the action of the clerk and ordered that no license be issued. On April 19, 1915, said Hugh F. Wiley was taken by said Emma Bagby Wiley and her said confederates to Jeffersonville, Ind., or to Louisville, Ky., the exact place being unknown to the plaintiff, where a marriage license was obtained and a marriage ceremony performed.

"At the June, 1915, term of the Decatur circuit court said Emma Bagby Wiley was indicted for perjury arising out of alleged false answers made by her in her application for a li-

cense to marry said Hugh F. Wiley. On September 27, 1915, one Ed. B. Bach, by his affidavit filed with a justice of the peace, charging her with the crime of perjury arising out of her testimony given before the grand jury. She was put under bond in the sum of \$1,000 by the justice of the peace to appear at the next term of the Decatur circuit court. On January 17, 1916, the prosecuting attorney of said county filed his affidavit charging her with the crime of perjury arising out of her testimony before the grand jury.

"On May 8, 1915, said Hugh F. Wiley, by proper legal proceedings duly instituted, was adjudged an insane person, and recommitted to the State Hospital for Insane, and was received at said hospital May 11, 1915. He was thereafter continuously confined in said institution until his death.

"On the — day of June, 1915, said Ed. B. Bach was duly appointed guardian of the person and estate of said Hugh F. Wiley by the Decatur circuit court. On June 30, 1915, an action was commenced in said court, entitled Hugh F. Wiley v. Emma Bagby Wiley, to annul said pretended marriage on the ground of the mental incapacity of said Hugh F. Wiley at the time of said marriage. Said Bach, as guardian aforesaid, maintained, continued, and prosecuted said action until long after the death of his said ward.

"After the death of said Hugh F. Wiley said Ed. B. Bach, as guardian aforesaid, entered into an agreement with said Emma Bagby Wiley and others, which agreement is said to have been reduced to writing. Plaintiff avers that, as he is informed and believes, said agreement contains stipulations whereby said Emma Bagby Wiley and said Ethel Pauline Wiley together are to receive four-sevenths of said estate; that one Mollie K. Henderson is to receive three-sevenths of said estate; that said Ed. B. Bach and one Rollin A. Turner are to be appointed administrators of said estate; and that the suit to annul said marriage and the criminal proceedings aforesaid are to be dismissed. Pursuant to said agreement all said causes pending in said court were dismissed; said Bach and Turner, the latter being an attorney for Emma Bagby Wiley, were appointed administrators of the estate of the said Hugh F. Wiley, deceased; and said administrators are proceeding with the settlement of said estate. None of appellants was a party to said agreement nor a party to any of the proceedings, suits, or actions aforesaid. None of the appellants has in any manner consented to or ratified said agreement or any of the proceedings with reference to said actions pending in said circuit court.

"Mollie K. Henderson, as plaintiff is informed, is claiming some relationship to the deceased which will entitle her to share in his said estate, and she is made a party to answer as to such relationship and as to her interest, if any, in said estate.

"Ed. B. Bach and Rollin A. Turner, as administrators, are made defendants to answer as to any interest they may have in their trust capacity or otherwise.

"Plaintiff avers that said pretended marriage was void and of no effect from the beginning; that said Ethel Pauline Wiley was not begotten by, and is not the child of, the said Hugh F.

Wiley, and that she is the child of another man; that the descent and distribution of the property in the estate of said decedent depends on a judicial determination of the validity or invalidity of said pretended marriage, and of the legitimacy or illegitimacy of said Ethel Pauline Wiley.

"Prayer that said marriage be declared void; that the legitimacy of Ethel Pauline Wiley be determined, and that she be adjudged not to be the child of said Hugh F. Wiley; and for such further order in the premises as the court may deem just, equitable, and right."

The appellants, other than Mack H. Wiley, joined in a cross-complaint against the appellees. The substance of the cross-complaint is identical with that of the complaint. Appellees demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and also demurred to the cross-complaint on the same ground. Each demurrer was sustained. Appellants refused to plead further, and judgment was rendered accordingly. The ruling on each demurrer is assigned as error.

Elmer Bassett, of Shelbyville, for appellants.

Thomas E. Davidson, Goddard & Craig, Wickens, Osborn & Hamilton, and Tremain & Turner, all of Greensburg, for appellees.

DAUSMAN, C. J. [1] As frequently occurs in equity cases, the complaint covers a variety of elements which tend to a common purpose. The specific relief asked is (1) that the ostensible marriage be adjudged void, and (2) that the status of the child be judicially established. But it is clear that the ultimate purpose of the action is to determine the property rights of the parties. In other words, the ultimate purpose of the action is to determine who are the heirs at law and entitled to take the estate of the deceased. Under the facts averred, if the ostensible marriage is void, then Emma Bagby Wiley has no interest in said estate; and if Ethel Pauline Wiley is not the child of the deceased, then she has no interest in the estate. The purpose of the action is as unmistakable as if appellants had filed a complaint to quiet title to the real estate under section 1116, Burns 1914, or to make proof of heirship or title under section 2928, Burns 1914. It appears from the complaint that appellants are not seeking to dissolve a voidable marriage. They rest their claim to the estate on the unequivocal theory that the pretended marriage is void. They are concerned in the marital status of their ancestor to the extent only that it interferes with their alleged title to his estate. If appellants had joined in a complaint to quiet title, in the usual short form under the statute, and containing no reference whatsoever to the pretended marriage, nevertheless, under

the general rule, the marriage could have been thus attacked collaterally, and, if shown to be void, could have been so declared in that proceeding. In other words under the general rule, if the ostensible marriage is void, then the appellants would not be compelled to bring an action for the specific purpose of having it so adjudged; for a void marriage is good for no legal purpose, and its invalidity may be shown in any court, between any parties, either in the lifetime of the ostensible husband and wife or after the death of either or both of them. *Halbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17; *In re Gregorson's Estate*, 160 Cal. 21, 116 Pac. 60, L. R. A. 1916C, 697, Ann. Cas. 1912D, 1124; *Cartwright v. McGown*, 121 Ill. 888, 12 N. E. 737, 2 Am. St. Rep. 105; *Orchardson v. Co-field*, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211; *Jenkins v. Jenkins' Heirs*, 2 Dana (Ky.) 102, 26 Am. Dec. 437; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Gathings v. Williams*, 27 N. C. 487, 44 Am. Dec. 49; *Crump v. Morgan*, 38 N. C. 91, 40 Am. Dec. 447; *Sims v. Sims*, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665; *Foster v. Means*, Speers, Eq. (S. C.) 569, 42 Am. Dec. 332; *Fearnow v. Jones*, 34 Okl. 694, 126 Pac. 1015, L. R. A. 1916C, 720; *Mountholly v. Andover*, 11 Vt. 226, 34 Am. Dec. 685; 18 R. C. L. 439 et seq. However, on grounds of fairness, convenience, and propriety, it may be better for all concerned that the validity or invalidity of the ostensible marriage should be litigated and determined in an action instituted for that special purpose, and our Supreme Court has so indicated. *Bruns v. Cope*, 182 Ind. 289, 105 N. E. 471. See, also, *Williamson v. Williams*, 56 N. C. (3 Jones Eq.) 446; *Wightman v. Wightman*, 4 Johns. Ch. (N. Y.) 343. Therefore the appellees are in no position to complain of the form of the action.

[2] By the common law of England, as it has existed there for centuries, the ceremonial marriage of an insane person is void; and under that law (excluding all statutory influences) it has been the duty of every court to which, and in every form in which, the subject could be presented, to pronounce such marriage void. *Crump v. Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447; *Jenkins v. Jenkins*, supra; *Jaques v. Public Administrator*, 1 Bradf. Sur. (N. Y.) 499; *Atkinson v. Medford*, 46 Me. 510; 4 Kent's Comm. 76; *Blackstone's Comm.* subject, "Husband and Wife." That law our ancestors brought with them to this country. It was made the law of the territory of Indiana as early as 1795 by the Governor and Judges, acting under the authority of the ordinance of 1787. It was adopted by the territorial Legislature in 1807; and by legislative declaration it has continuously remained the law of this state, except wherein it is incompatible with

enactments of the General Assembly or constitutional provisions. Section 236, Burns; *Stevenson v. Cloud*, 5 Blackf. 92; *Sopher v. State*, 169 Ind. 177, 81 N. E. 913, 14 L. R. A. (N. S.) 172, 14 Ann. Cas. 27.

[3] But the relations, duties, obligations, and consequences flowing from the marriage contract are so important to the peace and welfare of society as to be subject to legislative control. The Legislature may prescribe who may marry; the age at which they may marry; the procedure and form essential to constitute marriage; the duties and obligations created by marriage; the effect on the property rights of the parties; and the causes which shall be regarded as sufficient for its dissolution. 18 R. C. L. 386, et seq.; 9 R. C. L. 245.

[4, 5] In 1852 the Legislature enacted the following statute:

"The following marriages are declared void:

"First. When either party had a wife or husband living at the time of such marriage.

"Second. When one of the parties is a white person and the other possessed of one-eighth or more of negro blood.

"Third. When either party is insane or idiotic at the time of such marriage." Section 8360, Burns 1914.

The presumption is that by the word "void" the Legislature intended precisely what the word connotes; and we would hold unhesitatingly that clause 3 of said section is merely declaratory of the common law, were it not for the familiar fact that the word "void" is commonly misused. The carelessness of legislators, judges, and lawyers in using the word "void" is deplorable and inexcusable. 29 A. & E. Enc. 1065; 40 Cyc. 214; *Bennett v. Mattingly*, 110 Ind. 197, 202, 10 N. E. 299, 11 N. E. 792; *Irwin v. Marquette*, 26 Ind. App. 383, 59 N. E. 38, 84 Am. St. Rep. 297. In determining the legislative intent nothing is to be gained by comparing the numerous statutes and decisions in which the word "void" is inaccurately used in the sense of "voidable"; for in each instance the real meaning must be determined from the context and the nature of the subject-matter involved. Nor can we derive any assistance by considering how the word is used in the law of negotiable instruments, conveyances, and contracts generally; for it is clear that the marriage contract is unlike any other contract, except as to the element of consent. It is much more than a contract with respect to property. 18 R. C. L. 383 et seq.; *Noel v. Ewing*, 9 Ind. 37; *McCabe v. Borge*, 89 Ind. 225; *Pence v. Aughe*, 101 Ind. 317; *Castor v. Davis*, 120 Ind. 231, 22 N. E. 110. True, the Legislature has declared marriage to be a civil contract. Sec. 8357, Burns 1914. But the evident purpose of that declaration is to place the subject of marriages under the con-

trol of the civil authorities to the exclusion of the ecclesiastical, and to prevent its degradation by being subjected to the mandates, dogmas, or vagaries of any particular sect or cult. *Michigan University v. McGuckin*, 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917; *Grigsby v. Reib*, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E, 1, Ann. Cas. 1915C, 1011; note L. R. A. 1915E, 15.

An ethical marriage is pre-eminently psychical. It is the union of two lives in mutual esteem, confidence, and love. "While it is in some degree of the head, it is primarily and chiefly of the heart;" and the ceremonial solemnization, in accordance with the requirements of the state, is "the legal band around affections assumed to be already united." *Bishop, M. D. & S. § 599*; *Herbert Spencer, Ethics of Individual Life*; *Orchardson v. Cofield*, *supra*. There may be a lawful marriage where the ethical element is lacking, but the very least that the law will tolerate is mutual consent. Where one of the parties is insane there can be no mutual consent, and therefore no marriage. In such cases it would be shameful to hold that any sort of ceremony can create the relation of husband and wife. From the thought of it reason and conscience revolt.

When we reflect upon the nature of marriage and contemplate its importance in the development of the race, we realize the necessity of cherishing so precious an institution and of maintaining its essential characteristics. It is the foundation of the home and the origin of those family ties without which we would cease to be human. It is the source of those motives which prompt us to provide care and comfort for childhood and old age, and to plan and toil and sacrifice for the welfare of future generations. Throughout the ages it has fostered the development of those qualities of head and heart which give us all there is of worth in life. *Bishop v. Brittain Invest. Co.*, 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868. We cannot believe, therefore, that the General Assembly intended by section 8360 to provide a way whereby marriage may be polluted; but we are of the opinion that it intended thereby to protect it against just such wickedness as is averred in the complaint. By declaring the ceremonial marriage of an insane person void, the law frustrates the unscrupulous by blasting the hope of pecuniary gain. See *Huffman v. Huffman*, 51 Ind. App. 330, 99 N. E. 769.

[6] In view of all the legislation on this subject, we have no doubt that it is the purpose and policy of the Legislature to protect the citizens of the state from the evil consequences which would inevitably result from the marriage of the insane. The legislative effort to afford this protection would be nullified by holding such marriages voidable.

See section 8363 et seq., *Burns* 1914. We are of the opinion that the word "void" in said section 8360 is accurately used, and that under the facts averred in the complaint the ceremonial marriage of *Hugh F. Wiley and Emma Bagby* is void.

But counsel insist that section 1060, *Burns* 1914, supports their contention that the Legislature intended that the marriage of an insane person should be not void, but voidable. Section 1060 is in the following language:

"When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void, on application of the incapable party, by any court having jurisdiction to decree divorces; but the children of such marriage, begotten before the same is annulled, shall be legitimate; and in such cases the same proceedings shall be had as provided in applications for divorce."

This section is section 25 of an act entitled:

"An act regulating the granting of divorces, nullification of marriages, and decrees and orders of courts incident thereto, and repealing all laws conflicting with this act, and declaring an emergency." Acts 1873, p. 107.

The real question presented by this contention is whether the Legislature intended that the words "want of * * * understanding," in section 1060, should be taken as the equivalent of "insane or idiotic," in section 8360.

[7-8] It is clear that, to the extent that it relates to the matter of adjudging a marriage void, section 1060 is purely remedial. As to that feature there is nothing to be said in its favor, if it be applicable to a marriage where one of the parties is insane. It confers no power upon the courts; for it is universally conceded that courts of equity jurisdiction have inherent power, independent of any statute, to adjudge marriages void which in truth are void. *Henneger v. Lomas*, 145 Ind. 287, 299, 44 N. E. 462, 32 L. R. A. 848, and authorities there cited. It is a wise provision of the law which has clothed the courts with this inherent power; for, while it is not essential that such a judgment must be rendered in order that the presumed consequences of an ostensible marriage may be avoided, nevertheless such a judgment serves a beneficent purpose, which cannot be so effectively accomplished in any other way. Such a judgment, when rendered in an action between the parties to an ostensible marriage, constitutes an unassailable record, which fixes the true status of the parties, overthrows the presumptive rights which arise from and are dependent upon the supposed marriage, and affords security to all persons who may have business or social re-

lations with the ostensible husband and wife. To permit this inherent judicial power to be curtailed or narrowed would be a public misfortune. We are of the opinion that this statute was not intended to prevent the courts from granting relief from the presumptive consequences of void marriages, in whatever form and between whatever parties the matter may be presented. Apparently its purpose is to give a remedy to "the incapable party" whose incapacity is due merely to want of age, and we cannot extend its effect beyond that.

If the Legislature intended by section 1060 to give a remedy to an incapable party whose incapacity is due to insanity, then manifestly it is inadequate for the purpose intended. Where one of the parties is insane, such insane party cannot, of course, while insane institute an action in his own behalf to declare the marriage void; and the Legislature has not authorized any one, not even his guardian, to institute such an action for him. *Pence v. Aughe*, 101 Ind. 317. To make the remedy in any event available to the insane person, we would be obliged to read into said section the provision that the insane person may avail himself of the remedy on being restored to sanity. On that basis, if the insane person never should be restored to sanity he would remain married until death, and everybody concerned, and also the state, would be bound by the marriage. Such a rule can rest on nothing other than the conception of a voidable marriage. Such a rule would be so far beneath the established standard of decency, so abhorrent to the prevailing moral sense, and so incompatible with the public welfare, as to be intolerable in a civilized commonwealth. Such a rule would permit an unscrupulous adventurer or adventurer to acquire property by a method involving moral turpitude to a greater degree than forgery or burglary, to say nothing of the deplorable consequences likely to be entailed upon the children of the insane. Furthermore, to put that construction on section 1060 would be unwarranted, for the reason that by implication it would deprive the sane party, however innocent and honest, of any remedy whatsoever. See *Huffman v. Huffman*, supra. Also it would bring this section into direct conflict with section 8360.

[10, 11] It is our duty to construe the two sections now under consideration so that, if possible, both may stand. For obvious reasons we cannot entertain the thought that the Legislature intended by enacting section 1060 to repeal section 8360. We dare not say that the former amends the latter, for a statute may not be amended by implication. Section 21, art. 4, Constitution of Indiana. The title of the act of 1873 excludes every conclusion other than the one we have reached, if section 1060 is to be regarded as constitu-

tional. We are of the opinion, therefore, that by the words "want of age or understanding" the Legislature had reference only to that want of understanding which is presumed to be the concomitant of a child under the minimum age prescribed by law at which marriage may be entered into.

Our attention has been directed to certain cases which apparently conflict with our decision in the case at bar, and it is advisable that we give them some consideration.

In *Teter v. Teter*, 88 Ind. 494, it is stated, in effect, that a ceremonial marriage, where the man has a wife then living, is void, but that a ceremonial marriage where one of the parties is insane is voidable. But the question whether the ceremonial marriage of an insane person is void or voidable was not before the court, and the statement concerning that question is pure dictum. A reading of the case of *Koonce v. Wallace*, 52 N. C. 194 (7 Jones, 194), discloses that the statement therein made concerning the same question is also pure dictum. We have, then, a case of dictum resting on dictum. Furthermore, in *Koonce v. Wallace* the court referred to a marriage into which one of the parties was incapable of entering by reason of "a mere want of age or understanding." That dictum, therefore, must be regarded as one of those side remarks which are so apt to fall lightly and unobserved when the mind is intent on the main question. Had the question been briefed and argued, and presented to the court as the real question for decision, we are forced to assume that the statement would not have been made. Section 8360 declares void three kinds of marriages. The word "void" is used but once in that section. While the Legislature sometimes has used "void" in the sense of "voidable," it is incredible that it would attempt to use the word in both senses at the same time in the same sentence.

In *Bruns v. Cope*, 182 Ind. 289, 105 N. E. 471, it is stated, contrary to the general rule, that the marriage status cannot be questioned in a statutory action; and this holding is apparently on the ground that the question of the validity of a presumptive marriage never should be submitted to a jury. Concerning the opinion in the *Bruns* Case we deem it our duty to say, most respectfully, that it confounds the element of insanity with the element of fraud. In other words, it indicates that the law regards a ceremonial marriage where one of the parties is insane as being exactly on the same footing as a marriage into which one of the parties is induced by fraud. Evidently the Legislature was of the opinion that, in the very nature of things, the one differs radically from the other; for it has declared void the one, but not the other. Section 8360, supra. We must keep constantly in mind that we are

bound by this statute. Furthermore, with respect to the point now under consideration, the *Bruns Case* seems to conflict with prior decisions by the same court, which prior decisions are therein cited and approved. *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453; *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600. See, also, *Teter v. Teter*, 88 Ind. 494; *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78. However, the *Bruns Case* does not conflict in the slightest degree with our view of the case at bar, for this action is in the form suggested by that case.

[12] On account of certain averments in the complaint we deem it proper to say that a void marriage cannot be ratified. The ratification of nothing is unthinkable and impossible. *Teter v. Teter*, 88 Ind. 494. Should the insane party be restored to sanity, and thereafter the two should live together as husband and wife for a long period of time, under circumstances evincing pure motives and good faith from the beginning, then from their subsequent and continued conduct the presumption may arise that the parties actually entered into a new marriage, which new marriage, although there was so solemnization and no compliance with any of the provisions of the statute relating to the procurement of a license, nevertheless in some cases may be valid at common law. *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742; *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78. The distinction between such a marriage, commonly called a common-law marriage, and ratification, is real and substantial. The presumption of marriage arising out of the conduct of the parties is one of fact. It is therefore rebuttable, and reliance upon it is hazardous.

In order that there may be no misunderstanding we desire to emphasize the fact that, in arriving at the conclusion that the ceremonial marriage of *Hugh F. Wiley and Emma Bagby* is void under the averments of the complaint, we have excluded from consideration the allegations concerning fraud and conspiracy, and we hold said marriage void solely on the ground of his alleged insanity. But this statement must not be taken as an intimation that the manner in which the marriage was brought about may not be proved at the trial for whatever bearing it may have on the main issue.

[13] However, it is entirely proper that the status of the child *Ethel Pauline* should be determined in this action, so that all conflicting claims to the estate of the deceased may be settled without other litigation.

The judgment is reversed, and the trial court is directed to overrule each demurrer, and to permit further proceedings in accordance with this opinion.

(326 N. Y. 622)

PHONVILLE v. NEW YORK & CUBA S. S. CO. et al.

(Court of Appeals of New York. April 22, 1919.)

1. MASTER AND SERVANT ⇐385(12)—WORKMEN'S COMPENSATION—AMOUNT OF COMPENSATION.

An employe earning \$35.00 a week, who has lost three-fourths of his right hand, is entitled as compensation to \$20 a week for 183 weeks, and not to \$15 a week for 244 weeks, since the extent of the employe's injuries limits, not the amount of payments, but the time during which they are to continue.

2. MASTER AND SERVANT ⇐385(11)—WORKMEN'S COMPENSATION—COMPENSATION.

Permanent loss of the use of the hand, arm, foot, leg, or eye is equivalent to the loss of the organ itself.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings under the Workmen's Compensation Law (Consol. Laws, c. 67) by William E. Phonville for compensation for injuries, opposed by the New York & Cuba Steamship Company, employer, and the Travelers' Insurance Company, insurance carrier. From an order of the Appellate Division (173 N. Y. Supp. 919) modifying, and as modified unanimously affirming, an award by the State Industrial Commission, the employer and insurance carrier appeal. Order of Appellate Division reversed, and award of State Industrial Commission affirmed.

See, also, 174 N. Y. Supp. 917.

E. C. Sherwood, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. [1, 2] The Industrial Commission has found that the claimant has lost the use of 75 per cent. of his right hand. His weekly wages being \$35.00, it awarded him \$20 a week for 183 weeks. Unanimously approving the findings of fact, the Appellate Division altered this award to \$15 a week for 244 weeks. In this it erred. The act fixes but one rate of compensation for injuries. The workman is to receive two-thirds of his weekly wages, not exceeding a certain sum. The extent of his injuries limits, not the amount of these payments, but the time during which they are to continue. If for the loss of a hand that time is 244 weeks, for the loss of three-fourths of the hand it is 183 weeks. The weekly compensation for the loss of a hand, arm, foot, leg, or eye is not to exceed \$20 a week. Permanent loss of the use of any such member is equivalent to the loss. The same measure applies to it. In other cases \$15 is the limit. In 1917 an

award was authorized for the proportionate loss of the use of a hand. Clearly the compensation for such proportionate loss is intended to be some fraction of the amount allowed for the total loss. The weekly limit is \$20 not \$15.

Because of the unanimous affirmance no other questions need be considered by us.

The order of the Appellate Division should be reversed, and the award of the state Industrial Commission affirmed, but without costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOSO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order reversed, etc.

(233 Ill. 159)

**WABASH R. CO. v. BOARD OF REVIEW
OF COOK COUNTY. (No. 12624.)**

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 6, 1919.)

TAXATION — RAILROADS — EFFECT — OPERATION BY FEDERAL GOVERNMENT.

The taking over by the United States government of the control and operation of the railroads under the act of Congress (U. S. Comp. St. 1918, §§ 3115½a-3115½p) providing for the operation and control of railroads by the federal government did not, in view of sections 1, 10, 12, and 15 of such act, render the money received from their operation exempt from taxation by the state.

Appeal to Review Decision of Board of Review of Cook County.

Objections by the Wabash Railroad Company to the action of the Board of Assessors in raising an assessment filed with the Board of Review of Cook County. From a decision of the Board of Review, confirming the assessment, the objector appeals. Decision affirmed.

John Gibson Hale, of Chicago, for appellant.

Edward J. Brundage, Atty. Gen., and Clarence N. Boord, of Chicago, for appellee.

FARMER, J. The Wabash Railroad Company made and filed with the board of assessors of Cook county a schedule of personal property showing cash on hand on April 1, 1918, \$10,000. The board of assessors raised the amount to \$50,000, and made return of its assessment of one-third of that amount (\$16,667) to the board of review. The railroad company filed its objection to the action of the board of assessors with the board of review, claiming the cash on hand was not its property, but was the property of the United States government, by reason of the govern-

ment's control and operation of the railroad since January 1, 1918, and that all such moneys received from such operation and control, under the provisions of section 12 of the Federal Railroad Control Act (Act March 21, 1918, c. 25 [U. S. Comp. St. 1918, § 3115½]), were the property of the United States government, and not subject to taxation by the state. The board of review confirmed the assessment, and the railroad company, claiming to act for the Director General of Railroads of the United States, appealed to the auditor of public accounts, and he has pursuant to the statute filed in this court a certified statement of the facts, including the affidavit of F. L. O'Leary that he is federal treasurer of the Wabash Railroad Company; that between January 1, 1918, and June 1, 1918, all moneys received from the operation of the road in excess of disbursements made in operation of the road were in certain depositories and carried in the name of the Wabash Railroad Company; that all moneys on hand April 1, 1918, in banks in Cook county, or with station agents or other depositories, were received from the operation of the road subsequent to January 1, 1918, and belonged to and were the property of the United States government. The question presented is whether the money scheduled was subject to taxation by the state authorities.

It was settled by the decision of the Supreme Court of the United States in *McCulloch v. State of Maryland*, 4 Wheat. 429, 4 L. Ed. 579, that the power of a state to tax does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States, and that doctrine has since the decision of that case been adhered to by federal and state courts. Did the taking over by the United States government of the control and operation of railroads under the act of Congress providing for the operation and control of railroads by the federal government render the money received from their operation exempt from taxation by the state?

Section 1 of the said act of Congress (U. S. Comp. St. 1918, § 3115½a) provides that the President, having in time of war taken over the possession, control, and operation of certain railroads and systems of transportation, is authorized to agree with and guarantee to any such carrier making operating returns to the Interstate Commerce Commission that during such federal control it shall receive as compensation not exceeding a sum equivalent, as nearly as may be, to its average annual railway operating income for the three years ending June 30, 1917. Said section further provides:

"Every such agreement shall provide that any federal taxes * * * commonly called war taxes, assessed for the period of federal control beginning January 1, 1918, or any part

of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under federal or any other governmental authority for the period of federal control or any part thereof, either on the property used under such federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation, * * * shall be paid out of revenues derived from railway operations while under federal control; that all taxes assessed under federal or any other governmental authority for the period prior to January 1, 1918, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation."

Section 10 (U. S. Comp. St. 1918, § 3115½) provides:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government: * * * Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, * * * it is necessary to increase the railway operating revenues," the Interstate Commerce Commission, in determining the reasonableness of a rate, shall take into consideration the finding by the President, together with such recommendations as he may make.

Section 12 declares moneys derived from the operation of the carriers during federal control to be the property of the United States, and—

"disbursements therefrom shall, without further appropriation, be made in the same manner as before federal control and * * * are chargeable to operating expenses or to railway tax accruals. * * * If such revenues are insufficient to meet such disbursements, the deficit shall be paid out of such revolving fund in such manner as the President may direct."

Section 15 (U. S. Comp. St. 1918, § 3115½) provides:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

By the terms of the act federal control was not to continue to exceed 21 months after the war. We understand the taking over of the operation and control of the railroads by the federal government was a temporary war measure, and that they did not thereby become instruments or agencies of the government for the purpose of carrying into effect powers of the government conferred by the people—at least to the extent that their property was not subject to taxation by the states. It would seem from the provision of section 1 "that other taxes assessed under federal or any other governmental authority" during federal control, "or on the revenues, or any part thereof, derived from operation, * * * shall be paid out of revenues derived from railway operations while under federal control," and from the provisions of sections 10, 12, and 15 relating to tax accruals, that it was not the intention of Congress to deprive the states of the power of taxation which they possessed and exercised prior to the passage of the act temporarily taking over, not the ownership, but the operation and control, of railroads.

The decision of the state taxing authorities in assessing the property is approved, and the assessment confirmed.

Decision affirmed.

(238 Ill. 90)

LEWARK v. DODD et al. (No. 12347.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 4, 1919.)

1. DESCENT AND DISTRIBUTION §1—NATURE.

The descent of property whether by inheritance or devise is controlled by statute.

2. WILLS §1—TESTAMENTARY POWER—NATURE.

The right to make a will, and the right to take property under a will, exist only by virtue of the statutes, and are entirely subject to their provisions.

3. WILLS §222—CONTEST OF WILL—STATUTORY REMEDY.

The right to contest a will by a bill in chancery is purely statutory, and can be exercised only in the manner and within the limits prescribed by Statute of Wills, § 7.

4. WILLS §260—CONTEST OF WILL—LIMITATIONS.

Statute of Wills, § 7, providing that any person interested shall appear to contest probate of will within one year after probate or where claimant was under disability at time of probate within one year after removal of disability, is not a statute of limitations, but one conferring jurisdiction.

5. COURTS \Leftrightarrow 95(2)—DECISIONS—CONSTRUCTION OF STATUTES.

In construing a statute, the decisions of other states with practically similar statutes are not controlling, but at most are merely persuasive.

6. WILLS \Leftrightarrow 352—ACTION TO CONTEST WILL—DECREE.

On a bill to contest a will under Statute of Wills, § 7, brought within one year after contestant had become of age, but more than one year after the probate of the will, a decree adjudging the will void in its entirety, instead of limiting the effect of the decree to the interest of contestant, is erroneous.

7. EQUITY \Leftrightarrow 377—PROCEDURE—ISSUES FOR JURY.

Where judge exercises both common-law and chancery jurisdiction in the same court at the same time, and has the right to make the issue at law and immediately call a jury to try it, it is unnecessary to follow some of the rules which prevail under the system of separate courts of chancery and common-law jurisdiction, and in practice some of such rules are disregarded.

8. WILLS \Leftrightarrow 318(1) — ACTION TO SET ASIDE PROBATE—SUBMISSION OF ISSUES.

On bill to contest a will under Statute of Wills, § 7, the usual method of submitting issue to be tried by jury is in form of questions made up by court, or by the parties under the direction of the court, framed so as to require merely an affirmative or negative answer.

9. APPEAL AND ERROR \Leftrightarrow 213 — SUBMISSION OF ISSUES—WAIVER.

Objections to the manner in which the issue was submitted to the jury will be regarded as waived, where no objection was made to trial court.

Appeal from Circuit Court, Cook County; Oscar M. Torrison, Judge.

Bill by Elmer N. Lewark against Charles Dodd and others. Decree for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Albert Peterson and William E. Cloyes, both of Chicago, for appellants.

Frank B. Murray, Alanson C. Noble, and Ralph F. Potter, all of Chicago, for appellee.

CARTER, J. Appellee, Elmer N. Lewark, a minor, in June, 1917, filed a bill by his next friend in the circuit court of Cook county to contest the will of Lula G. Knorr upon the ground of the insanity of the testatrix and the undue influence of the sole devisee with reference to the same. Upon the trial of the issue in the circuit court the jury returned a verdict finding that the instrument in question was not the last will and testament of Lula G. Knorr, and the court rendered a decree adjudging the will, and the probate thereof, void. This appeal followed.

Lula G. Knorr executed the instrument here in question on September 20, 1913, leaving all of her property to Mary E. Dodd, the wife of Charles Dodd; neither of them being related in any way to her. The testatrix died October 21, 1913. She left no surviving husband, and her heirs were her mother, Mary E. Knox, and Elmer N. Lewark, the appellee, and his sister, who were her nephew and niece. The will was admitted to probate January 8, 1914. On January 7, 1915, Mrs. Knox and the appellee and his sister (both the latter then being minors, by Mrs. Knox, their next friend) filed a bill to contest the will, which was afterwards dismissed for want of prosecution. The bill on which the decree here in question was entered was filed June 1, 1917. Appellants do not question the verdict, but they insist that the court erred in decreeing the will to be void in its entirety, instead of limiting the effect of the decree to the interest of the appellee, and that no issue of law was properly made up as to whether the writing produced was the last will and testament of the testatrix.

[1-3] In this state the descent of property, whether by inheritance or devise, is controlled by statute. The right to make a will, and the right to take property under a will, exist only by virtue of the statutes of this state, and are entirely subject to their provisions. In re Estate of Graves, 242 Ill. 212, 89 N. E. 978; Kochersperger v. Drake, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446. The right to contest a will by a bill in chancery is purely statutory, and can be exercised only in the manner and within the limitations prescribed by the statute. Selden v. Illinois Trust & Savings Bank, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180; Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211; Spaulding v. White, 173 Ill. 127, 50 N. E. 224. The provision for the contest of wills is found in the proviso to section 7 of the Statute of Wills, as follows:

"Provided, however, that if any person interested shall, within one (1) year after the probate of any such will, testament or codicil in the county court as aforesaid, appear and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the circuit court of the county wherein such will, testament or codicil shall have been proven and recorded as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate shall be forever binding and conclusive on all of the parties concerned, saving to infants or non compos mentis the like period after the removal of their respective disabilities." Hurd's Stat. 1917, p. 2967.

[4] This proviso is not a statute of limitations, but is one conferring jurisdiction. *Sinnet v. Bowman*, 151 Ill. 146, 37 N. E. 885; *Spaulding v. White*, supra; *Carlin v. Peerless Gas Light Co.*, 283 Ill. 142, 119 N. E. 66.

The question first presented here is whether, by the proviso to said section 7 as to contesting wills, the court is given the right to entirely set aside the will at the suit of one within the saving clause after the year has passed, so as to wholly destroy the interests of all the beneficiaries named by the instrument, or only to set it aside as it affects the interests of the heir, who was an infant or non compos mentis at the time the will was probated, and who filed such contest before the expiration of a year after becoming of age or becoming sane, as the case may be.

This court in *Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145, discussed at some length the history of our statute on wills and the sources from which its various provisions were derived, stating that section 7, as to the contest of wills, was taken, in substance, in 1829 from the statute of Kentucky (1 *Littell's Laws*, p. 611), and that the Kentucky statute was taken, in turn, from the Virginia statute (12 *Hening's St. at Large*, p. 140). It is stated in that opinion, also, that under the common law there could be a contest of the will every time it was offered in evidence. The earliest Virginia statute (1748 [5 *Hening's St. at Large*, 454]) referred to in that case provided for the probate of wills upon due notice and contained no provision as to contests by persons under no disability, but provided that a contest by those under certain disabilities, such as being under age or non compos mentis, must be brought within ten years after their several disabilities and incapacities were removed. The later Virginia statute (1785) provided that any contest must be brought within seven years after the probate, whether brought by one under legal disability or not. The Illinois statute of 1829 provided that those under disabilities must bring the contest, if at all, within five years after their disability was removed. The statutes of Virginia and Kentucky with reference to will contests are very similar to the statute of this state.

It will thus be seen that the tendency has constantly been to shorten the time within which the contest can be brought and to narrow the classes of people for whose benefit the time is extended. Now the statute of this state provides that the contest must be brought within a year after the disabilities are removed; the last amendment in 1903 changing the limitation from three years to one. Under the authorities already cited there can be no question that the Legislature could, in terms, fix the time of contest as to all parties in any manner that it desired. In view of the history of legisla-

tion on this subject, did it intend, when it passed the proviso to section 7 as it now reads, to make the probate of the will binding and conclusive on all parties except infants and persons non compos mentis, unless a contest was begun by one or more of the parties not under disability within one year after the probate of the will? This question has never been passed upon by this court, but under practically similar statutory provisions as to contesting wills the Supreme Courts of California and Montana have held that such a statute was conclusive as to all those under no disabilities if the contest was not begun within the time so limited. *Samson v. Samson*, 64 Cal. 327, 30 Pac. 979; *Spencer v. Spencer*, 31 Mont. 631, 79 Pac. 320. *Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507, is in accord with the same conclusion.

[5] It has also been held that where one coheir or tenant in common is under disability, his coheirs or cotenants who are not under disability will still be barred by the statute of limitations, even though the statute saves the right of the cotenant under disability. *Roe v. Rowleston*, 2 Taunt. 441; *Stovall v. Carmichael*, 52 Tex. 383; *Belote v. White*, 2 Head (Tenn.) 703. On the other hand, the reasoning of the courts in *Powell v. Koehler*, 52 Ohio St. 103, 39 N. E. 195, 28 L. R. A. 480, 49 Am. St. Rep. 705, *Wells v. Wells*, 144 Mo. 198, 45 S. W. 1095, and *Crocker v. Williamson*, 208 N. Y. 480, 102 N. E. 588, would tend to the opposite conclusion. We agree, however, with counsel for appellants that some of the decisions last cited did not have the identical question raised that is raised here. In any event, none of the decisions in other jurisdictions are necessarily controlling here, and at the most they are only persuasive.

[6] It is argued with earnestness by counsel for appellee that it is unreasonable to construe the statute so that a will can be valid as to certain of the heirs or parties and invalid as to others; that the will should be annulled in its entirety or not at all. We see no difficulty, however, in voiding the probate so far as concerns the interest of the contesting heirs then or formerly under disability, and permitting it to stand so far as it concerns the heirs who have lost their rights by lapse of time. It is purely a question of what the Legislature intended. One of the great objects of the law is to quiet the title to property and render it certain. If section 7 is to be construed as contended for by counsel for the appellants, there would be a chance that 20 years or more after a will was probated the whole title under which the beneficiaries claimed might be overthrown and the property given to the heirs. This would render it very difficult, if not impossible, to dispose of the property or improve it to any considerable extent during all that time. It is the policy of the law to

limit uncertainties, such as the one here under consideration, as much as is commensurate with other rights which the law cannot overlook. It is clear the policy of the law has been for many years in this country, and especially in this state since 1829, to limit the time in which will contests could be brought. It would be absolutely contrary to the trend of public policy in this regard to construe this statute as holding that the rights of the beneficiaries, not only with respect to those heirs who are under disability, but also with respect to those under no disability, shall remain unsettled until such time as the disabilities of all the heirs are removed. In our judgment a fair construction of the statute, in the light of the history of legislation upon this subject, is that after the year the probate is, as the proviso says, forever binding and conclusive on all the parties concerned, except infants and persons non compos mentis. The circuit court erroneously held otherwise.

It is also urged by counsel for appellants that the final decree is wrong, because the record shows that no issue of law was properly made up as to whether the writing produced was the last will and testament of the testatrix. The decree recites:

"The court having heretofore directed an issue at law to be made up whether the writing referred to in the pleadings and purporting to be the last will and testament of Lula G. Knorr, deceased, was the last will and testament of the said Lula G. Knorr or not, and a jury * * * having been duly called, selected, and sworn to try the said issue, * * * and the jury having found by their verdict that the said writing was not the last will and testament of said Lula G. Knorr, deceased," etc.

[7] In a system of practice where the common-law and equity courts were entirely separate and their jurisdiction was exercised by different judges, an issue to be tried at law was certified by the chancery court to the common-law court, and after the trial the verdict was certified by the common-law court back to the chancery court. Under our system the same judge exercises both common-law and chancery jurisdiction in the same court at the same time, and he may make the issue at law and immediately call a jury to try it. This practice has made it unnecessary in our courts to follow some of the rules which prevailed under the system of separate courts of chancery and common-law jurisdiction, and in practice some of such rules are disregarded. *Williams v. Bishop*, 15 Ill. 553; *Milk v. Moore*, 39 Ill. 584.

[8, 9] The usual method of submitting the issue to be tried by a jury in a case of this character is in the form of questions made up by the court, or by the parties under the direction of the court, framed so as to require merely an affirmative or negative an-

swer. Whether or not that was done in this case the record does not set out at length. The recital in the decree is that it was done, and that the issue was submitted to the jury, and the verdict so returned by the jury upon that issue must be taken as showing that it was done. There seems to have been no objection made in the circuit court as to the manner in which this question was submitted. Therefore any objection to the manner in which it was submitted must be regarded as waived.

The decree of the circuit court will be reversed, and the cause remanded, with directions to enter a decree in accordance with the views herein expressed, holding the will to be void, but limiting the effect of the decree only as to the interest of the minor heir of Lula G. Knorr, deceased, who by his next friend brought this contest.

Reversed and remanded, with directions.

(238 Ill. 87)
JAKUB v. INDUSTRIAL COMMISSION et al. (No. 12539.)

(Supreme Court of Illinois. April 15, 1919.)

1. MASTER AND SERVANT §417(3) — WORKMEN'S COMPENSATION — REVIEW—NECESSITY OF REVIEW BY COMMISSION.

In proceeding under the Workmen's Compensation Act, the circuit court may review the record by certiorari under section 19, without the necessity of a review of the decision of the arbitrator by the Industrial Commission.

2. MASTER AND SERVANT §376(2) — WORKMEN'S COMPENSATION—PRE-EXISTING DISEASE—CAUSE OF DEATH.

Under the Workmen's Compensation Act, compensation may be awarded, although there is a pre-existing disease, if the disease is aggravated and accelerated by an accidental injury in the course of employment, but there must be an accidental injury as the immediate or proximate cause of death.

3. MASTER AND SERVANT §372—WORKMEN'S COMPENSATION—"ACCIDENTAL INJURY."

An "accidental injury," within the Workmen's Compensation Act, is one which occurs in the course of the employment, unexpectedly, and without the affirmative act or design of the employé; it being something which is unforeseen and not expected by the person to whom it happens.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Accidental Injury.]

4. MASTER AND SERVANT §376(2) —WORKMEN'S COMPENSATION—ACCIDENT AS CAUSE OF DEATH.

Where an employé engaged in baling scrap copper was found dead near the baling press, with a completed bale of copper beside him, and there was no evidence proving accident, or accidental injury, the claim being that the heavy

work which deceased was doing hastened his death by heart and kidney disease, there could be no recovery.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding by Eudokia Jakub under the Workmen's Compensation Act for compensation for the death of her husband, John Jakub, opposed by J. Sandrovitz & Co., employer. Denial of award by an arbitrator was filed with the Industrial Commission, and became final as its decision. The finding was confirmed on certiorari to the Circuit Court, and applicant brings error. Affirmed.

Isaac Landsberg, of Chicago, for plaintiff in error.

Truman Henry Miner, of Chicago (Alfred Roy Hulbert, of Chicago, of counsel), for defendant in error.

CARTWRIGHT, J. Plaintiff in error, Eudokia Jakub, applied to the Industrial Commission for compensation for the death of her husband, John Jakub, while in the employment of defendant in error, J. Sandrovitz & Co. An arbitrator found that Jakub did not sustain accidental injuries arising out of and in the course of his employment, and denied the application. The decision of the arbitrator was filed with the Industrial Commission, and became final as the decision of the commission. Plaintiff in error sued out a writ of certiorari from the circuit court of Cook county, and, a return being made by the commission, the court confirmed the finding, and certified that the case was one proper to be reviewed by this court.

[1] There was no application for a review by the Industrial Commission of the decision of the arbitrator, and the question is presented whether the circuit court had jurisdiction to review the decision. Section 19 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 144) provides that the decision of the arbitrator shall be filed with the Industrial Commission, which shall send to each party a copy of the decision, and, unless a petition for review is filed by either party within 15 days after the receipt by said party of a copy of the decision, then the decision shall become the decision of the Industrial Commission; that the decision of the Industrial Commission, acting within its powers, and of the arbitrator or committee of arbitration, where no review is had, and his or their decision becomes the decision of the Industrial Commission, shall, in the absence of fraud, be conclusive, unless reviewed as therein provided. The provision for such review is that the circuit court of the county where any of the parties defendant may be found shall, by writ of certiorari to the Industrial Commission, have power to review all questions of law presented by the record. Plaintiff in error did not avail herself of the

statutory right to a review of the decision by the Industrial Commission and the privilege of introducing additional evidence upon such review, but permitted the decision of the arbitrator to become final as the decision of the Industrial Commission. By the statute the circuit court was given jurisdiction to review the record by certiorari without the necessity of a review of the decision of the arbitrator by the commission.

On the hearing before the arbitrator plaintiff in error proved the following facts: John Jakub was employed by defendant in error in baling loose pieces of copper in large bales, weighing from 900 to 1,500 pounds, by an electric baling press. He would put rags in the bottom of the press, and then put on the scrap copper and press it down, and repeat the process until there was enough for a bale, and would then release the power, open the press, bind the bale with wire, and take it off the press upon a truck and haul it away. The last that was known of him before his death, he was heard to call for more copper to put in the press. Very soon afterward he was found lying on the floor, with the bale, completed and wired, also on the floor, about two feet from him. He was still breathing, and died within a half hour. These facts being proved, defendant in error introduced the verdict of a coroner's jury, which was admitted without objection, and found that the deceased came to his death "from organic heart disease (marked chronic fibrous myocarditis) and kidney disease." In rebuttal the plaintiff in error offered the testimony of a physician, who said that after the coroner's autopsy he examined the heart, lungs, liver, kidneys, part of the intestines, and the stomach, and found in them acute hyperemia and the heart somewhat enlarged; that in case of organic heart disease there was hyperemia in other organs, and the heavy exertion of the work in which he was employed would hasten his death. Another physician testified that in the condition of the deceased the effort and exertion of his work would interfere with the heart action and cause more or less trouble, and finally cause death if the work was too heavy.

[2, 3] Compensation may be awarded, although there is a pre-existing disease, if the disease is aggravated and accelerated by an accidental injury in the course of employment. This rule was applied in *Peoria Railway Terminal Co. v. Industrial Board*, 279 Ill. 352, 116 N. E. 651, where a fireman fell from the engine and suffered accidental injuries and a fracture of his skull. To bring a case within that rule, however, there must be an accidental injury as the immediate or proximate cause of death. The statute provides compensation for accidental injuries or death suffered in the course of the employment, and an injury to be accidental is one which occurs in the course of the employment unexpectedly and without the af-

firmative act or design of the employé. It is something which is unforeseen, and not expected by the person to whom it happens. *Matthiessen & Hegeler Zinc Co. v. Industrial Board*, 284 Ill. 378, 120 N. E. 249.

[4] In this case there was no evidence tending to prove any accident or accidental injury to the deceased. There was no mark upon his person, and nothing from which it could be inferred that an accident had occurred, and it is not claimed that there was any accident, but only that the heavy work which he was doing in the ordinary course of his employment caused or hastened his death. The decision of the arbitrator was therefore right, and the circuit court did not err in confirming the decision.

The judgment is affirmed.
Judgment affirmed.

(238 Ill. 235)

PEOPLE, for Use of STATE BOARD OF HEALTH, v. KANE. (No. 12648.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 6, 1919.)

1. APPEAL AND ERROR ⇨1170(12) — IRREGULARITY IN VERDICT OR JUDGMENT—SETTING ASIDE.

Where action was debt, and verdict and judgment was for damages, and no objection was made to either on account of form, the judgment will not be reversed therefor, in view of Practice Act, § 77.

2. PHYSICIANS AND SURGEONS ⇨6(12) — PRACTICING WITHOUT CERTIFICATE—PENALTY—"FIRST OFFENSE."

The offense, defined by Laws 1899, p. 273, amended by Laws 1917, p. 579, of practicing medicine or surgery or treating human ailments without a certificate from the state board of health, consists, not of treating some individual, but of general practice by treating the public, so that a "first offense" means a first conviction, and there could not be a judgment for five first offenses.

3. PHYSICIANS AND SURGEONS ⇨2—LICENSE TO PRACTICE—STATUTE—VALIDITY — POLICE POWER.

Laws 1899, p. 273, as amended by Laws 1917, p. 579, making it an offense to practice medicine or surgery or treat human ailments without a certificate from the state board of health, was enacted in the exercise of the police power, for the protection of the lives and health of the people, and it is valid, unless infringing on constitutional rights.

4. PHYSICIANS AND SURGEONS ⇨6(1) — LICENSE TO PRACTICE—CHIROPRACTOR—"PRACTICING MEDICINE."

A chiropractor, whose practice consists of adjusting the vertebrae of the spinal column, professes a method of treating physical ailments, injuries, or deformities that is not within the common meaning of the term "prac-

ticing medicine"; but the Legislature could define the term for the purposes of Laws 1899, p. 273, § 7, as including that method of practice.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Practicing Medicine.]

5. CONSTITUTIONAL LAW ⇨209—ARBITRARY DISCRIMINATIONS—AUTHORITY OF BOARDS.

The General Assembly cannot arbitrarily interfere with the rights guaranteed by the Constitution, and cannot invest any board or commission with arbitrary discretion, which may be exercised in the interest of a favored few, or which affords opportunity for unjust discrimination.

6. PHYSICIANS AND SURGEONS ⇨2—STATUTE—CONSTITUTIONALITY.

The act providing for examination of persons applying for license to practice medicine and surgery, providing that those desiring to practice any other system of treating human ailments should pass an examination as to qualification, confers upon the state board of health the discretion to grant or refuse license under an impartial method of examination under rules prescribed by the board, and permits the courts to determine the reasonableness of the rules, and is not violative of constitutional provision.

Appeal from Macon County Court; John H. McCoy, Judge.

Action by the People, for the use of the State Board of Health, against James E. Kane. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Whitley & Fitzgerald, of Decatur, and John A. Walgren, of Chicago, for appellant.

Edward J. Brundage, Atty. Gen., Jesse L. Deck, State's Atty., of Decatur, Albert D. Rodenberg, of Springfield, and Charles F. Evans and A. R. Ivens, both of Decatur, for appellee.

CARTWRIGHT, J. The people of the state of Illinois, for the use of the state board of health, appellee, commenced this action in debt in the county court of Macon county against James E. Kane, appellant, and filed a declaration containing 10 counts, charging him with practicing medicine without a license from the state board of health. The plea was the general issue, and upon a trial there was a verdict for the defendant. The court granted a new trial, and on the second trial there was again a verdict for the defendant and judgment accordingly. The plaintiff appealed to the Appellate Court, which reversed the judgment and remanded the cause. On the third trial there was a verdict for the plaintiff and assessing damages at \$500. The court rendered judgment on the verdict, and ordered that the defendant be committed to the common jail of Macon county until the fine and costs were paid.

This appeal was prosecuted from that judgment.

[1] The action was debt, and the verdict and judgment were for damages; but no objection was made, to either on account of form, and the judgment will not be reversed for formal matters of that kind. *Bowden v. Bowden*, 75 Ill. 111. Section 77 of the Practice Act (Hurd's Rev. St. 1917, c. 110) provides that no verdict or judgment shall be set aside for irregularity only, unless cause be shown for the same during the sitting of court at the term such judgment or verdict shall be given.

[2] The suit was brought under the act of 1899 (Laws 1899, p. 273), as afterward amended (Laws 1917, p. 579), which authorized a recovery of \$100 for the first offense and \$200 for each subsequent offense. The offense defined by the act consisted in practicing medicine or surgery or treating human ailments without a certificate issued by the state board of health. The offense did not consist of treating some individual, but for practicing medicine generally by treating the public, so that a first offense meant a first conviction. There could not be a judgment for five first offenses, and the judgment must be reversed for that reason.

[3, 4] The appeal was taken to this court, on the ground that the act was in conflict with the Constitution, and therefore void. It was enacted in the exercise of police power, for the protection of the lives and health of the people. The state has a right to regulate any and all kinds of occupations for that purpose, and all measures and regulations for the protection of the public health, not infringing upon constitutional rights, are within the scope of the police power. The right of a citizen to follow any legitimate occupation is subject to the paramount power of the state to impose such regulations as may be required to secure the people against ignorance, incapacity, deception, or fraud in the practice of medicine, subject only to such restraints as are imposed by the Constitution. Section 7 of the act provided that any person should be regarded as practicing medicine, within the meaning of the act, who should treat or profess to treat, operate on, or prescribe for any physical ailment, or any physical injury to or deformity of another. The defendant was a chiropractor, and his practice consisted of adjusting the vertebrae of the spinal column. That method of treating physical ailments, injuries, or deformities is not within the common meaning of the term "practicing medicine," but the General Assembly had a right to define the practice of medicine for the purposes of the act so as to include that method. *People v. Gordon*, 194 Ill. 560, 62 N. E. 853, 88 Am. St. Rep. 165.

[5, 6] Within constitutional limits the General Assembly is the sole judge of what laws

shall be enacted for the protection of the public health, and so long as it does not infringe upon inherent or constitutional rights its determination of what measures and regulations shall be adopted is conclusive. The exercise of the police power, however, is subject to constitutional limitations, and the power extends only to such measures as are reasonably necessary and appropriate for the accomplishment of a legitimate object within the domain of the police power. The General Assembly cannot arbitrarily interfere with the enjoyment of rights guaranteed by the Constitution, and cannot invest any board or commission with arbitrary discretion which may be exercised in the interest of a favored few, or which affords opportunity for unjust discrimination. *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238. Every citizen has a right to be governed by fixed rules, and cannot be subjected to the will or caprice of an administrative board. *Ruhrat v. People*, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30; *People v. Wilson*, 249 Ill. 195, 94 N. E. 141, 35 L. R. A. (N. S.) 1074; *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 94 N. E. 920, 34 L. R. A. (N. S.) 998. The act provided for examinations of persons applying for licenses to practice medicine, and, as to those desiring to practice medicine and surgery in all its branches, prescribed general rules for an examination. As to those who desired to practice any other system or science of treating human ailments, who did not use medicines internally or externally, or practice operative surgery, it required that examinations should be of a character sufficiently strict to test their qualifications as practitioners. That provision, standing alone, conferred upon the state board of health arbitrary power to grant or refuse licenses in its own discretion and upon its own judgment as to what examination would be sufficient to test the qualification of each applicant for a license. It furnished no standard and no guide and no security to an applicant by which the courts could determine whether the requirements of the board were reasonable or not. The act, however, provided that all examinations should be conducted under rules and regulations prescribed by the board, which should provide for a fair and wholly impartial method of examination. Such rules and regulations, if made, would be subject to review by the courts to determine whether reasonable or not. *Kettles v. People*, 221 Ill. 221, 77 N. E. 472. Considering the provision of the statute for the adoption of rules and regulations subject to judicial review, under which examinations should be made and licenses issued, the statute did not violate any constitutional right. The record does not show whether or not any rules and regulations were adopted by the board, and it affords no means for de-

termining whether any constitutional right of the defendant was violated by unreasonable or arbitrary rules and regulations with which he could not be compelled to comply.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

(238 ILL. 123)

SWIFT & CO. v. INDUSTRIAL COMMISSION et al. (No. 12533.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 5, 1919.)

1. MASTER AND SERVANT \S 417(7)—WORKMEN'S COMPENSATION ACT — FINDING OF COMMISSION—CONCLUSIVENESS.

Under Workmen's Compensation Act, \S 24, when the facts and circumstances of the accident were known to employer or his agent, and where the commission found that the notice was in fact given, and the finding is supported by competent evidence, it is conclusive upon appeal.

2. MASTER AND SERVANT \S 386(5)—WORKMEN'S COMPENSATION ACT—DUTY OF COMMISSION TO APPOINTMENT AWARD.

Under Workmen's Compensation Act, \S 7, as amended in 1915, the commission was not required to apportion compensation between a widow and a child in a proceeding by the employé for an award, carried to completion by the widow as his administratrix after employé's decease; there being no contest as to who should receive the benefit of the award.

3. MASTER AND SERVANT \S 386(5)—WORKMEN'S COMPENSATION ACT—DUTY OF COMMISSION TO APPOINTMENT AWARD.

Workmen's Compensation Act, $\S\S$ 7, 21, providing for determination by the Industrial Commission of the proportionate share of each beneficiary, does not require that the commission shall determine how much or what proportion of the compensation every member of the class may receive.

4. MASTER AND SERVANT \S 385(16)—WORKMEN'S COMPENSATION ACT — EXPENSE OF PHYSICIAN—EMPLOYÉ'S ELECTION TO PAY PHYSICIAN.

In view of Workmen's Compensation Act, providing that the employer shall provide necessary medical treatment for a period not longer than eight weeks, an injured employé's selection of a physician other than one of the staff maintained by employer was an election to secure his own physician, and under section 8 he must be held to have elected to do so at his own expense, and it was not error for circuit court to strike from an award a sum allowed therefor.

Error to Circuit Court, Cook County;
Oscar M. Torrison, Judge.

Proceeding under the Workmen's Compensation Act by Beatrice Kucinski, administra-

trix, against Swift & Co., employer. Award was made by the Industrial Commission, and from a judgment affirming the award, after striking from the same a certain sum awarded for medical services, the employer brings error, and the administratrix, defendant in error, assigns cross-errors. Affirmed.

T. M. Coen, of Chicago, for plaintiff in error.

Charles W. Lamborn, of Chicago, for defendants in error.

STONE, J. The circuit court of Cook county affirmed the award of the Industrial Commission in favor of the defendant in error, Beatrice Kucinski, administratrix of the estate of Tony Kucinski, deceased, for injuries received by him while in the employ of the plaintiff in error, and from which it is claimed he subsequently died.

Tony Kucinski was at the time of his death 28 years of age, and for a number of years, with short intervals of absence, was in the employ of the plaintiff in error. His last employment was for about one year. It appears from the evidence that the alleged accident occurred on or about September 10, 1915. While the deceased was pushing a truck loaded with boxes and cases he slipped and fell, and some of the cases fell upon him, striking him in the region of the back and hip. It appears that he left the employment of the plaintiff in error about 4 weeks after the injury. For a time after that he was able to be about and walk with the aid of a cane and had some medical treatment. On December 27th following he was taken to the Michael Rees Hospital, where upon examination his hip was found to be infected with incipient tuberculosis, and an operation was performed for the removal of an abscess. On February 24, 1916, a more advanced tubercular hip condition was found. Thereafter it was discovered that his lungs were tubercular. About May of the same year he was taken to the Cook County Hospital, and died the following August of pulmonary tuberculosis. Application for the adjustment of this claim was filed February 25, 1916. The testimony of deceased was taken in the Cook County Hospital on the 11th day of May, 1916. Beatrice Kucinski, his widow, was appointed administratrix of his estate, and appears as defendant in error here.

It appears from the evidence that prior to the injury deceased had enjoyed good health; that he had never had any trouble with his hip or leg and had never limped or suffered from rheumatism. The testimony of attending physicians tends to show that the appearance of tubercular infection at the hip was caused by the blow received by the deceased in the accident in question, and that the infection later spread to his lungs, causing

death. It does not appear to be urged by the plaintiff in error that the accident was not the cause of death.

The commission found as a fact that both the deceased and the respondent were working under and subject to the Workmen's Compensation Act of Illinois (Hurd's Rev. St. 1917, c. 48, §§ 126-1521) that the deceased did on the 10th day of September sustain an accidental injury which arose out of and in the course of the employment; that the respondent had notice of the accident, and that claim was made within the time prescribed by law; that the deceased died as a result of the accidental injury; that respondent is liable for hospital and medical services to the amount of \$150, in addition to compensation of \$6.50 per week for a period of 416 weeks. The circuit court affirmed the award after striking from the same the sum of \$150 awarded for medical services.

It is contended by the plaintiff in error that no notice was given of the alleged accident within 30 days thereafter, as required by the Compensation Act; that, since the deceased is survived by a widow and a minor child, it is error to award compensation to the administratrix of the estate of the deceased, such right to compensation being an independent right vested in the dependents of the deceased; that, the commission having held compensation was due to the representative of the estate, it was error to refuse to determine the relative interests of the surviving dependents in such and to apportion the same between the dependents upon demand and request of plaintiff in error on the hearing before the Industrial Commission. Cross-errors are assigned by the defendant in error averring that the court erred in striking from the award of the Industrial Commission the sum of \$150 for medical services.

[1] Concerning the contention of plaintiff in error that no notice of the injury was given, as required by section 24 of the Workmen's Compensation Act, the record shows that the deceased testified concerning the manner of his injury, and that immediately after the injury he told Joe Lukide, a foreman of plaintiff in error, that he had been injured and how it happened; that he was sent to the company doctor, who examined his hip, applied medicine of some sort, and told him that he would be all right by the next day; that he returned to work, but that the pain increased for 3 or 4 weeks, at the end of which time he told Lukide that his hip hurt him so much that unless he could get easier work he would have to quit; and that Lukide told him there was no other job for him and that he should go home and stay there until he was ready to come back. Section 24 of the Workmen's Compensation Act provides, among other things, that notice of the injury shall be given within 30 days, with certain exceptions, and further provides

"that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer, his agent or vice principal in the enterprise." The commission found that notice of the injury was, in fact, given as required by statute. There is evidence in the record tending to prove that deceased notified Lukide, who the deceased testified was plaintiff in error's foreman, of the injury shortly after its occurrence. While it is earnestly urged that Lukide was not a foreman of the plaintiff in error, it is not the province of this court to weigh the testimony on that point. As has been repeatedly held by this court, where there is competent evidence before the commission fairly tending to prove a fact, the finding of that fact by the commission precludes its review here. *Smith-Lohr Coal Co. v. Industrial Com.*, 286 Ill. 34, 121 N. E. 231; *Big Muddy Coal Co. v. Industrial Board*, 279 Ill. 235, 116 N. E. 662; *Albaugh-Dover Co. v. Industrial Board*, 278 Ill. 179, 115 N. E. 834. As the foreman was the agent of the plaintiff in error, it follows that section 24, regarding notice, has been complied with. *Wabash Railway Co. v. Industrial Com.*, 286 Ill. 194, 121 N. E. 569; *Parker-Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976.

[2] Plaintiff in error's second contention is that the court erred in affirming an award of compensation to the administratrix while the evidence shows that the widow and a child survived; that, while compensation for disability prior to death is payable to the administrator, compensation on account of death is payable to the dependents; that it was not only the duty of the commission to award the compensation to the dependents, but it was incumbent upon it to apportion the compensation between the widow and child.

Section 7 of the Compensation Act, as amended in 1915, provides as follows:

"The amount of compensation which shall be paid for an injury to the employé resulting in death shall be: (a) If the employé leaves any widow, child or children whom he was under legal obligation to support at the time of his injury, a sum equal to four times the average annual earnings of the employé, but not less in any event than one thousand six hundred fifty dollars and not more in any event than three thousand five hundred dollars. Any compensation payments other than necessary medical, surgical or hospital fees or services shall be deducted in ascertaining the amount payable on death."

Paragraph (f) of said section 7 provides as follows:

"The compensation to be paid for injury which results in death, as provided in this section, shall be paid at the option of the employer either to the personal representative of

the deceased employé or to his beneficiaries, and shall be distributed to the heirs who formed the basis for determining the amount of compensation to be paid by the employer, the distributees' share to be in the proportion of their respective dependency at the time of the injury on the earnings of the deceased: Provided, that, in the judgment of the court appointing the personal representative, a child's distributive share may be paid to the parent for the support of the child. The payment of compensation by the employer to the personal representative of the deceased employé shall relieve him of all obligations as to the distribution of such compensation so paid. The distribution by the personal representative of the compensation paid to him by the employer shall be made pursuant to the order of the court appointing him." Laws 1915, p. 402.

In support of his contention that the Industrial Commission should apportion the amounts due to the several beneficiaries, counsel for plaintiff in error cites *Smith-Lohr Coal Co. v. Industrial Com.*, supra. The question decided in that case arose by reason of a contest between the widow and the parents of the deceased as to who was entitled to the compensation, and this court in that case held:

"The statute as to distribution of the amount paid by the employer to the personal representative of the deceased applies only in cases where the employer voluntarily pays the compensation to the personal representative of the deceased without a hearing and determination before an arbitrator or the Industrial Commission. If the compensation is fixed by the Industrial Commission, it is required to determine who is entitled to the compensation before it can determine the amount. * * * The fact that the claimants were the persons described in paragraphs (a) and (b), under which paragraphs the amount of the compensation provided is the same, could not operate to relieve the Industrial Commission from the duty of determining the person or persons who were entitled to the compensation. We do not construe the statute in such cases as this to leave it to the probate court to determine who is entitled to the award made by the Industrial Commission."

In the case at bar there is no contest as to who shall receive the benefit of the award, and the rule laid down in the *Smith-Lohr Coal Co. Case* on that point has no application here.

[3] It is also contended that, in view of the proviso in section 21 of the Compensation Act providing for the reduction of compensation in the event of the death of the beneficiary before the completion of the compensation payments, it is necessary to determine what the relative interests of the widow and child are in the compensation, so that, in the event of the death of either, the payments of compensation, so far as the deceased beneficiary is concerned, can be determined, and the employer not subject to a judgment and execution for the entire amount. Section 21, as

amended in 1915, provides in this regard as follows:

"Any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto, subject to the provisions of this act relative to compensation for death received in the course of employment: Provided, that, upon the death of a beneficiary, who is receiving compensation provided for in section 7, leaving surviving a parent, sister or brother of the deceased employé, at a time of his death dependent upon him for support, who were receiving from such beneficiary a contribution to support, then that proportion of the compensation of the beneficiary which would have been paid but for the death of the beneficiary, but in no event exceeding said unpaid compensation, which the contribution of the beneficiary to the dependent's support within one year prior to the death of the beneficiary bears to the compensation of the beneficiary within that year, shall be continued for the benefit of such dependents, notwithstanding the death of the beneficiary."

The proviso in section 21 applies to those cases where the beneficiary receiving compensation provided for in section 7 dies leaving surviving a parent, sister, or brother of the deceased employé who was at the time of his death dependent upon the said deceased employé for support and who was receiving from such beneficiary a contribution towards support. In this case the only beneficiaries are the widow and a child, whose compensation is payable under paragraph (a) of section 7. The death of either of these beneficiaries would not leave surviving "a parent, sister or brother of the deceased employé"; hence it follows that the proviso in section 21 has no application to compensation awarded under paragraph (a) of section 7. As we understand paragraph (a) and (f) of section 7, they do not provide for determination by the Industrial Commission of the proportionate share which each beneficiary is entitled to receive where the beneficiaries are all of the class specified in paragraph (a) of said section, although, as was held in the *Smith-Lohr Coal Co. Case*, the commission must, in order to determine the total amount of compensation, determine who is entitled to receive the same. That case does not, however, hold that it is incumbent upon the commission to determine how much or what proportion of the compensation every member of the class may receive. As was said by this court in the case of *Wangler Boiler & Sheet Metal Works Co. v. Industrial Com.*, 287 Ill. 118, 122 N. E. 366:

"Compensation under the act in question is analogous to and is to take the place of damages at common law and under the statute. While the right to compensation is not a subject of bequest of the beneficiary, but continues in the dependents of the beneficiary only in the manner provided by said act, yet such right to compensation, when determined according to law, is no less a vested right, and one that can

be affected only by the act of the Legislature that gave it. *Hansen v. Brann & Stewart Co.*, 90 N. J. Law, 444, 103 Atl. 696. The intention of the Legislature to so treat that right is shown by section 9 of the act, which, as we have seen, provides that where a lump sum settlement is awarded by the Industrial Board in case of an injury resulting in death, there is no right of rejection either by the employer or beneficiary. The intention of the Legislature that such right shall be a vested right is further shown by paragraph (g) of section 19 of the act, which provides for judgment in the circuit court on an award where there is a refusal or failure to pay the compensation; such judgment being treated as similar to an execution. *Friedman Mfg. Co. v. Industrial Com.*, 284 Ill. 554, 120 N. E. 460."

By paragraph (a) of section 7 the employer becomes liable, at all events, to pay a sum equal to four times the average earnings of the employé, within the limitations there prescribed as to amount, and, as we view the provisions of section 21 of the act, the Legislature did not intend that its provisions regarding reduction of compensation should apply to cases enumerated in said paragraph. The commission therefore did not err in making the award without determining the amount to which each beneficiary is entitled.

[4] It is urged by cross-errors assigned by defendant in error that the circuit court erred in striking from the award the sum of \$150 for medical services. There is no evidence as to what medical expenses were incurred by the deceased prior to February 24, 1916. The award of the Industrial Commission relative to the amount for medical services is based upon the testimony of Dr. Mueller for his services between the 24th day of February and the 1st day of April following, in the year 1916. The services were not rendered within eight weeks of the date of the alleged accident, to wit, September 10, 1915, or within eight weeks of the first day of disability. The deceased was evidently under treatment prior to February 24th. The services of Dr. Mueller were rendered at the request of the deceased. Section 8a of the statute in question, relative to medical and hospital services in case of injury not resulting in death, as amended in 1915, is as follows:

"The employer shall provide necessary first aid, medical, surgical and hospital services; also medical, surgical and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of \$200. The employé may elect to secure his own physician, surgeon or hospital services at his own expense."

There is no evidence in the record tending to show that the deceased requested plaintiff in error to supply medical services, other than the letter of his attorney on February 24, 1916, to plaintiff in error, stating that he assumed that plaintiff in error would as-

sume all obligations of the Workmen's Compensation Act. Plaintiff in error maintains a staff of physicians. The testimony of deceased showed that he was familiar with that fact, yet he chose other medical aid in the treatment he received prior to February 24th and subsequent to the day of the injury, when the evidence shows he went to the company doctor. His selection of Dr. Mueller on February 24th was an election to secure his own physician, and under section 8 he must be held to have elected to do so at his own expense. The circuit court did not err in striking the sum of \$150 from said award.

No reversible error appearing in the record, the judgment of the circuit court will be affirmed.

Judgment affirmed.

CARTWRIGHT, J., took no part in this decision.

(288 Ill. 106)

BEUTEL v. FOREMAN et al. (No. 12554.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 5, 1919.)

1. STATUTES §263—CONSTRUCTION—RETROACTIVE INTENTION.

While a statute is not generally deemed to be retroactive, it will be given a retroactive effect, when it was clearly the intention of the Legislature that it should so operate.

2. STATUTES §188—CONSTRUCTION—USUAL MEANING OF WORDS.

In the construction of statutes, it is the duty of the court to take the words found therein, and to give to each its ordinary, usual meaning.

3. MUNICIPAL CORPORATIONS §176(3)—POLICE PENSION FUND—RIGHT TO PENSION—CONSTRUCTION OF STATUTE.

Police Pension Fund Act, § 3, as amended by Laws 1917, p. 274, held retroactive, and to apply to all persons who were entitled to pensions under said act, and included a retired policeman, who had served 20 years, who would have been entitled to a pension under the preceding law, but was excluded therefrom, because not 50 years of age, by the present act.

4. CONSTITUTIONAL LAW §102(2)—MUNICIPAL CORPORATIONS §176(3)—POLICE PENSION FUND—RIGHT OF STATE TO TAKE AWAY RIGHT OF PENSION.

As between the state and members of the police department of a municipality, the state may take away the right of pension from a policeman having served 20 years, by amending the statute to provide pensions in such cases only after attaining the age of 50 years.

Error to Circuit Court, Cook County;
Charles M. Walker, Judge.

Petition by Joseph B. Beutel and others for writ of mandamus against Oscar G. Fore-

man and others, as Trustees of the Police Pension Fund of the City of Chicago. Judgment for the named plaintiff, and defendants bring error. Reversed and remanded.

Samuel A. Ettelson, Corp. Counsel, of Chicago (James W. Breen and Roy Gaskill, both of Chicago, of counsel), for plaintiffs in error.

Grant Newell and Joseph B. Beutel, both of Chicago, for defendant in error.

CARTER, J. A petition was filed by defendant in error and others in the circuit court of Cook county, praying that a writ of mandamus issue against Oscar G. Foreman and others, as trustees of the police pension fund of the city of Chicago, commanding them to order that a yearly pension equal to one-half the amount of his salary be paid each of the petitioners. After the pleadings were settled a hearing was had in the circuit court, and a final order and judgment entered in favor of Joseph B. Beutel, as prayed in the petition. From that judgment a writ of error was sued out from the Appellate Court for the First District, and the cause was transferred from the Appellate Court to this court, apparently on the ground that the constitutionality of a statute was involved.

The brief and argument of plaintiffs in error, and some of the earlier documents in this case, gave the name of defendant in error as Nicholas Berwick, who was the first one named in the petition for mandamus, whereas the testimony was taken and judgment entered in the trial court as to Joseph B. Beutel, wherefore the title has been changed by proper proceedings in this court, and is now as given above.

The record shows that defendant in error, Beutel, after completing a service of 20 years as a member of the police force of the city of Chicago, filed on March 31, 1917, an application for a pension with the plaintiffs in error, the board of trustees of the police pension fund of the city of Chicago; that on July 12, 1917, his application was denied on the ground that the Police Pension Fund Act, as amended on July 1, 1917 (Laws 1917, p. 274), provided that no policeman should be pensioned after a service of 20 years until he should have reached the age of 50 years. Plaintiffs in error deny that Beutel was 50 years of age on July 1 or July 12, 1917, and argue that therefore, under amended section 3 of the Police Pension Fund Act, he was not entitled to a pension.

Section 3 of said act, as amended July 1, 1917, reads, in part, as follows:

"Whenever any person shall have been or shall hereafter be appointed and sworn as a probationary or regular policeman in any such city, and shall have served for a period of twenty (20) years or more as such policeman in the police force of any such city, or where

the combined years of service of such person in the police department and fire department of any such city shall aggregate twenty (20) years or more, in either such case when such person shall have arrived at the age of fifty (50) or more years he may make application to said board for retirement, and said board shall order and direct that such policeman, after his retirement from the police force, shall be paid a yearly pension."

[1-3] The Police Pension Fund Act (Hurd's Rev. St. 1917, c. 24, §§ 391-419k) for a few years prior to July 1, 1917, provided that a policeman should be entitled to his pension after a service of 20 years, but did not have any provision that this could not be paid until he arrived at the age of 50 years, as does the amended act of July 1, 1917, and it is argued by counsel for defendant in error that when he retired from the police force, on March 31, 1917, the law as then in force entitled him to a pension before he reached the age of 50 years, if he had served 20 years continuously on the police force of the city of Chicago, and that the amendment of section 3, in force July 1, 1917, if it is intended to be retroactive and applies to this case, is unconstitutional and void. It is contended by counsel for plaintiffs in error, and conceded by counsel for defendant in error, that said amendment to section 3 was intended to be retroactive and apply to all policemen who were entitled to pensions under said act.

While it is true that a statute is not generally deemed to be retroactive, but prospective only, in its force, a statute will be given a retroactive effect when it was clearly the intention of the Legislature that it should so operate. *Hathaway v. Merchants' Loan & Trust Co.*, 218 Ill. 580, 75 N. E. 1080, 4 Ann. Cas. 164. In the construction of statutes it is the duty of the court to take the words found in the statute, and to give to each its ordinary, usual meaning. *Eddy v. Morgan*, 216 Ill. 437, 75 N. E. 174. We agree that, fairly construed, the amendment to section 3 of the Police Pension Fund Act, read in connection with the other sections of the act, was intended to be retroactive, and to apply to all persons who were entitled to pensions under said act, and that therefore it included the defendant in error within its provisions.

[4] Counsel for defendant in error earnestly insist that the Pension Act in force previous to July 1, 1917, gave him a contract and property right in his pension at the time he filed his application for the same, and therefore the amendment in question must be held to be unconstitutional, because of violating a property right vested in him. The Legislature cannot pass a retrospective or an ex post facto law impairing the obligation of a contract, nor can it deprive a citizen of any vested right by a mere legislative act. *Dobbins v. First Nat. Bank*, 112 Ill. 553. This is a principle of general jurisprudence.

"But a right to be within its protection must be a vested right. It must be something more than a mere expectation, based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. If, before rights become vested in particular individuals, the convenience of the state induces amendment or repeal of the laws these individuals have no cause to complain." 1 Lewis' Sutherland on Stat. Const. (2d Ed.) § 284; *People v. Clark*, 283 Ill. 221, 119 N. E. 329.

Counsel for plaintiffs in error contend that no person entitled to a pension has a vested legal right in said pension; that pensions, considered in connection with vested rights, must be held to be bounties of the government, which that government has a right to give, withhold, or recall at its discretion, while counsel for defendant in error argue that this court in *Hughes v. Traeger*, 264 Ill. 612, 106 N. E. 431, and *People v. Abbott*, 274 Ill. 380, 113 N. E. 696, Ann. Cas. 1918D, 450, has held that the pensions to employes of municipalities "are in the nature of compensation for services previously rendered for which full and adequate compensation was not received at the time of the rendition of the services," and that therefore those decisions which hold that a pension is not a vested right, under such circumstances as exist here in the claim of defendant in error, cannot be upheld. Counsel are in error in their argument that the decisions of this court last referred to intended to hold that the right of pension was a vested right under the circumstances found in this record. In *Hughes v. Traeger*, supra, the court particularly stated the opposite, saying (264 Ill. 617, 106 N. E. p. 433):

"The fund created by these deductions remains subject to the disposition of the Legislature, and the employes cannot prevent its appropriation in another way than that designated by the statute. It is not their property, and the statute does not amount to a contract by the state to use it in the manner provided by the statute. A change in the disposition of the fund would not, however, violate any right of the complainant, for until the happening of the event designated by the statute for its distribution he has no vested right in the fund, but only an expectancy created by the law, which the law may revoke or destroy. *Pennie v. Reis*, 132 U. S. 464 [10 Sup. Ct. 149, 33 L. Ed. 426]; *State v. Trustees*, 121 Wis. 44 [98 N. W. 954]."

Moreover, both of the opinions in which this court has laid down the rule as to the basis of granting pensions which counsel for defendant in error rely on as giving their client a vested right, are based on Dillon on Municipal Corporations, vol. 1 (5th Ed.) § 430, and that learned author, in discussing the subject of pensions for municipal employes in section 431, adopts the doctrine laid down by the United States Supreme

Court in *Pennie v. Reis*, supra, that a person does not have a vested right in his pension. That court said in that case with reference to the pension fund (132 U. S. 471, 10 Sup. Ct. p. 151, 33 L. Ed. 426):

"Being a fund raised in that way, it was entirely at the disposal of the government, until, by the happening of one of the events stated—the resignation, dismissal, or death of the officers—the right to the specific sum promised became vested in the officer or his representative. It requires no argument or citation of authorities to show, that in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the state impaired no absolute right of property in the police officer. The direction of the state, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. There was no contract on the part of the state that its disposition should always continue as originally provided. Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority."

This court has practically laid down the same rule in *Eddy v. Morgan*, supra, and *Pecoy v. City of Chicago*, 265 Ill. 73, 106 N. E. 435. A reading of this last case will show that something of the same argument was made with reference to the police pension fund being vested under this statute as is made by counsel for defendant in error in this case; but the court there indorsed the reasoning of this court in *Eddy v. Morgan*, supra, and that of the United States Supreme Court in *Pennie v. Reis*, supra.

A full discussion of the question of vested rights in pension funds is found in *Gibbs v. Minneapolis Fire Department Relief Ass'n*, 125 Minn. 174, 145 N. W. 1075, Ann. Cas. 1915C, 749, and in the exhaustive note following the opinion. It was argued there, as here, that the right of a person claiming a pension was a vested one, and the opinion quoted from another decision (*Rudolph v. United States*, 36 App. Cas. D. C. 379) with approval, as follows:

"The statute differs from a contract in that the government may withdraw the benefits conferred at any time it may deem advisable, after a party enters the service, either before or after the right to a pension accrues. * * * It also follows that, while there is no vested right in a pension which cannot be divested by the mere exercise of the legislative will, if relators have any rights they are vested ones so long only as the statute in question remains in force and unchanged, subject to be divested at any time that Congress may desire."

See, also, *Stevens v. Minneapolis Fire Department Relief Ass'n*, 124 Minn. 381, 145 N. W. 35, 50 L. R. A. 1018, and note reviewing

the authorities; 21 R. C. L. 242; 2 McQuillin, Mun. Corp. § 511; 5 McQuillin, Mun. Corp. § 2422.

We can reach no other conclusion in this case than that, by the great weight of authority in this and other jurisdictions, as between the state and the members of the police department of one of the municipalities in this state, the state may take the right of pension away, under such circumstances as shown by this record, without affecting the contract right of the pensioners or violating the Constitution.

The judgment of the circuit court will be reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

(238 Ill. 99)

RANDOLPH v. HINCK. (No. 12568.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 5, 1919.)

1. NEW TRIAL §176—MATTER OF RIGHT IN EJECTMENT.

Under the statute, in the circuit court the parties are allowed a new trial in ejectment as a matter of right, if they comply with the provisions of the statute, but such right is confined to the trial court.

2. JUDGMENT §713(2)—RES JUDICATA—MATTERS THAT MIGHT HAVE BEEN LITIGATED.

When a matter is brought to the Supreme Court, every question which might be raised, and every objection which might be made, is settled for purpose of subsequent litigation by its decision, even in ejectment cases; the doctrine of res judicata embracing, not only what actually has been determined in former suit, but also extending to any other matter which might have been determined.

3. TRUSTS §134—ESTATE OF TRUSTEE—POWER TO SELL OR DEVISE.

Under the common law, the legal estate in the hands of a trustee possesses precisely the same properties, characteristics, and incidents as if the trustee were the absolute owner.

4. TRUSTS §191(1)—CONVEYANCE BY TRUSTEES—POWER IN WILL.

A will empowering trustees and executors "to sell any or all of my real estate at public or private sale upon such terms and conditions, and for such price as they or the survivor of them may deem best," etc., conveyed to the trustees all of testator's realty of every character without limitation on their power to sell any trust estate that he might have.

5. TRUSTS §134—POWER OF TRUSTEE TO DEVISE.

Under deed from a master in chancery to the grantee denominated simply as "trustee," the grantee had power to devise the legal title to the land to his trustees.

6. EJECTMENT §26(1) — LEGAL TITLE — TRUSTS OR EQUITABLE TITLES.

In ejectment proceedings only the legal title is involved, and it is not competent to show who paid the consideration money on a conveyance of the premises for the purpose of establishing a trust, since an equitable title forms no bar to recovery in ejectment, and even in case of a naked trust the trustee can recover in ejectment against the cestui.

7. TRUSTS §203—CONVEYANCE BY TRUSTEE —PASSAGE OF LEGAL TITLE.

Deed by a trustee of land held in trust for the use of another will pass the legal title to the grantee, whether made rightly or in violation of the trust under which title is held.

8. TRUSTS §239—SALE BY TRUSTEES—EXECUTION OF DEED BY ONE ONLY.

Under Administration Act, § 97, a deed from only one of two executors and trustees named in testator's will giving power to sell conveyed the legal title to the land.

9. TRUSTS §203—CONVEYANCE BY EXECUTOR AND TRUSTEE—TITLE.

Where a trustee, grantee simply as such, executed a formal declaration of trust, and after his death one of his executors and trustees, with power to sell and convey, did convey the land involved in the declaration of trust, the legal title passed.

10. EJECTMENT §25(2)—OUTSTANDING TITLE —RIGHT OF TRESPASSER TO SET UP.

Defendant in ejectment, not claiming through or connecting his title with the title of any third person in any way, being a mere trespasser, and without title, cannot set up an outstanding title in persons other than plaintiff.

Appeal from Circuit Court, Randolph County; J. F. Gillham, Judge.

Suit in ejectment by Mabel Hartzell Randolph against John Hinck. From judgment for plaintiff, defendant appeals. Affirmed.

J. Fred Gilster, of Chester, and Edward Robb, of Perryville, Mo., for appellant.

H. Clay Horner, of Chester, for appellee.

CARTER, J. This is a suit in ejectment. The action was originally begun by appellee as a forcible entry and detainer suit, but an amended declaration was filed, and the court decided on the first hearing that the cause was one in ejectment. On the original trial in the circuit court judgment was rendered in favor of appellee, and an appeal was taken to this court, where the judgment was affirmed. Randolph v. Hinck, 277 Ill. 11, 115 N. E. 182. The appellant thereafter, under the provisions of the ejectment statute, made his motion for a new trial in the circuit court, which was allowed, and a second trial was had under the issues joined in the ejectment proceeding. Judgment was again entered in favor of appellee, and this appeal followed.

The facts with reference to the land here

in controversy, as to its situation and surroundings and the claims of the parties thereto, are set forth quite fully in the opinion of this court in the former case, and need not be here restated.

[1, 2] Counsel for appellant claim that the former suit was tried originally as if it were a forcible entry and detainer suit, and that much of the proof introduced on this hearing was not heard in the former proceeding. On the former hearing appellant based his claim almost wholly upon so-called "water rights," and admitted that the record title of the property was in appellee, while here counsel for appellant chiefly base their argument upon the claim that appellee has not shown a title justifying a recovery in ejectment proceedings. They claim, however, that on this proceeding there is a more complete showing as to the washing away of part of the land in controversy, and state that the suit formerly tried and submitted did not raise the question in the same way it is raised here. We cannot so hold. On the first trial the question as to the water rights in the land, largely based on the question of changes in the channel of the Mississippi river, and accretion, reliction, and submergence with reference to the land affected, was gone into thoroughly, and this court held that the land described and conveyed in the chain of title was identical with the land on this island, known as Hinck Island, and could be identified and located by situation, extent, and boundary from the original survey. The additional evidence introduced on this second hearing is largely of a cumulative nature, and is not such as to materially change our views as to the right to the land with reference to changes in the channel by accretion, reliction, or submergence.

Under the statute, in the circuit court the parties are allowed a new trial as a matter of right, if they comply with the provisions of said statute, but this right is confined to the trial court. *Lowe v. Foulke*, 103 Ill. 58. When a matter is brought to this court, every question which might have been raised and every objection which might have been made is settled, even in ejectment cases. "The doctrine of *res judicata* embraces not only what has been actually determined in a former suit, but also extends to any other matter which might have been raised and determined in it." *Bradley v. Lightcap*, 201 Ill. 511, 66 N. E. 546. After a full review of the authorities the same doctrine is laid down by this court in *Spitzer v. Schlatt*, 249 Ill. 416, 94 N. E. 504. Under these authorities we think there can be no question on this record that appellant is bound by the former decision of this court with reference to his so-called water rights in this land, and the argument of counsel for appellee that appellant is so bound on the question of the title is not without support in the decisions. We will, however, take up the question of title

as if we were assuming that the decision in the former case does not control here.

On the first hearing counsel for appellant stipulated that the title was in appellee, but refused to be bound by that stipulation on the second trial, and counsel for appellee introduced documents showing, as appellee argues, the record title to be in her—among other documents a deed from the master in chancery of Randolph county conveying this and other property to "William M. Runk, trustee"; also the will of Runk, authorizing and empowering his trustees and executors, Evelyn T. B. Runk and A. Howard Ritter, "to sell any or all of my real estate at public or private sale, upon such terms and conditions and for such price as they or the survivor of them may deem best, either in fee simple or for any less estate, and to make good and sufficient deed or deeds therefor," etc.; also a deed from Ritter, executor of the estate of William M. Runk, conveying this and other property to William Hartzell. Appellee also made proof that Evelyn T. B. Runk, executrix and trustee of the will of William M. Runk, renounced her right to serve as executrix, and the deed from Ritter states that the deed was made by him alone, because said executrix and trustee under the will had renounced her right to act. The appellee also introduced the will of William Hartzell, by which he devised this property to his daughter, Mabel Hartzell, appellee herein. The documents offered in evidence by appellee tended to show a chain of title—at least *prima facie*—in appellee.

There was nothing in the deed from the master in chancery of Randolph county conveying this land to William M. Runk that in any way indicated the terms upon which Runk held the property as trustee, the deed merely stating that the land was conveyed to "William M. Runk, trustee." The will of Runk was executed in 1890. On the second hearing appellant introduced a document dated in 1887, executed by Runk, in the form of a declaration of trust, wherein he declared that this land conveyed to him in the master's deed was held by him in trust for certain persons (naming them), and to be conveyed to him or his executors, administrators, and assigns when requested by such persons or their legal representatives. It is earnestly insisted by counsel for appellee that in this ejectment proceeding this declaration of trust, which apparently was obtained by counsel for appellant from the representatives of the Runk estate, cannot be considered as affecting the title, that a trustee such as Runk was under the master's deed is the absolute owner of the estate and exercises all the powers of ownership, and that he may be treated by others as sole proprietor; while it was argued by counsel for appellant that the title which Runk held as trustee could not be devised by him.

[3-7] The general rule is that under the

common law the legal estate in the hands of a trustee possesses precisely the same properties, characteristics, and incidents as if the trustee were the absolute owner. The trustee may sell and devise it. 1 Perry on Trusts (6th Ed.) §§ 321-335, inclusive. The principal question, as this author says, that here arises as to the power to devise is whether the words of the will were intended to embrace estates held by the testator in trust, and he further says (sections 335, 336) that a general devise of real estate will pass estates vested in the testator as trustee or mortgagee, unless a contrary intention can be collected from the expressions of the will or from the purposes or limitations to which the devised lands are subjected. We think it is clear, under this reasoning and under the wording of William M. Runk's will, that he conveyed to his trustees all of his real estate of every character, and did not intend to limit their power to sell any trust estate that he might have. The master's deed of record in Randolph county conveyed to Runk, as trustee, the land in question, and under the doctrine laid down in Perry on Trusts, heretofore referred to, and the decisions therein cited, Runk had the power of devising the legal title to his trustees and did so devise it. In ejectment proceedings only the legal title is involved. It is not competent in such an action to show who paid the consideration money on the conveyance of the premises for the purpose of establishing a trust. *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148. An equitable title forms no bar to recovery in ejectment. *Fischer v. Eslaman*, 68 Ill. 78. Even in case of a naked trust the law is so insistent upon the legal title being sustained that it enables the trustee to recover in ejectment against the cestui que trust. *Reece v. Allen*, 5 Gilman, 236, 48 Am. Dec. 336. A deed by a trustee for land held in trust for the use of another will pass the legal title to the grantee, whether it was rightly made or made in violation of the trust under which the title was held. *Walton v. Follansbee*, 131 Ill. 147, 23 N. E. 332; *Chapin v. Billings*, 91 Ill. 539.

[8, 9] Counsel for appellant also insist that the deed from Ritter to Hartzell, being executed by only one of the executors named in Runk's will, did not convey the title. Under section 97 of our act on administration (*Hurd's Stat.* 1917, p. 27), passed in 1872, if an executor fails or refuses to qualify the others may execute the power, thus making it impossible, by failure or refusal to qualify, to prevent the execution of the power by the remaining executors. *Starr v. Willoughby*, 218 Ill. 485, 75 N. E. 1029, 2 L. R. A. (N. S.) 623. Under the authorities the legal title was certainly conveyed through the master's deed to Runk, the will of Runk, and the deed of one of his executors, to William Hartzell, the father of appellee. Even if it be conceded for the purposes of this hearing that appel-

lant could rightfully introduce the declaration of trust signed by Runk and have the equitable title considered, as shown by that declaration, on this hearing, we do not think it would change the fact that the legal title was conveyed to Hartzell, regardless of the provisions of the declaration of trust, and moreover such declaration of trust was not recorded in Randolph county before Hartzell purchased this land, and there is nothing in the record indicating that he knew anything about it.

[10] The argument of counsel for appellant is to the effect that under the declaration of trust offered by them it is shown that the equitable title to this property must stand in the name of the heirs and legatees of the beneficiaries therein named, and appellant in no way claims title through any of these beneficiaries or any third person not connected with this litigation. Appellant does not claim any record title to this property, but only claims that the land was vacant and unoccupied at the time of his entry, and that therefore he is entitled to it, first, because appellee has failed to prove title in herself, and, second, because appellant has proved title in a third person. Appellant does not claim through or connect his title with the title of any third person in any way, and therefore, being a mere trespasser and without title, he cannot set up an outstanding title in another. *Casey v. Kimmel*, 181 Ill. 154, 54 N. E. 905; *Anderson v. Gray*, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696; 9 R. C. L. 870.

The points already discussed in this opinion are the principal ones relied upon by counsel for appellant as to why the case should be reversed. They, however, do discuss other questions incidentally, which they argue tend to show that there was a defect in appellee's chain of title as proved on the trial—among others, the question whether the patent from the government to the original owner of the land was sufficient to identify and convey the property; another, to the effect that the record shows that a trustee in the chain of title bought the land at his own sale; another, that the sale under a certain trust deed was made after the two years provided for in said deed; and another, that one of the plats of the property was not properly certified to. We deem it sufficient to say that we have considered all of these questions, and do not think any of them should be sustained. We think the patent of the land as finally introduced in evidence satisfied the requirements of the law. We do not think that the record shows that the trustee bought at his own sale. The sale which is objected to as being made after the 2 years provided for in the trust deed was made more than 50 years ago, and no one directly interested in the record title has objected. This point we deem without merit, as we do the one with reference to the plat not being properly certified. The conclusion necessarily follows that the

trial court rightly entered a judgment in favor of appellee.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

(288 Ill. 163)

SEGGEBRUCH v. INDUSTRIAL COMMISSION et al. (No. 12585.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 6, 1919.)

1. MASTER AND SERVANT §361—WORKMEN'S COMPENSATION ACT—HAZARDOUS EMPLOYMENT.

Where neither the employer nor employé had elected to come under the Workmen's Compensation Act, whether they were under that act depended upon nature of employment and the business engaged in at time of the injury, and whether employé was injured in line of employment coming within purview of section 3, defining hazardous employments.

2. MASTER AND SERVANT §363—WORKMEN'S COMPENSATION ACT—HAZARDOUS EMPLOYMENT.

An individual engaged in farming and other business, who employed men without regular duties, and who had not elected under Workmen's Compensation Act, § 1, to come under the act, was not operating thereunder in respect to his farming, not within hazardous occupations enumerated in section 3, so that Industrial Commission had no jurisdiction to award compensation to an employé injured while hauling fertilizers.

3. MASTER AND SERVANT §346—WORKMEN'S COMPENSATION ACT—PURPOSE.

The intention of Workmen's Compensation Act in specifying certain occupations as extra-hazardous, and in depriving employer of certain defenses, was to secure to employes engaged in such occupations greater protection than was afforded by the pre-existing law.

Error to Circuit Court, Will County; Dorance Dibell, Judge.

Proceeding by Henry J. Luecke for an award of compensation under the Workmen's Compensation Act, opposed by William Seggebruch, employer. From a judgment of the circuit court affirming an award of the Industrial Commission in favor of claimant, the employer brings error. Reversed and remanded, with directions.

Bowles & Bowles, of Chicago, and O'Donnell, Donovan & Bray, of Joliet, for plaintiff in error.

Barr, McNaughton & Barr, of Springfield, for defendant in error.

STONE, J. The circuit court of Will county affirmed an award of the Industrial

Commission in favor of defendant in error, Henry J. Luecke, for injuries received by him while in the employment of the plaintiff in error.

Defendant in error was injured on the 8th day of February, 1915, while engaged in hauling manure and refuse from the barn of the plaintiff in error to certain farm land owned and operated by plaintiff in error. It appears from the evidence before the arbitrator that at the time and prior to the day of the accident in question the plaintiff in error was engaged in farming, in conducting a retail flour and feed store, a saloon, a grain elevator, and in retailing sand, gravel, tile, and brick, in the village of Crete, Will county, Ill. The elevator was the usual grain elevator located near the railroad tracks, to which farmers hauled their grain over a dump, from which the grain was elevated to bins by machinery driven by an electric motor. The grain in the elevator was shipped out in cars, and part of the grain was hauled by teams from this elevator to Chicago Heights, a distance of about five miles, and part of the grain was hauled to a feed store operated by plaintiff in error at the village of Crete. Plaintiff in error owned and operated a farm of 117 acres about one mile from the village, and also owned a subdivision to the village of about 20 acres. The brick, tile, stone, gravel, and sand were handled direct from the cars on which they were shipped into Crete, or were sometimes unloaded onto the ground along the grain elevator switch track and hauled out by the farmers. Sometimes the gravel was hauled direct from the cars or the storage on the ground aforesaid direct to the public roads by the teams of the plaintiff in error. The accounting part of all business except the saloon was carried on in the office located at the feed and flour store. The plaintiff in error had four or five horses at the time of the accident. These horses were kept in the barn on the premises where the feed store and the residence of the plaintiff in error were located, and were used in connection with all of his aforesaid businesses. The manure from the barn was in a concrete bin adjoining the barn, and when the bin was full the men employed by plaintiff in error would haul it out to the farm and onto the land in the subdivision. On the day of the accident defendant in error was emptying the bin and hauling the contents thereof onto the subdivision with a team and wagon, and while unloading the manure he was either thrown or fell from the wagon and was badly injured. He was sent to the hospital at Chicago Heights, where he remained for several months, and at which place one leg was amputated because of the condition produced by the injury.

Several men were employed by the plaintiff in error, none of whom, including the defendant in error, had any regular duty. Defendant in error did every kind of work for the plaintiff in error except office work. Sometimes he worked at the elevator, at which time he stopped and started the machinery; at other times he worked in connection with the gravel, sand, brick, and tile, unloading or hauling the same from the car; at other times he hauled grain from the elevator to Chicago Heights; at other times he hauled flour and feed to the store buildings at Crete; at other times he worked on the farm during the farming season. Defendant in error testified that he took care of the teams; that he did not know the character of the work he did the day before the accident. On cross-examination he stated that he was hauling manure for fertilizer; that he had hauled the same that year to other places; that he worked the land for plaintiff in error during the proper season; that on the day of the accident he hauled manure because he did not have any other work on hand; that the elevator was used in the fall when grain came in; that he did not know whether or not he worked in the elevator during the month of February in which he was injured.

The Industrial Commission found that defendant in error and plaintiff in error were operating under, and were subject to the terms and provisions of, the Workmen's Compensation Act (Laws 1913, p. 335); that the injury of the defendant in error was an accidental injury arising out of and in the course of his employment; that the applicant sustained temporary total disability for a period of 24 weeks and the loss of one leg; that medical and hospital services were furnished by the plaintiff in error to the extent of \$40; and that applicant had expended in addition thereto \$160 during a period of eight weeks after the accident. The commission allowed an award of \$6 per week for 24 weeks, and a further award of \$6 per week for 175 weeks and said amount of \$160. Plaintiff in error filed his petition for a writ of certiorari in the circuit court of Will county, and that court affirmed the award and quashed the writ.

[1] The only contention of the plaintiff in error is that the court erred in affirming the award, for the reason that the plaintiff in error was not under the provisions of the Workmen's Compensation Act either by election or by virtue of the hazardous nature of his business or employment. It is admitted that neither the employer nor employé had elected to come under the provisions of said act. Whether or not the parties hereto were under the Workmen's Compensation Act depends upon the nature of the employment

and the business engaged in at the time of the injury. It is evident plaintiff in error followed a varied line of business, and the test is whether or not the defendant in error was at the time he was injured working in a line of employment which comes within the purview of section 3 of the Workmen's Compensation Act. *Vaughan's Seed Store v. Simonini*, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713.

[2, 3] It is urged by defendant in error that plaintiff in error was engaged in conducting an elevator business, and that such elevator business is a hazardous occupation. It was said in *Vaughan's Seed Store* case, *supra*:

"The reasonable interpretation of paragraph (b) of section 3 is that the provisions of paragraph (a) shall only apply to an employer engaged in the extrahazardous occupations mentioned, * * * and it was not intended that employers engaged in such extrahazardous occupations should for that reason be subject to any greater liability to their employes not engaged in such occupations than other employers under the same circumstances. The defendant in error was not an employer of the plaintiff in error in any of the extrahazardous occupations mentioned in section 3, and plaintiff in error was not exposed to any of the dangers arising from such extrahazardous occupations. Whether or not the defendant in error, as to any part of its business, was subject to the provisions of the Workmen's Compensation Act, it was not subject to such provisions so far as the plaintiff in error was concerned."

The defendant in error, as appears from the record, was at the time of his injury engaged in the spreading of fertilizer over certain farm land of the plaintiff in error. This occupation was that of farming—a business not included within paragraph (b) of section 3 of the Workmen's Compensation Act. In the case of *Fruit v. Industrial Board*, 284 Ill. 154, 119 N. E. 931, the employer was engaged in the retail coal business, and the employé was injured while employed in that business. It was urged that because of the fact that the employer conducted also the business of delivering goods for a wholesale house he was thereby brought under paragraph (b), § 3, of the act as a carrier. This court there held that whether or not he had at times engaged in the business of delivering goods for others was immaterial, as the employé was, at the time he was injured or employed, not working in that line of employment or in doing anything connected therewith.

By section 1 of the Workmen's Compensation Act any employer is authorized to elect to provide and pay compensation for accidental injuries to his employes arising out of and in the course of the employment. He is not, however, required by the act, under that section, to pay such compensation, as such payments are entirely voluntary. If he does not so elect, he remains subject to the same

liabilities and may make the same defenses as before the passage of the act. Section 3 limits this right of election, as that section presumes that all employers engaged in the different occupations or businesses therein specified have elected to come under the act in case such employers do not act concerning an election, and if they do elect not to come under the act they surrender the right to introduce the defenses of assumed risk, negligence of fellow servants, and contributory negligence. The intention and purpose of the Workmen's Compensation Act in specifying certain occupations as extrahazardous, and in depriving the employer of the right of said defenses thereto, is to secure to the employees engaged in such extrahazardous occupations a greater degree of protection than was afforded by the law previous to the enactment of that act. It was not the purpose to extend the provisions of the act to occupations not having any connection with the extrahazardous occupations mentioned in section 3. To hold otherwise would be to hold that said section 3 applies to all occupations, and that all employers come under the act, regardless of whether or not they had elected to do so. The fact that the defendant in error here did at times operate the machinery of the elevator does not aid his contention, for the reason that he was not engaged in that occupation at the time of his injury, nor was he engaged in any occupation incident thereto, and had not been during the month in which he was injured. The fact, if it be a fact, that his employer would at times engage in occupations coming within section 3 is of no avail here, where the injury of the employee did not arise out of or in the course of his employment at such hazardous occupation or any occupation incident thereto. *Fruit v. Industrial Board*, supra; *Vaughan's Seed Store v. Simonini*, supra; *Hochspeier v. Industrial Board*, 278 Ill. 523, 116 N. E. 121, L. R. A. 1918F, 227.

As the defendant in error was not engaged in any occupation referred to in section 3, and there was no election on his part or on the part of the employer to come under the Compensation Act, it follows that they were not operating under said act, and that the Industrial Commission was without jurisdiction to award the compensation in this case, and the circuit court erred in affirming the award and quashing the writ of certiorari.

It is urged by the defendant in error, on cross-errors, that the circuit court should have stricken from the record the testimony taken before the Industrial Commission, but not heard by the board of arbitrators, for the reason that the transcript of said testimony taken on review was not filed within the time prescribed by the act. As it appears

from the testimony taken before the board of arbitrators that the defendant in error was not engaged in an extrahazardous occupation, and was not therefore within the purview of the Compensation Act, which facts are not in any way changed by the testimony taken before the commission on review, it does not become material here to decide whether or not the transcript of said testimony taken on review was properly preserved or filed in apt time.

The judgment of the circuit court will therefore be reversed, and the cause remanded to said court, with directions to set aside the findings of said commission and quash the record.

Reversed and remanded with directions.

(238 Ill. 126)

**CHICAGO, R. I. & P. RY. CO. v. INDUS-
TRIAL COMMISSION et al.**
(No. 12511.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 5, 1919.)

**1. MASTER AND SERVANT §373—WORKMEN'S
COMPENSATION ACT—INJURY "ARISING OUT
OF EMPLOYMENT"—HOMICIDE.**

Where a locomotive boiler washer's helper quit work, and thereby obliged the boiler washer to apply to the foreman for another helper, which angered the first helper, who in the ensuing quarrel shot the boiler washer, the shooting was incidental to, and arose out of, the employment within the Workmen's Compensation Act.

**2. COMMERCE §27(8)—RAILROAD EMPLOYEES
—"INTERSTATE COMMERCE."**

A locomotive boiler washer shot and killed by another employee of defendant while engaged in washing a boiler on a locomotive, not assigned to any particular train or work, but standing in defendant's yards ready to be assigned to either intrastate or interstate commerce, is not engaged in interstate commerce, so as to prevent recovery under the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Cartwright and Dunn, JJ., dissenting.

Error to Circuit Court, Cook County;
Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by Katherine Kraujalis for compensation for the death of Alexander Kraujalis, opposed by the Chicago, Rock Island & Pacific Railway Company, employer. An award of compensation was made by the Industrial Commission, confirmed by the circuit court, and certified to the Supreme Court for review by writ of error. Affirmed.

M. L. Bell and A. B. Enoch, both of Chicago, for plaintiff in error.

John L. Hopkins and A. G. Abbott, both of Chicago, for defendant in error.

FARMER, J. Alexander Kraujalis was employed by the Chicago, Rock Island & Pacific Railway Company in its yards at Blue Island as a locomotive boiler washer. While engaged in work he was shot and killed in the roundhouse of the railroad company by another employé of the company, who was known as a machinist's helper, and was employed by the same company. The killing occurred Monday night November 19, 1917. Kraujalis left surviving him a wife and two children, and application was made for compensation under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i); it being claimed that the death occurred in the course of and arose out of the employment of deceased.

Kraujalis was, as we have said, a locomotive boiler washer, and for some months his assistant or helper in that work was his brother-in-law, Kaupus. Saturday night, November 17th, Kaupus was not on duty, and Hunt, a machinist helper, was assigned to the duty of assisting deceased in the work. Through the week machinist helpers were let off at 11:30 p. m., and on Saturday night at 10:30 p. m. Saturday night, November 17th, Hunt quit and left his work about 10 o'clock p. m., and deceased was left without any helper. Kraujalis reported that fact to the foreman, Dan Dougherty, and the foreman directed him to get a Mexican to help him the rest of the night. Monday night, November 19th, Kaupus was assisting Kraujalis as his helper, and Hunt was at work as a helper to a machinist named Deady. About 7 o'clock p. m. the deceased went to the storehouse for some oil, and about the same time Hunt was sent by Deady to the same storehouse for some cotter-keys. The two men met in the storehouse, and a quarrel ensued. Hunt called deceased a vile name, and they engaged in a fight. Kraujalis threw Hunt down and held him for some minutes. Hunt pleaded with him to be allowed to get up, which Kraujalis permitted him to do, and when he arose he struck Kraujalis on the jaw and "put him out." Kraujalis called for his brother-in-law, Kaupus, who came to the storehouse and threw Hunt out. He testified Hunt said Kraujalis had reported him to the boss and that if he was fired he would kill Kraujalis. Immediately afterwards Kraujalis and Kaupus went to the office of Dougherty, the foreman, and reported that Hunt was fighting them. Hunt had returned to his place of work, and Dougherty and the two men went to where Hunt was engaged, and Dougherty called for Hunt. He came to where the men were, and there struck, or tried to strike, Kaupus with a sledge ham-

mer. In some manner the sledge hammer got out of Hunt's hands, and Kaupus testified he then tried to grab him in the breast. About that time another employé came by with a hose on his shoulder, and Kaupus took the hose and struck Hunt with the end of it, on which was a metal tip. The blow staggered Hunt, and when he recovered he ran or went away. Kraujalis and Kaupus went back to the engine they were washing out. Kaupus turned the water on, and Kraujalis was handling and directing the hose. While they were thus engaged, Hunt came with a revolver and began shooting at Kaupus. One bullet passed through Kaupus's shirt, and he ran away. Hunt then shot Kraujalis, wounding him so severely that he died.

The above is the substance of the material testimony as to how the death occurred. The arbitrator before whom the application for compensation was heard denied compensation. A petition for a review was filed before the Industrial Commission, and upon the hearing the commission awarded compensation to the applicant. The award was confirmed by the circuit court of Cook county, and that court certified the cause was a proper one to be reviewed by the Supreme Court. Accordingly the case is before us by writ of error.

A reversal is asked by the plaintiff in error upon two grounds: (1) The injury to deceased which caused his death did not arise out of his employment; (2) both deceased and Hunt were engaged in interstate commerce at the time of the shooting, and no award can therefore be made under the state Compensation Act.

The determination of the question whether an injury arose out of the employment in some cases presents one of the most difficult problems in connection with the act. Glass on Workmen's Compensation, 40. This Court has in several cases adopted the definition of the Supreme Court of Massachusetts in the McNicol Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, viz.:

"It [the injury] 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment."

See Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149; Mueller Construction Co. v. Industrial Board, 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918F, 891, Ann. Cas. 1918E, 808.

[1] Kraujalis was not the superior of Hunt in the sense that he had authority to

discharge him, but his (Kraujalis') work was such that he could not perform it without the assistance of a helper. When the helper quit work before the work was completed, it was his duty to ask the foreman for help, which made it necessary for him to inform the foreman his helper had quit work. It was the performance of this duty that aroused the anger of Hunt and caused him to quarrel and fight with Kraujalis. It does not appear that Kraujalis at any time was the aggressor or sought an altercation with Hunt. The meeting of the two men at the storehouse the night of the shooting was accidental. Hunt had learned Kraujalis had reported to the foreman that Hunt had quit work Saturday night before quitting time and began abusing Kraujalis and called him an offensively vile name. They engaged in a fight, but Kraujalis, who was the larger man, does not appear to have done anything more than throw Hunt down and hold him until he pleaded to be allowed to get up. This Kraujalis permitted him to do, and he then struck Kraujalis on the jaw—a blow which a witness said "put him out." It was also testified Hunt there said Kraujalis had reported him, and if he was discharged he would kill him. When Kraujalis and his helper, Kaupus, went with the foreman to the place where Hunt was at work, Hunt was the aggressor, according to the testimony, and sought to strike Kaupus with a sledge hammer. It is not shown by the testimony that Kraujalis there said or did anything. After Kraujalis and Kaupus had returned to and were engaged in the duties of their employment, Hunt came to them with a revolver and began shooting at Kaupus. When he ran away he then turned on and shot Kraujalis, who was holding and directing the hose in washing out the boiler. The shooting was incidental to, and arose out of, the employment. It cannot be said, as a matter of law, that the injury was such a one as might happen to any one and did not arise out of the employment. "It [the risk of injury] may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected" therewith. *Bryant v. Flssel*, 84 N. J. Law, 72, 86 Atl. 458. There was a causal connection between the conditions under which Kraujalis was required to perform his work and the injury. It cannot be said that the proof does not tend to show that the shooting of Kraujalis was caused by his report to the foreman that Hunt had quit work. This the nature of his work required him to do, as he was obliged to ask the foreman for another helper. He was acting entirely in the line of his duties, and this brought upon him the murderous assault by Hunt with a gun. That such an attack is an unusual and extraordinary result makes it none the less an incident of the employment. There is no

dispute that Kraujalis was shot in the course of his employment, and we cannot say the Industrial Commission and the circuit court erred in finding the injury arose out of the employment, and this conclusion is sustained, in principle, by *Trim School District v. Kelly*, 7 B. W. C. C. 274, where the teacher was assaulted and killed by bad and unruly pupils. *Polar Ice and Fuel Co. v. Mulray* (Ind. App.) 119 N. E. 149; *In re Heitz*, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344.

It was stipulated at the hearing that plaintiff in error was engaged in both interstate and intrastate commerce. There was a division point on plaintiff in error's road after leaving Blue Island, at Silvis, Ill., a city of about 3,000 population, about eight miles east of the Iowa line. The engines which hauled interstate trains to Silvis hauled interstate trains coming from the west from Silvis to Chicago. The proof tends to show that there were five engines in the roundhouse at Blue Island that were used principally for interstate trains, and it is claimed the engine Kraujalis was working on when shot was one of them. Its number was 2008. The road foreman of equipment testified there was no written order assigning engines to different trains; that if the exigencies required it they would not let an engine lie idle, but would use it on any train when for the benefit or advantage of the company. It was the duty of the foreman to assign the power. At times engine 2008 was used in intrastate service. At the time Kraujalis was at work on the engine it had not been assigned to any particular train. In *Minneapolis & St. Louis Railroad Co. v. Winter*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, it was alleged in the declaration that the plaintiff, when injured, was making repairs on an engine, and that the parties were engaged in interstate commerce. It was stipulated that the engine had been used in hauling freight trains over defendant's lines, which freight trains carried both intrastate and interstate commerce, and was so used after the plaintiff's injury. The court said:

"This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business, and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

[2] That decision appears to us conclusive of the contention of plaintiff in error that

the parties were at the time of the injury engaged in interstate commerce.

The judgment of the circuit court is affirmed.

Judgment affirmed.

CARTWRIGHT and DUNN, JJ., dissenting.

(233 Ill. 255)

PAULY et al. v. MADISON COUNTY.*
(No. 12209.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 4, 1919.)

1. COUNTIES ⇨114—LIABILITIES—CONSTRUCTION OF BUILDINGS—ARCHITECTS' SERVICES.

Architects who have a contract with the building committee of the board of supervisors to make plans for an addition to the courthouse, duly approved by the board, cannot recover for plans for a new courthouse, made pursuant to instructions by the committee, unauthorized by the board; they being bound to know the extent of the committee's authority.

2. COUNTIES ⇨124(2)—UNAUTHORIZED CONTRACTS—RATIFICATION.

Where a building committee of the board of supervisors, having, without authority, instructed architects to make plans for a new courthouse, reported to the board that they had so instructed the architects, the fact that such report was laid on the table, and at the next meeting a motion to amend the committee's report so as to authorize a new building was lost, negatives a ratification of the act of the committee by the board.

3. COUNTIES ⇨124(1) — LIABILITIES — CONTRACTS WITH ARCHITECTS—SERVICES.

Architects who entered into a valid contract with the building committee of the board of supervisors to make plans for a courthouse addition, which contract was approved by the board, are entitled to recover the reasonable value for their services rendered up to the time that the committee, without authority, interrupted the work by changing the plans so as to call for the construction of a new courthouse.

Error to Appellate Court, Fourth District, on Appeal from Circuit Court, Madison County; Louis Bernreuter, Judge.

Action by Charles Pauly and Edward C. Pauly, partners under the name of Chas. Pauly & Son, against the County of Madison. Judgment for plaintiffs in the circuit court was affirmed by the Appellate Court, and defendant brings writ of certiorari. Reversed and remanded.

J. F. Eeck, of Edwardsville, for plaintiff in error.

D. H. Mudge, of Edwardsville, for defendant in error.

CARTWRIGHT, J. The Appellate Court for the Fourth District affirmed the judgment recovered in the circuit court of Madison county by the defendants in error, Charles Pauly and Edward C. Pauly, partners under the name of Chas. Pauly & Son, against the county of Madison for \$5,062.50 for services as architects under a contract with the building committee of the board of supervisors. A writ of certiorari was ordered for a review of the judgment of the Appellate Court.

At the meeting of the board of supervisors of the county of Madison held on December 1, 1909, the public building committee of the board submitted a report relative to improvements on the courthouse. The report recited at length the crowded condition of the county offices and the inadequacy of the rooms provided for the courts, with the prospect of being required to furnish further space for a probate judge and probate clerk after the next election, and stated that the revenue of the county at that time, without increasing the tax rate, would enable the board to appropriate and expend \$50,000 per annum for improvements of the courthouse until they should be completed. The committee presented and recommended the adoption of the following proposition:

"To build a wing on the south side of the present building three stories high, to cost about \$50,000. After same is complete to the extent of a temporary occupancy, to move the offices from the center part to the south wing and then demolish the center portion and rebuild same to conform with the south wing. This avoids renting any outside space. After completing the center part then remodel the north wing to make it conform with the balance of the building, the result being practically a new building three stories high, with all modern improvements and the appearance of a stone court house with architecture up to date."

The report concluded with the statement that the total cost of the contemplated improvements would be covered by \$150,000, which would mean an expenditure of \$50,000 for a period of three years, building only each section, as above enumerated, annually. The committee asked for authority to secure the services of a competent architect and to make a contract with him to supervise and superintend that improvement on a basis that was customary, the committee to submit to the board the plans for approval and adoption, subject to alteration if not meeting the approval of the board. The report was adopted, and in pursuance of the authority given the building committee on December 6, 1909, entered into a contract with plaintiffs, reciting that, whereas the county was about to erect an addition to the Madison courthouse, the plaintiffs agreed to prepare the plans and specifications for the building, to make all necessary

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Reversing judgment 211 Ill. App. 12.

drawings, to procure estimates from builders and contractors for the construction, and, by and with the consent of the county, to let the contract to the lowest responsible bidder and to superintend the construction of the building. The county was to pay 5 per cent. of the aggregate amount of all contracts, but if superintending the structure by plaintiffs should be dispensed with, they were to receive 3 per cent. of the aggregate amount of all contracts. At a meeting of the board on January 6, 1910, the building committee submitted a report relative to the proposed improvements on the courthouse, stating that it had secured the services of the plaintiffs and made a contract with them for plans on the customary basis of 3 per cent. of the cost of the building and 5 per cent. if the plaintiffs did the superintending, and that the committee had visited Springfield, Decatur, Lincoln, and Bloomington and got a great deal of valuable information by inspecting buildings and getting ideas for plans. The report was adopted, and the contract thereby approved. At a meeting of the board on February 3, 1910, there was a discussion of the courthouse proposition, and the board was informed by the building committee that the Illinois Traction System had chartered a car "free gratis" for the whole board to visit Springfield, Lincoln, and Bloomington. At a meeting of the board on March 10, 1910, the resolution of a mass meeting held that day was received and spread of record opposing the proposed plan for remodeling the courthouse and against the present site and in favor of a new courthouse and a new site to be donated by the citizens of Edwardsville, favoring a bond issue and demanding open competition in every phase of the work, including the employment of architects, contractors, and furnishers. This resolution amounted to a protest against the previous action of the board and the proposed plan and demanded open competition in the employment of architects for a new courthouse as well as contractors and furnishers. At some time after that mass meeting the committee instructed plaintiffs to prepare plans for a new courthouse, for which no authority had been given. The plaintiffs prepared plans for such new courthouse, estimated to cost \$225,000 without heat, light, or plumbing, which would amount to about \$25,000 additional. At a meeting of the board on August 9, 1910, the building committee submitted the plans and specifications prepared for a new courthouse, and the building of the proposed new courthouse was referred to the judiciary committee, to act in conjunction with the state's attorney and have the proposition voted on at the November election, 1910. At a subsequent special meeting of the board the judiciary committee reported that it had agreed upon a reso-

lution providing for erecting a new courthouse at the present courthouse site in Edwardsville, the question of issuing county bonds therefor to the amount of \$350,000 to be submitted to a vote of the people at the election on November 8, 1910, and that report was adopted. The proposition was submitted at the election and defeated. At the January, 1911, meeting of the board the building committee made a lengthy report reviewing the various proceedings, stating that the bond issue had been voted on and defeated; that the cost of a new courthouse would be about \$225,000; that after the mass meeting in March, 1910, the committee believed the public desired practically a new building and had instructed the plaintiffs to prepare plans accordingly, which were presented to the board. The committee recommended that the plans prepared by plaintiffs be accepted and the building committee authorized to advertise for bids in accordance with the plans and proceed with building operations. The report was laid on the table until the next regular meeting. At the February, 1911, meeting, the chairman of the building committee moved the adoption of the committee report for remodeling the courthouse, with an amendment authorizing the committee to advertise for bids for a contract to build a new courthouse, the cost of the building not to exceed \$250,000. On a vote the motion was lost.

The declaration contained the common counts for labor, services, and materials and two special counts setting out the contract in *hæc verba*, alleging the ratification of the same by the board on January 6, 1910, performance by the plaintiffs in accordance with the contract, and the wrongful failure, neglect, and refusal of the county to proceed with the construction of the building. The trial was before the court without a jury, and there were frequent objections to evidence as irrelevant and incompetent, but everything offered was admitted subject to objection, and there is no method of determining what was regarded by the court as competent and relevant. In this opinion, however, all the facts proved by legitimate evidence are stated, and it will not be necessary to consider objections made to evidence.

[1, 2] The court held a proposition of law that the plaintiffs were not barred from recovering because of the fact that the plans and specifications made did not call for a reconstructed building or a building built in additions, on account of the acts of the board at the meetings held in January, February, and March, 1910, above stated. There was nothing in any act of the board justifying such a holding. Among the duties imposed by law on boards of supervisors is the duty to build courthouses, and it is their imperative duty to provide the same for the

use of the county. *Andrews v. Board of Supervisors*, 70 Ill. 65; *County of Coles v. Goehring*, 209 Ill. 142, 70 N. E. 610. Supervisors have no power to act individually, and it is only when convened and acting together as a board that they represent and bind the county by their acts. *Bouton v. Board of Supervisors*, 84 Ill. 384; *Marsh v. People*, 228 Ill. 464, 80 N. E. 1006. There is no power to bind the county by an architect or committee appointed by the board unless authority has been given by the board. *Sexton v. County of Cook*, 114 Ill. 174, 28 N. E. 608. All persons assuming to act as the official agents of a county must have the requisite authority for that purpose, otherwise the county will not be bound, and every one dealing with them must know at his peril the extent of their authority. *Scates v. King*, 110 Ill. 456. The county board gave authority to its building committee to secure the services of competent architects to prepare plans and specifications for alterations and improvements of the courthouse, as specified in the report of the building committee on December 1, 1909. By virtue of that authority the committee on December 6, 1909, entered into the contract with the plaintiffs to prepare plans and specifications for the contemplated addition to the courthouse. There was authority to make the contract, and it was ratified and confirmed by the board. After the demonstration by the mass meeting in March, 1910, the committee instructed the plaintiffs to prepare plans for a new courthouse, for which no authority had been given. When the committee reported to the county board at the January, 1911, meeting that it had instructed the plaintiffs to prepare plans for a new courthouse, the report was laid on the table until the next meeting, and at the next meeting the motion to amend the committee's report so as to authorize a new building was defeated. There was no evidence tending to prove ratification of the unauthorized act. The court held another proposition of law that the plaintiffs, in dealing with the committee, were required to know at their peril the extent of its authority; that the building committee had no authority to bind the county for plans and specifications for a courthouse that would cost \$225,000 and would have to be constructed all at one time, and the plaintiffs could not recover unless it was shown that the plans were in accordance with the contract entered into with the committee and that the board ratified the contract with full knowledge of all the material facts. This statement of the law was correct, but it appears that the court concluded there had been a ratification, of which there is no evidence. There was no right to recover for plans and specifications designed for a new courthouse.

[3] To prove their damages the plaintiffs introduced evidence of the amount of work done both before and after the change from the plans provided by the contract, including those made for a new courthouse. Edward C. Pauly testified that after the contract was made the plaintiffs proceeded to prepare plans and specifications for the addition to the courthouse and consulted with the committee and made numerous sketches from ideas suggested from time to time, and that this continued for eight or nine months. For any services rendered in pursuance of the contract to make plans for an addition to the courthouse according to the proposition submitted by the building committee to the board of supervisors and adopted by the board the plaintiffs would be entitled to recover. This is so notwithstanding the fact that the plans were afterward changed by direction of the committee and the unauthorized order was given to prepare plans for a new courthouse. The evidence furnished no information as to the time when the change was made or the amount or value of the work done in pursuance of the contract in making plans and specifications for the addition.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

(238 Ill. 240)

O'CONNOR et al. v. HIGH SCHOOL BOARD OF EDUCATION OF EVANSTON HIGH SCHOOL DIST. et al. (No. 12653.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 6, 1919.)

1. SCHOOLS AND SCHOOL DISTRICTS — 67—
PURCHASE OF SCHOOLHOUSE SITE — SUB-
MISSION OF QUESTION TO VOTERS.

Under Hurd's Rev. St. 1913, c. 122, § 91, as amended by Laws 1913, p. 583, giving the board of education for a high school the power of school directors to build schoolhouses, and Hurd's Rev. St. 1915, c. 122, § 119, as amended by Laws 1915, p. 639, prohibiting the board of directors from purchasing a schoolhouse site, without an election called under School Law, § 198, a high school board was not authorized to purchase a schoolhouse site by a vote, where the proposition submitted combined the purchase of a site either with the erection of a new building or the issuance of bonds.

2. SCHOOLS AND SCHOOL DISTRICTS — 68—
SCHOOLHOUSE SITES — SELECTION — CENTRAL
LOCATION.

School Law, § 86, requiring the high school board to establish a high school at a central point convenient to a majority of the township pupils, does not apply to the selection of a site by the majority of the voters.

**3. SCHOOLS AND SCHOOL DISTRICTS ¶22—
CREATION—HIGH SCHOOL DISTRICTS—STATUTE—RETROACTIVE EFFECT.**

The proviso that when certain classes of cities lie within two or more townships, the township in which the majority of the city's inhabitants, with the city, should constitute a high school district, added by amendment to School Act 1889, § 38, by Laws 1891, p. 200, providing for organization of high school districts, which amendment was re-enacted as section 90 of the revised school act, applies where a village became a city after the amendment.

4. STATUTES ¶228—CONSTRUCTION—INTENTION OF LEGISLATURE—SCOPE OF PROVISIO.

Although the purpose of a proviso is not to enlarge the enactment to which appended, and operate as a substantive enactment itself, it will be given that effect if such was the expressed intention of the Legislature.

**5. SCHOOLS AND SCHOOL DISTRICTS ¶22—
CREATION OF DISTRICTS—STATUTES—REPEAL—VALIDITY.**

A provision in the act of 1857, creating Evanston township for school purposes, that no act subsequently enacted should repeal any provision thereof unless mentioned in the repealing act, does not prevent an act of 1891 regarding school townships, which does not mention the act of 1857, from applying.

**6. SCHOOLS AND SCHOOL DISTRICTS ¶67—
PURCHASE OF SITE—ORDERING ELECTION—PETITION BY VOTERS.**

The high school board of a high school district having a population of more than 1,000 and not over 100,000, subject to Hurd's Rev. St. 1917, c. 122, § 91, is also subject to School Law, §§ 123, 127, and elections to choose a building site, issue bonds for its purchase, and erect a building, can only be called by petition of voters, as required by section 127.

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Jesse A. Baldwin, Judge.

Bills by John P. O'Connor and others against High School Board of Education of Evanston High School District and others. From a judgment of the Appellate Court affirming the decree of the circuit court in favor of defendants, complainants appeal. Reversed and remanded. See, also, 285 Ill. 120, 120 N. E. 518.

Howard T. Wilcoxon and William Sherman Carson, both of Chicago, for appellants.

Wilson, Moore & McIlvaine, of Chicago (N. G. Moore, of Chicago, of counsel), for appellees.

FARMER, J. The Appellate Court for the First District affirmed the decree of the circuit court in this case and granted a certificate of importance, upon which a further appeal is prosecuted to this court.

Two bills were filed by appellants in the circuit court, but were consolidated and dis-

posed of in one decree. Both bills attacked the validity of two elections held in the Evanston High School District—one November 6, 1915, the other December 11, 1915—upon the questions of choosing a new site for a school building and the issuance of bonds to purchase the site and erect the building. The first bill filed contained the necessary statutory requirements for a contest of the election held December 11 and for a recount of the ballots cast at that election. The second bill filed by the same parties alleged they had previously filed a bill asking, among other things, for a recount of the ballots; that it contained all allegations necessary to a petition for contesting the election of December 11 and was filed within the time required by statute for contesting elections, but complainants, fearing it might not be sufficient to permit all the proceedings of the board in calling the election, and prior to and leading up to the same, to be fully inquired into, the second bill was filed in order that the proceedings pertaining to the abandonment of the present high school site and the selection of a new site might be examined, considered, and adjudged with reference to their conformity to law and with reference to their validity. The prayer of the two bills was the same, and they asked that the elections be declared to be null and void, and the board of education restrained from preparing or negotiating bonds or using the proceeds of any tax for the purchase of a schoolhouse site, except that the first bill prayed for a recount of the ballots cast at the election held December 11, 1915. The bills were answered, consolidated, and heard together. The cause was heard, the ballots produced in court and counted, and the court found and decreed that the new site, called the Ridge avenue site, received a majority of all the votes cast, and the relief prayed for in each of said bills was denied. The complainants prosecuted an appeal to this court, and it was held we had no jurisdiction, nor had the circuit court jurisdiction, of any statutory contest of the election; also that the public revenue was not directly involved and the appeal should have been taken to the Appellate Court. It was accordingly transferred to that court. *O'Connor v. High School Board*, 278 Ill. 618, 116 N. E. 119. The Appellate Court appears to have understood the decision of this court to be that no relief could be had in equity against any action of the high school board in holding the elections, and reversed the decree of the circuit court and remanded the cause, with directions to that court to dismiss the bills for want of jurisdiction. This court granted a writ of certiorari, and the case was again brought here for review. We held that the bills raised questions as to the validity of said elections, other than a stat-

utory contest of the election, of which the court had jurisdiction, and that the errors assigned on the court's refusal to grant the relief prayed for and decreeing that the elections were lawfully called, held, and conducted, and that the board was lawfully authorized to purchase the site, issue bonds, and appropriate the proceeds, or part thereof, to purchase said proposed site, and dismissing the bill, should have been considered by the Appellate Court. The judgment of the Appellate Court was therefore reversed and the cause remanded to that court, with directions to consider the errors assigned. *O'Connor v. Evanston High School District*, 285 Ill. 120, 120 N. E. 518.

On the 12th of October, 1915, appellees, the board of education for the high school district, adopted a resolution declaring the present high school site and building unsuitable and inconvenient; and on October 18, 1915, called for an election to be held November 6, 1915, for the purpose, as stated in the notices, of voting for or against the proposition to build a new high school building for said district, and upon such new site as might be thereafter selected according to law, and to issue \$500,000 in bonds for the purpose of purchasing such new site, when selected, and of paying the cost of building a new high school building. The ballots were canvassed and both propositions declared to have been carried by a majority of the votes cast. On the 12th of November, 1915, appellees adopted a resolution ordering that an election be held December 11, 1915, for the purpose of selecting a new site for the proposed high school. Notice was given of the election to be held that day for the purpose of selecting a new site for said school building. The ballot used at that election contained a description of three new sites, with a square opposite each one for the voter to designate his choice. The present site was not mentioned, but the ballot contained a blank space with a square opposite, presumably to be used by voters who wished to vote for some site other than the three described. The Ridge avenue site was declared to have received a majority of all the votes cast on the question of site. At the election held on November 6, 1915, no site for the proposed new building was voted upon. The notice stated the election was held "for the purpose of voting for or against the proposition to build a new high school building in and for said district upon such new site as may be hereafter selected according to law, and also for the purpose of voting for or against the proposition to issue school building bonds of said district to the amount of five hundred thousand dollars (\$500,000) for the purpose of purchasing such new site when selected and of paying the cost of building a new high school building on such new site." A majority of the votes cast at said election were declared to have been in favor of both prop-

ositions, and the election of December 11, 1915, was held for the purpose of voting upon the selection of the site.

Appellants contend (1) that the elections held in November and December did not confer any legal right or authority upon appellees to purchase a new site for the school building; that such authority could only be conferred by a vote of the people at an election called and conducted as required by section 198 of the school law (Hurd's Rev. St. 1917, c. 122); (2) that the form of the proposition to build on a new site submitted by notice of the election held November 6, 1915, was insufficient and illegal, in that voters were limited and confined to voting upon building on a new site, thereby eliminating from the consideration of the voters the present or old site; (3) both elections were void because there was no petition of voters for such elections preceding the elections; (4) the site chosen is illegal because not centrally located; (5) the election of December 11 was invalid because persons not residing in the high school district were permitted to vote at said election, and under the facts stipulated the result would have been different if they had not been permitted to vote.

It is admitted by appellees that they had no authority to purchase a schoolhouse site unless authorized to do so by vote of the people of the district, but they contend they were so authorized by the election of November 6, 1915. This is denied by appellants. Section 91 of chapter 122 of Hurd's Statutes, as amended in 1913, in part reads:

"For the purpose of building schoolhouses, supporting the school and paying other necessary expenses, the territory for the benefit of which a high school is established under any of the provisions of this act, shall be regarded as a school district, and the board of education thereof shall, in all respects, have the power and discharge the duties of school directors, for such district." Laws of 1913, p. 583.

Section 119 of the same chapter, as amended in 1915, provides:

"It shall not be lawful for a board of directors to purchase or locate a schoolhouse site, or to purchase, build or move a schoolhouse, or to levy a tax to extend schools beyond nine months, without a vote of the people at an election called and conducted as required by section 198 of this act. A majority of the votes cast shall be necessary to authorize the directors to act. If no locality shall receive a majority of the votes, the directors may select a suitable site. The site selected by either method shall be the school site for such district." Laws of 1915, p. 639.

[1] The first question presented for our consideration is whether appellees were authorized by a vote of the people to purchase a site for a high school building. Appellees adopted a resolution on October 12, 1915, that the present high school site and building were "unsuitable and inconvenient," and

on the 16th of October called an election to be held November 6, 1915, for the purpose, as stated in the notices, "of voting for or against the proposition to build a new high school building in and for said district upon such new site as may be hereafter selected according to law, and also for the purpose of voting for or against the proposition to issue school building bonds of Evanston Township High School District to the amount of five hundred thousand dollars (\$500,000) for the purpose of purchasing such new site when selected and paying the cost of building a new high school building on such new site." The direct proposition to authorize the purchase of a site was not expressly submitted to the voters, but the appellees contend it was necessarily involved in, and covered by, the proposition to erect a building "upon such new site as may be hereafter selected," and to issue bonds for purchasing "such new site when selected" and paying the cost of the building. The wording of the proposition submitted to be voted upon at the election November 6 is not clear. As the propositions were phrased, if a voter was in favor of the bond issue to erect a new building, but opposed to selecting a new site, he would very naturally conclude that he would have to vote against the bond issue in order to vote against a new site. On the other hand, if he was in favor of a new site, but opposed to a bond issue to pay for it he would have to vote for a bond issue to pay for it or vote against a new site. The propositions were so interwoven that a voter who favored one proposition would, in order to vote for it, have to vote for the other also. The propositions of a new building to be paid for by a bond issue and to authorize the purchase of a new site should have been submitted in such manner that a voter would readily understand how to vote for one proposition and against the other if he so desired. It may be, as counsel for appellees insist, that the vote for the proposition to build on a new site when selected and purchase it out of the proceeds of a bond issue would imply authority to purchase, but such authority should not rest on implication. The proposition to authorize appellees to purchase a new site should have been so clearly and unmistakably stated that a voter could vote for or against that proposition alone, without reference to how he wished to vote on the question of erecting a new building and issuing bonds to pay for it. The way the questions were submitted, the question of a bond issue was linked with both the propositions to build and to select a new site. It is conceivable that a voter might desire to vote for a new building and bond issue to pay for it, or for a new site but against a bond issue to pay for the new site, preferring that be done by a tax levy. It is also conceivable that a voter might favor a new building to be paid

for by a bond issue, and oppose the selection of a new site because he preferred that the new building be erected on the old site. It would be difficult to determine how such a person could vote and have his wish given expression and effect. It seems apparent that appellees assumed they had, by their resolution declaring the present site and building unsuitable and inconvenient, made the selection of a new site necessary and eliminated the present site from consideration. At least the propositions submitted to be voted upon would indicate that such was their purpose and intention, and they were so framed as to make it difficult, if not impossible, for voters to vote for a new building without also voting to select a new site. The Constitution requires that all elections shall be free and equal, which means that the vote of every qualified elector shall be equal in its influence with that of every other one. *People v. Election Com'rs*, 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562. As the propositions were submitted at the election November 6, a voter desiring to vote for one of them and against another had not an equal opportunity and influence with the voter who either favored or opposed all the propositions submitted.

Upon the question whether, in any event, by the election of November 6 appellees were given authority to purchase a schoolhouse site *People v. Chicago & Eastern Illinois Railroad Co.*, 270 Ill. 594, 110 N. E. 825, seems very much in point. In that case an election was held on the questions of erecting a new high school building, to be paid for by a bond issue of \$35,000, and the selection of a site. A majority of the votes cast at the election were against erecting a new building and issuing bonds. A majority of the votes cast on the selection of a site were in favor of what was designated the Ellsworth site. The board of education thereupon secured an option on the purchase of said site for \$7,500, and levied a tax to pay for it, judgment for which was applied for by the collector and objected to by the taxpayer. This court held the statute in positive and unequivocal language made the board's power to purchase or select a school site dependent upon its being authorized to do so by a majority vote of the voters voting at an election held for that purpose. The court said:

"The voters of such a district at that time not only had the right and privilege of voting on the proposition of selecting a site, but also on the proposition of purchasing a site. The added proviso has only taken one of those privileges away from the voter—the privilege of selecting a site—and then only when the voters fail, by a majority vote, to select the site themselves. The statute as amended must be construed as giving the voters of the district the privilege of voting for or against the purchase of a building site, and the board of education cannot, in any case, purchase a site unless au-

thorized by a majority of the voters voting at an election for that purpose. In this case the record shows that the voters of the district in question never had the privilege of voting on the question for and against purchasing a school-house site. The nearest they were privileged to do that under the notice of the election was to vote 'for a site for said high school.' What interest had any voter, if there were such voters, in voting 'for a site for said high school' who was utterly opposed to purchasing or selecting any site whatever? The board had no right to assume that all voters were in favor of selecting some site and of purchasing some site or other and refuse to submit to them the right to vote on the proposition for or against purchasing a school site."

To the same effect, in principle and substance, are *Greenwood v. Gmelich*, 175 Ill. 526, 51 N. E. 565, and *Board of Education v. Carolan*, 182 Ill. 119, 55 N. E. 58.

The election of November 6 did not authorize appellees to purchase a site nor did the election of December 11. That election was held for the purpose of locating the site, it being assumed the previous election authorized appellees to purchase it when selected.

Some questions are raised which should be decided for the guidance of the board in the event of another election being held to vote on the questions here involved.

[2] The site receiving a majority of the votes cast is designated the Ridge avenue site. It is well to the northern part of the high school district, and near the line forming the north boundary of Evanston township and the south boundary of New Trier township. It was stipulated that the present location of the high school is not far from the geographical center of Evanston, and a little more than one block from the high school population center. We have been unable to find any statement of the distance the Ridge avenue site is from the present location of the high school building, but from a plat in evidence it appears to be 15 or more blocks north of the present site. Appellants contend that the site at Ridge avenue could not be legally selected because it is not at a "central point most convenient to a majority of the pupils of the township." The board of education is only authorized to select a site when at an election held to select a site no locality receives a majority of the votes cast, in which event the board may select a suitable site. Section 86 of the School Law makes it the duty of the high school board of education to establish "at some central point most convenient to a majority of the pupils of the township" a high school. This restriction is placed on the selection of a site by the board, and no such restriction is placed on the voters in the selection of a site at an election held for that purpose. Such a limitation was not thought necessary in the selection of a site

by the voters, for it can hardly be imagined that a majority of the voters of the district would select a site remote and inconveniently located for the majority of the pupils of the township. The board of education has no power to control or limit the action of the voters in the selection of a site, and the law has placed no restriction upon the selection by the voters except to require a majority vote to make the selection. If no site receives a majority of the votes cast the site may be selected by the board, in which case it shall select a site "at some central point most convenient to a majority of the pupils of the township."

[3] Prior to 1892 Evanston was a village, and then included in its boundaries the disputed territory in Niles and New Trier townships. The township of Evanston lies wholly in the now city of Evanston, the organization having been changed from a village to a city in 1892. By act of 1857 the township of Evanston was constituted a township for school purposes and its boundaries described. Two years later some territory was disconnected and attached to New Trier township. In 1882 Evanston high school was established as a high school for Evanston township under the act of 1879. That act did not provide for a board of education to control and manage the high school, but such control and management were in the trustees. In 1890 a board of education was elected as authorized by the act of 1889, consisting of five members, since which time the school has been under the control and management of such board of education. The appellees contend that as the parts of New Trier and Niles townships in dispute were a part of the village of Evanston before and at the time it was incorporated as a city, in 1892, the whole territory automatically became the high school district by virtue of the act of the Legislature in 1891.

Section 38 of the School Law of 1889 (Laws 1889, p. 276) made provision for calling an election to vote for or against the organization of a township high school. That section was amended in 1891 by adding to it:

"Provided, that when any city in this state, having a population of not less than 1,000 and not over 100,000 inhabitants, lies within two or more townships, then that township in which a majority of the inhabitants of said city reside shall, together with said city, constitute a school township under this act for high school purposes." Laws of 1891, p. 200.

In 1909 (Laws 1909, p. 367) the act concerning schools was revised, and the proviso quoted became section 90 of the revised act. It is not contended that when the proviso was enacted, in 1891, it applied to Evanston, which was then a village, and by its terms the proviso only related to cities; but it is insisted that when in 1892 Evanston be-

came a city the act then applied, and the whole territory within the city limits became the high school district. Appellants contend that the proviso must be considered in connection with the section to which it is attached—the organization of high schools—and it should be limited in its application to township high schools thereafter established; that to construe the provision as contended for by appellees would give it a retroactive effect, which would be unauthorized, because no purpose of the Legislature is expressed or can be inferred to make the act retrospective.

[4] At and before the time of its incorporation as a city Evanston had a population of not less than 1,000 and not more than 100,000 and lay within two or more townships, i. e., Evanston, Niles, and New Trier. The amendment was attached to section 38 of the act of 1889, which authorized calling an election to vote for or against the organization of a township high school. Aside from the fact that at the time the amendment was enacted, in 1891, Evanston was a village, and by its terms the amendment was limited in its application to cities, the amendment accurately describes the situation of Evanston, and provides that in such city the township in which a majority of its inhabitants reside shall, together with said city, constitute a township high school “under this act”—not “under this section”—for high school purposes. While it was an amendment in the form of a proviso attached to section 38, its application was not by its terms limited to the section but applied to the act concerning the establishment of township high schools, and, though the legitimate office of a proviso is not to enlarge the enactment to which it is appended and operate as a substantive enactment itself, it will be given that effect if such was the plainly expressed intention of the Legislature. In *re Day*, 181 IH. 73, 54 N. E. 646, 50 L. R. A. 519. In the case of *Trustees of Schools v. People*, 161 Ill. 146, 43 N. E. 696, and *People v. Bruennemer*, 168 Ill. 482, 48 N. E. 43, the proviso was given the effect of independent legislation. In the revision of the School Act in 1909 the proviso was re-enacted as section 90.

Counsel for appellants concede the Legislature had the power to change or modify the district, but argue that before that effect will be given the amendment it must clearly appear that such was the intention, and further contend the language of the enactment will not admit of that construction; that if the Legislature had intended it to apply to high schools already established it could have so indicated by the addition of a few words. With as much force it may be said if the Legislature had intended the act should apply only to districts thereafter established it could have said so. We see no

valid reason for restricting the benefits of the legislation to districts thereafter established, and its language does not, to our minds, indicate that it was so intended. As we view it, the intent was that it should apply to any high school district that came within its description, and the enactment of the proviso as independent legislation in the revision of 1909 would seem to indicate such was the intention of the Legislature.

[5] Our attention is called to the act of 1857 changing the boundaries and the name of the township from Ridgeville to Evanston and to constitute the same a township for school purposes. The act contained a provision that no act, general or special, relating to school purposes, afterward enacted, should affect or repeal any of the provisions of that act unless specifically mentioned in the repealing act. The act of 1857 was not mentioned in the act of 1891. We do not understand one General Assembly can bind a subsequent one as to the specific manner in which it must word an act repealing or modifying a previous act. The Legislature has power to repeal or modify acts passed by a former Legislature, and this power may be exercised either by expressly declaring its intention, or where the intention is inferred from subsequent repugnant legislation.

We are disposed to hold that the disputed territory in Niles and New Trier townships is a part of the high school district, and the residents of that territory had a right to vote at the elections.

[6] Appellants contend both elections were void because they were not called pursuant to a petition of voters, as required by section 127 of the School Act. It was stipulated that no petition of voters preceded the call of the election, but appellees contend that section 127 does not apply and that no petition was necessary. If the provisions of section 127 were applicable then the elections were unauthorized and invalid because no petition of voters was filed asking that an election be called. The basis of appellees' contention is that they constitute a township board of education, which was created under the act of 1889, consisting of five members, and that such a board is to be distinguished from boards of education for districts having a population of not less than 1,000 nor more than 100,000, consisting of six members and a president; that the powers of the appellee board of education are to be found in the statute relating to school directors, and it makes no provision for a petition for such election. Chapter 122, § 91, supra. Section 123 is as follows:

“In all school districts having a population of not fewer than 1,000 and not more than 100,000 inhabitants, and not governed by special acts, and in such other districts as may hereafter be ascertained by any special or gen-

eral census to have such population, there shall be elected a board of education to consist of a president, six members and three additional members for every additional 10,000 inhabitants."

Section 127 provides:

"The board of education shall have all the powers of school directors, be subject to the same limitations, and in addition thereto they shall have the power, and it shall be their duty: * * * To buy or lease sites for schoolhouses with the necessary grounds: Provided, however, that it shall not be lawful for such board of education to purchase or locate a schoolhouse site, or to purchase, build or move a schoolhouse, unless authorized by a majority of all the votes cast at an election called for such purpose in pursuance of a petition signed by not fewer than 500 legal voters of such district, or by one-fifth of all the legal voters of such district."

When the high school district was organized its management passed under the control of the board of education, with powers and duties of school directors for the district. The high school district has a population of more than 1,000 and not exceeding 100,000, and, if the proviso to section 38 applied, it would seem sections 123 and 127 applied also. We are of opinion that the appellee board of education, as successor to the school directors, is subject to the provisions of the statute referred to, and could not lawfully call the election except pursuant to a petition of voters, as provided by section 127. It was held in *Greenwood v. Gmelich*, supra, that although the School Law consists of different articles and sections it must be construed as one entire act.

The judgment of the Appellate Court and the decree of the circuit court are reversed, and the cause remanded to the circuit court for further proceedings and decree in harmony with the views expressed in this opinion.

Reversed and remanded.

(238 Ill. 329)

SKINNER v. NORTHERN TRUST CO. et al. (No. 12599.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 6, 1919.)

1. PERPETUITIES §8(1)—CONVEYANCES AND DEVISES TO CHARITABLE USES.

Conveyances and devises to charitable uses are not within the rule against perpetuities.

2. CHARITIES §3—STATUTES—COMMON LAW.

The statute of charitable uses (43 Eliz. c. 4) is a part of the common law of Illinois.

3. CHARITIES §4, 31—GIFTS TO CHARITIES—VALIDITY.

Gifts to charities are looked upon with favor by the courts, and every presumption consistent with the language used will be indulged to sustain them.

4. CHARITIES §1—"CHARITY."

A "charity" is a gift to be applied, consistent with existing laws, for the benefit of an indefinite number of persons, by means of education or religion, or to relieve from disease, suffering, or constraint, by assisting them to establish themselves in life, or by creating or maintaining public buildings or works lessening the burden of the government.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charity.]

5. CHARITIES §11 — GIFTS — CHARITABLE CHARACTER OF DONATION.

A devise in trust to pay net income of trust estate to a Visiting Nurse Association, chartered to secure skilled attendants in illness and to maintain a hospital or a nurse's training house, to a Home for Destitute and Crippled Children of the city of Chicago, which name described its charter object, to the Glenwood Manual Training School, chartered to provide a home for destitute and dependent boys, and to the Illinois Humane Society, chartered to prevent cruelty to children, was a devise to charitable purposes.

6. CHARITIES §4—GIFTS—VALIDITY.

Devises to charitable corporations were not void on the ground that such corporations or their successors might cease to exist, in which event the residuary estate would vest in the heirs of the testatrix.

Appeal from Circuit Court, Cook County; Frederick A. Smith, Judge.

Bill by Jane Barnard Skinner against the Northern Trust Company and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Helmer, Moulton, Whitman & Whitman, of Chicago (John B. Skinner, of Chicago, of counsel), for appellant.

Bayley & Webster, of Chicago, for appellees.

STONE, J. This is an appeal from the decree of the circuit court of Cook county dismissing for want of equity a bill filed by appellant praying that clause 13 of the last will and testament of Louise May Whitehouse be set aside, and the trust therein created be held void and inoperative, for the reason that said clause is in violation of the established rule against perpetuities.

The contested clause of the will, after devising all of the testatrix's property to the Northern Trust Company as trustee, with full power to manage, lease, invest, sell, and convey, and with directions to sell all nonin-

come property, with authority to employ agents, attorneys, etc., reads as follows:

"Said trustee shall collect the income of said trust estate, and shall pay from the net income derived therefrom, to my sister, Jane Barnard Skinner, the sum of two thousand (\$2,000) dollars per year, to be paid semiannually so long as she shall survive me; and shall also pay from such net income to my dear friend Edna Murphy Trego the sum of five hundred (\$500) dollars per year, to be paid semiannually so long as the said Edna Murphy Trego shall survive me; and shall also pay to Martha Clarke Howland, of Union Springs, New York, the sum of three hundred (\$300) dollars per year so long as said Martha Clarke Howland shall survive me; and shall pay the balance of the net income of said trust estate, semiannually, to the five (5) charitable corporations herein-after named, in equal shares. From and after the death of the last survivor of them, the said Jane Barnard Skinner, Edna Murphy Trego, and Martha Clarke Howland, said trustees shall pay the net income of said trust estate, semiannually, as follows: One-fifth thereof to the Visiting Nurse Association of Chicago, to be used by said association in carrying out its charitable purposes; another fifth thereof to the Home for Destitute Crippled Children of the city of Chicago, to use in carrying out its charitable purposes; another fifth thereof to the Glenwood Manual Training School, located at Glenwood, Cook county, Illinois, to be used in carrying out its charitable purposes; another fifth thereof to the Alexian Brothers' Hospital in the city of Chicago, to be used in carrying out the purposes of said hospital, in recognition of its kindly services to my father; and the other fifth thereof to the Illinois Humane Society of the city of Chicago, to be used, in its discretion, in the erection of street fountains in the city of Chicago, and, if not used for such street fountains, then to be used in carrying out the charitable purposes of said society. Said trust established by this clause 13 of my will shall continue perpetually for the benefit of the said five charitable organizations hereinbefore named, and in case either of said charitable organizations shall cease to exist, then its successor, if any, in the same charitable work theretofore carried on by it, shall succeed to the benefits hereunder and be entitled thereto in place of such organization ceasing to exist; and in case either of said five charitable organizations in this clause mentioned shall cease to exist, and shall leave no successor to carry on the work theretofore carried on by such organization, then the share of such net income hereby given to such organization so ceasing to exist shall thereafter be added, semiannually and equally, to the shares of the other charitable organizations hereinbefore mentioned then existing."

It is contended by the appellant that the bequests in clause 13 come within the rule against the creation of perpetuities; that the corporations designated in said clause as charitable corporations are not such in fact; that they have no charitable purposes for the carrying out of which the income from the trust estate is given; that the doctrine of

reverter to the original owner or his heirs in case of corporate dissolution is applicable to public and eleemosynary corporations; that the nature of the corporation, as well as its purposes or objects, must be determined from its charter or articles of association, and cannot be shown by extrinsic evidence.

It is conceded by the parties to this suit that clause 13 creates a perpetuity. The appellees, however, contend that they are not within the operation of the rule, on the ground that the character and purpose of the beneficiaries named in said will and of the bequests bring them within the exception in favor of trusts for charitable uses.

The only evidence submitted to support the contention of the appellant in the circuit court was the certified copy of the charter of each of said five corporations.

[1-4] It is well settled in this state that conveyances and devises to charitable uses are not within the rule against perpetuities. The statute of charitable uses (43 Eliz. c. 4) is a part of the common law of this state. *Heuser v. Harris*, 42 Ill. 425; *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; *Franklin v. Hastings*, 253 Ill. 46, 97 N. E. 265, Ann. Cas. 1913A, 135; *Andrews v. Andrews*, 110 Ill. 223; *Welch v. Caldwell*, 226 Ill. 488, 80 N. E. 1014; *French v. Calkins*, 252 Ill. 243, 96 N. E. 877. Gifts to charity are looked upon with favor by the courts. Every presumption consistent with the language used will be indulged in to sustain them. *Franklin v. Hastings*, supra. A charity, as defined by Mr. Justice Gray in *Jackson v. Phillips*, 14 Allen (Mass.) 556, and approved by this court, is as follows:

"A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their * * * hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burthens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." *Crerar v. Williams*, supra.

In *Grand Lodge v. Board of Review*, 281 Ill. 480, 117 N. E. 1016, this court said:

"It is the duty of the public to care for the indigent and the poor who are sick and afflicted, and while the public burden is not for the relief of aged and indigent Masons as such, the public is not relieved from the burden because they are Masons, and any institution which serves no selfish interest, but discharges, in whole or in part, any such duty, is a public charity. To constitute a public charity the benefit must not be conferred upon certain and defined individuals, but must be conferred on indefinite persons, composing the public or some part of the public; but the indefinite class

may be of one sex, or the inhabitants of a particular city, town, or county, or members of a particular religious or secular organization. * * * A home for working girls provided at moderate cost, with officers serving without compensation, with free attendance of physicians on the hospital staff, and a library and weekly entertainments, was held to be a public charity in *Franklin Square House v. Boston*, 188 Mass. 409 [74 N. E. 875]; and we see no apparent reason for saying that a classification must be based on something which involuntarily affects the public at large. A public charity cannot be limited to defined individuals, but if it operates upon indefinite persons, whose care and support rest upon the public, the effect is to afford relief from the public burden and the charity is public in its nature."

[5] With these definitions in mind, we view the testimony offered by appellant under the contention that four of the five corporations named in the will of the testatrix are not charitable bodies. It is contended that the question whether or not said corporations are charitable corporations must be determined alone from the powers given by their charters, and pursuant to that contention appellant offered certified copies of said charters in evidence. As it is admitted by the appellant that one of said corporations, the Alexian Brothers' Hospital, is a charitable body, we will pass to an examination of the charters of the remaining four.

In the charter of the Illinois Humane Society its objects are stated to be: "The prevention of cruelty to children, the enforcement of laws concerning cruelty to children, and the procuring or enactment of laws prohibiting cruelty to children and declaring the punishment therefor." The objects of the Glenwood Manual Training School are shown by its charter to be "to provide a home and proper training school for destitute and dependent boys who may be committed to their charge, and is not for pecuniary profit." The object of the Home for Destitute and Crippled Children, as shown by its charter, is as follows: "The object for which it is formed is to build and conduct a home and provide for destitute crippled children." The Visiting Nurse Association is chartered under the following provision: "The object for which it is formed is for the benefit and assistance of those otherwise unable to secure skilled attendance in time of illness, to promote cleanliness, and to teach proper care of the sick, and to establish or maintain one or more hospitals for the sick or a house or houses for the accommodation or training of nurses."

It is clear from reading the charters of these corporations that their purposes are charitable purposes. Their entire funds must be devoted to the objects named. Those objects, in each case, are to help those who cannot help themselves, thereby lessening the

burdens of government. They have no capital stock and can declare no dividends. All property or funds received by them must be used for the carrying on of their purposes as set out in their charters.

[6] It is urged that the devises are void for the reason that although said corporations are held to be charitable corporations, yet they and their successors may cease to exist, in which event the residuary estate would vest in the heirs of the testatrix, and that a devise to such remote heirs cannot come under the head of a devise for charitable uses. If this were the law there could be no such thing as a charitable use not affected by the rule against perpetuities, as such a possibility of reverter always exists in law in such a devise.

We are of the opinion that the corporations are charitable corporations, and the devises to them were for charitable purposes, and therefore are without the rule against perpetuities.

The circuit court did not err in dismissing appellant's bill, and the decree of that court will be affirmed.

Decree affirmed.

(238 Ill. 220)

PEOPLE ex rel. CHICAGO BAR ASS'N v. CHARONE. (No. 11208.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 6, 1919.)

1. ATTORNEY AND CLIENT ⇨53(2)—DISBARMENT—UNPROFESSIONAL OR DISHONORABLE CONDUCT—INSUFFICIENCY OF EVIDENCE.

In proceedings for disbarment of an attorney, evidence *held* not to show unprofessional or dishonorable conduct, but to show that, either through lack of judgment, diligence, or both, he had not, in part of the cases involved, given to his clients' business the attention demanded by his duty as an attorney.

2. ATTORNEY AND CLIENT ⇨106—DUTY OF ATTORNEY.

The relation of attorney and client is a fiduciary relation, and every attorney at law owes it to himself and to his profession to exercise diligence in the discharge of his duties.

3. ATTORNEY AND CLIENT ⇨44(1)—DISBARMENT—NEGLECT OF DUTY—DISHONORABLE OR UNPROFESSIONAL CONDUCT.

A young and inexperienced attorney, who, though he has not, in part of the cases involved in proceedings to disbar him, given the business of his clients the earnest attention which his duty as an attorney at law demands, will not be disbarred, where he has not been guilty of dishonorable or unprofessional conduct.

Disbarment proceedings by the People, on the relation of the Chicago Bar Association, against John S. Charone, wherein respondent was ruled to answer. Rule discharged.

Arthur Dyrenforth and John L. Fogle, both of Chicago (Lloyd M. Brown, of Chicago, of counsel), for relator.

John S. Charone, of Chicago (Benjamin P. Ackerman, of Chicago, of counsel), for respondent.

STONE, J. An information in the name of the people, on the relation of the Chicago Bar Association, praying that the name of the respondent, John S. Charone, be stricken from the roll of the attorneys of this court was filed, and he was ruled to answer. Respondent was admitted to the bar by this court in December, 1913, since which time he has been practicing in the city of Chicago.

The original information contained three counts. An additional count was filed with the commissioner, and notice given that on the submission of the cause as set out in the three original counts to the Supreme Court the relator would ask to amend the original information by adding thereto the additional count so filed, and that relator would file said amendment to the information before the commissioner and submit evidence in support of said additional count during the time limited by the court in which to take evidence, and that relator would rely on said amended count and the evidence taken thereunder in support of the prayer in the original information. The commissioner heard the evidence and has filed his report of findings and conclusions thereon, which evidence, findings of fact, and conclusions are in substance as follows:

First count: That in 1915 respondent was retained by Julius Gaters in the matter of his divorce suit and was paid the sum of \$37. Gaters testifies that respondent repeatedly told him that the divorce suit had been filed and was liable to be up most any time. Respondent testifies that he was to receive \$50 in full for his services before any bill was filed, and denies that he told Gaters at any time that suit had been instituted. The respondent further testifies that he drew two bills for Gaters charging desertion on the part of the wife of Gaters; that respondent was unable to ascertain from Gaters the date of the wife's desertion; that respondent informed Gaters that he would have to bring in two credible witnesses to substantiate the charges in the bill; that on investigation respondent was in possession of some evidence to the effect that Gaters, and not his wife, deserted; that respondent was at all times ready, willing, and able to file said suit, but was prevented from so doing by the failure of Gaters to pay him the full amount of \$50, of which \$13 is still due, and by his failure to furnish the necessary evidence to support said bill. The commissioner has found the facts and circumstances surrounding the bringing of the divorce suit as testified to by the respondent. Gaters produced in evidence two receipts—one, for \$37 for

services in securing a divorce, showing a balance of \$13, signed by the respondent; the second, on the letter head of the respondent, on the same day, promising to file a bill for divorce on Monday, July 10, 1916, and get a decree not later than six weeks thereafter, signed by the respondent. The respondent testified, and is corroborated by Irene Shedden, to the effect that these receipts were made and delivered under duress; that Gaters came into his office, threatened respondent and compelled him to put those statements in writing, and while so writing Gaters had a razor in his hand, waving it in a threatening manner; that Gaters threatened to cut him with the razor. It is admitted by the respondent that he received \$37, and that no suit for divorce has been filed. The commissioner finds that the two receipts in question were given to Gaters because of his threats to inflict bodily injury upon the respondent; that the respondent is ready and willing to file the bill and prosecute the suit for Gaters upon the receipt of the \$13 due him and the production of the necessary witnesses to support the bill. The commissioner suggests to this court that the conduct of Gaters in this matter should not receive direct or indirect commendation by finding adversely to the respondent.

Second count: That in May, 1915, through the recommendation of Gaters, Mrs. Elsie Spriggs employed respondent to secure a divorce for her and paid the respondent \$25, for which he gave his receipt. In June, 1915, she paid him \$15, for which he gave a receipt, and \$10 more was to be paid when the decree was entered. The respondent prepared the bill for divorce, and the same was docketed in the circuit court as No. B18685. A summons issued on the bill and was delivered to the sheriff and by him returned "Not found." The respondent and Mrs. Spriggs had several conversations in his office and over the telephone relating to the whereabouts of the defendant, Spriggs. The respondent testifies in detail relative to calls made by him at various addresses given him by Mrs. Spriggs in order to locate the defendant, which testimony is undisputed. In 1916 Mrs. Spriggs accused the respondent of failing to file any bill for her, in response to which he gave her the receipts from the clerk and sheriff showing that the bill had been filed and summons issued. The commissioner finds that Mrs. Spriggs gave no information to respondent as to the whereabouts of Spriggs other than the addresses mentioned by the respondent, who was unable to locate Spriggs, and that service could not be had by publication for the reason that Mrs. Spriggs insisted that her husband was in the city of Chicago; that respondent is ready and willing to proceed with the Spriggs case upon information to secure service on the defendant and upon the production of the required evidence to substan-

ulate the charges in the bill; that respondent has done all that he could do in the matter with the information at hand and is not guilty of negligence or bad faith toward Mrs. Spriggs.

Third count: That in November, 1915, Fred C. Schulz, agent of Sherman P. Stultz, employed respondent to prosecute a suit against Mrs. Anna Kemisch, a tenant, for money due; that respondent was paid \$10 to pay costs and apply on fees and was to receive \$5 extra out of money collected. The respondent brought suit, upon which judgment was entered by default November 18, 1915, for \$25, and \$3 costs were taxed. Execution was issued on this judgment, but was not delivered to the bailiff, due to the fact that the same became mislaid in moving the office effects of the respondent. In April, 1916, Schulz demanded the execution of the respondent and refused the respondent's request to continue the matter, whereupon the following day respondent sent the execution to Schulz. An alias execution was issued and delivered to the bailiff, who made demand upon Mrs. Kemisch and a levy. Some time after April 28, 1916, Mrs. Kemisch went to the respondent's office and paid \$30 to the stenographer in charge, who delivered it to respondent, at which time Mrs. Kemisch left the copy of the execution served on her April 28, 1916. Respondent testified that upon receipt of the money he called up Schulz's office; that Schulz was not in nor did he call back; that he repeated his call, which was never answered. The respondent claimed \$5 for his services and offered to return the \$25 in full if the same would be accepted in full payment, which was accepted by one Richards, acting for Schulz, whereupon the respondent promised to pay the money at noon on Saturday. Schulz called the respondent's office at 11:30 on the same day and stated that nothing less than \$30 would be accepted, and respondent retained the money pending a receipt from Schulz as requested. The commissioner further reported that while the preliminary proceedings against the respondent were pending before the bar association, on October 19, 1916, Schulz wrote a letter to the respondent, stating, in substance, that a replication to respondent's answer would be filed and the charges in the original complaint pressed unless the amount of \$25 was paid by the respondent by Tuesday, October 24, 1916, and that, if the amount was paid, the complaints and charges filed with the grievance committee of the Chicago Bar Association would be dropped. This letter was written without the knowledge or consent of the said commissioner, the said Chicago Bar Association, or any of its officers. The respondent refused to pay the money at the time designated, on the ground that he believed that such action on his part might be construed as an admission of the charges preferred against him.

At the first hearing of this cause respondent tendered the \$25 which he admitted was due Schulz for Stultz, with \$1.50 interest, which was accepted without condition of any kind as to the issues herein involved. The commissioner finds that the attempt of Schulz to use the Chicago Bar Association as a collection agency is improper; that respondent was negligent in handling the collection of said judgment; that he should have remitted the \$25 and retained the \$5 pending the settlement of the controversy; that, if Schulz had not changed his mind several times and had manifested some business courtesy toward the respondent, the payment of the money would probably have been made without delay.

Additional count: That the substance of the evidence on the additional count tends to show that in October, 1916, S. Steinman employed one Bernstein, an expressman, to haul some household goods; that Steinman paid Bernstein by check for his services, and afterwards, because of certain differences, stopped payment on the check; that Bernstein thereupon went to the office of Steinman, and in his absence seized and carried away a sewing machine belonging to Steinman, valued at \$25; that Steinman employed the respondent as an attorney in his behalf; that respondent, upon the advice and consent of Steinman, procured a warrant for the arrest of the Bernstein brothers on the ground of disorderly conduct; that the arrest was made, and it does not appear what disposition was made of the case, except that on suggestion of the assistant state's attorney the respondent was either to go to the state's attorney's office or bring a replevin suit; that respondent and Steinman agreed to a fee of \$10 for respondent's services in this matter, for which a receipt was given by respondent; that it appears that on December 1, 1916, Steinman paid respondent \$15, and received a receipt for the same, on account of costs; and that upon payment of \$9 more there were to be no more costs in the matter, and if it really became necessary to incur further costs respondent would refund the excess, and in the event of recovery respondent was to receive one-third of the amount realized. The testimony is very conflicting as to what transpired after December 1, 1916. Steinman testified that respondent was to return the money or get the machine, and that respondent delayed the matter from time to time, repeatedly promising to prosecute the suit, but which he did not do. It further appears that on January 19, 1917, respondent wrote a letter to Steinman, in which he stated that he had called the office of the clerk of the court and received the report that the case in controversy would definitely come up February 4, 1917; that respondent had had trouble, in that his father had been taken to the hospital and died on

the morning in question; that on February 4th the matter in question would be disposed of finally. The testimony of the respondent is to the effect that, when he wrote this letter, he contemplated that he had ample time to file the necessary papers, secure security, and have bond approved and get service in time to have the case called on the day mentioned; that respondent conferred with Steinman regarding the surety on the replevin bond; that Steinman said he did not care to ask his relatives to sign such a bond, and requested the respondent to get some one to act as surety. Steinman says respondent volunteered, in the first instance, to get the surety. Respondent testifies that at his request his mother signed a blank replevin bond and schedule and the clerk O. K.'d her signature; that he tried to get Steinman down to sign the bond, but could not do so. The testimony is conflicting as to whether it occurred on the 15th or 19th of January. Some time after February 4, 1917, Steinman engaged Attorney Barnett to represent him. The testimony tends to show that Steinman and Barnett, at the office of the respondent, demanded the full amount of \$34 heretofore paid to the respondent; that respondent offered to return \$24 to Steinman, who was advised by his attorney, Barnett, to accept it, but Steinman refused to compromise on any amount less than \$34; that respondent agreed to proceed in the replevin suit if Steinman would sign the bond or he would advance the costs to Barnett, attorney for Steinman, and turn over the balance; that on the day before the first hearing in this case the respondent offered to permit Steinman to use the bond in question in the prosecution of the replevin suit under the direction of his attorney, Barnett, which was refused; that respondent made no legal tender of the money to Steinman. The commissioner finds that the \$10 first paid by Steinman was for legal services rendered in the criminal court, and that Steinman is not entitled to be repaid that sum on any theory; that the \$24 aforesaid was to cover court costs in a replevin suit to recover the sewing machine in question and a damage suit against the Bernsteins; that the damage suit was not to be started until after the trial of the replevin suit; that the replevin suit was never started; that the respondent was negligent in the latter matter, but to some extent this was due to lack of experience and judgment in dealing with clients and to some extent due to the unreasonableness of Steinman; that respondent should not have written the

letter of January 19th unless the suit had actually been brought or respondent knew positively when he wrote the letter, because he might have anticipated the difficulty that would arise in having the bond executed by Steinman. The commissioner concludes that the respondent was unfortunate in having Steinman for a client; that respondent should have insisted upon Steinman executing the bond in question, and upon his refusal to do so he should have promptly returned the \$24 and notified Steinman that he would no longer act as his attorney.

The commissioner concludes that the evidence submitted to him on the whole record is not sufficient to show that the respondent has been dishonorable or criminal in his conduct or that he lacks good moral character, as charged in the information. The commissioner suggests to this court that respondent is a young lawyer of limited experience and of small means, forced by his circumstances to accept cases and clients of the kind mentioned in these proceedings; that, although respondent failed to exercise good judgment in his transactions with Schulz and Steinman, yet such failure, in the mind of the commissioner, was due to his lack of judgment under the circumstances rather than an intent to act dishonorably or unprofessionally, or in any manner calculated to bring the courts of justice into disrepute and contempt and to tarnish the good name of the legal profession.

[1, 2] We have examined the evidence in this case carefully, and are of the opinion that, while it does not disclose unprofessional or dishonorable conduct on the part of the respondent, it does disclose that either through lack of judgment or diligence, or both, respondent has not, in at least part of the cases referred to in the information, given to the business of his client the earnest attention which his duty as an attorney at law demands. An attorney at law cannot be too careful to avoid that which would tend to destroy the confidence of his client in his diligence. The relation of attorney and client is a fiduciary relation, and every attorney at law owes it to himself and to his profession to exercise diligence in the discharge of his duties.

[3] The commissioner has found that the evidence does not show dishonorable or unprofessional conduct, and we are of the opinion that the report of the commissioner should be affirmed, and that the rule should be discharged.

Rule discharged.

(223 Ill. 306)

WISCONSIN STEEL CO. v. INDUSTRIAL COMMISSION et al. (No. 12331.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 5, 1919.)

1. MASTER AND SERVANT ~~§~~405(4)—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING OUT OF EMPLOYMENT—EVIDENCE.

Evidence, in a proceeding for compensation for drowning of one employed as a pipe fitter about furnaces in houses on a slip connecting with a river, held not to warrant a conclusion that the accident arose out of his employment.

2. MASTER AND SERVANT ~~§~~405(4)—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING OUT OF EMPLOYMENT — BURDEN OF PROOF.

The burden is on an applicant to prove that the accident arose out of the employment by direct and positive evidence, or by evidence from which such inference can be fairly drawn, and without being based on a mere conjecture or surmise.

Carter, J., dissenting.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding before the Industrial Board by Josephine Karczewski, administratrix of Felix Karczewski, to recover compensation under the Workmen's Compensation Act, opposed by Wisconsin Steel Company, employer. From a judgment of the circuit court, on certiorari, affirming the finding of the Industrial Commission in favor of administratrix, the employer brings error. Reversed and remanded, with directions to the circuit court to set aside the award.

David A. Orebaugh, of Chicago (Edgar A. Bancroft, of Chicago, of counsel), for plaintiff in error.

T. A. Sheehan, of Chicago, for defendant in error.

FARMER, J. This was a proceeding before the Industrial Board by Josephine Karczewski, administratrix of the estate of her deceased husband, Felix Karczewski, to recover compensation under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152) on account of the drowning of her husband, who was in his lifetime an employé of the Wisconsin Steel Company, plaintiff in error. The Industrial Commission found in favor of the administratrix and entered a finding accordingly. The cause was taken to the circuit court of Cook county by certiorari, and the finding of the commission was affirmed. The trial judge certified that the case was one proper to be reviewed by this court, and the cause is here on writ of error.

Plaintiff in error owns and operates a large

steel plant covering considerable ground in South Chicago, Ill. Among its buildings are three casthouses, in which are located furnaces known as Nos. 1, 2, and A, and a storehouse in which the tools for making repairs are kept. The Calumet river runs in a north-easterly and southwesterly direction easterly of the casthouses, and a slip has been made from the Calumet river south of the casthouses, extending east and west about 1,000 feet. Furnace A and its accompanying casthouse is situated nearest to and immediately north of the center of the slip. Furnaces Nos. 1 and 2 and their accompanying casthouses are northeast of furnace A, No. 1 lying east of No. 2, and the storehouse is located several hundred feet northeast of furnace No. 1, near the westerly bank of the Calumet river. The casthouse containing furnace A was about 75 or 100 feet north of the slip. The casthouse containing furnace No. 1 was some 400 feet north of said slip. Felix Karczewski (usually called Joe Pelka and who will be so called in this opinion) had been employed for several years by the plaintiff in error as a pipefitter. Each blast furnace consists of the furnace proper and the stove. There are two or more stoves for each furnace. The combustible gases from the top of the furnace are carried off through one of them and the flues of the stove thus heated to an intense heat. The gas is then turned into the other stove, and the blast is blown through the heated stove and enters the furnace at a very high temperature. Thus each stove is alternately being heated by combustible gases from the top of the furnace and being used to heat the air which is blown into the bottom of the furnace. When a blast is in progress, the heat around the outside of the furnace, near its base, ranges from 140° to 150° Fahrenheit. Besides the pipes or conduits through which the gas is carried from the furnace to the stoves and the blast carried from the stoves to the furnace, each furnace is also equipped with two water pipes about a foot in diameter running from the river to the furnace, which carry water to cool the base of the furnace. Pelka's work was to inspect the mechanical parts of the three furnaces and keep them, including the water pipes, in good repair, and occasionally he was called on to assist in repairing the gas pipes also; but he was especially charged with the care of the water pipes which cooled the furnaces. He went to work about 5 o'clock on the night of September 28, 1916, his duties requiring him to be present at the tapping of the three blast furnaces operated by the company, to repair leaks if any should occur in the water pipes, and to see that all mechanical parts of the furnaces were in repair. The casting of the furnaces consisted in taking the iron from them, which was done by tapping them—taking out a clay plug at the bottom

and running the molten iron into ladles. The record shows that on September 28th Pelka was present at four casts, at 6:30, 7:30, 9:10, and 10 o'clock, respectively. He was not present at the cast which was made at 11:10 o'clock. One witness, however, testified that he saw him and talked with him about three minutes before 12 o'clock that night, and the wife of the keeper of a saloon outside the steel plant testified to seeing him at her husband's saloon at 10 minutes after 10 o'clock that evening. The rule of the plaintiff in error was that no employé should leave the premises at this last-named hour without permission of the foreman or his assistant, and none was given Pelka. It appears from the evidence that the only time an employé had a right, under the rule, to go outside of the plant without permission, was during the lunch hour, from 12 o'clock midnight to 12:30 a. m., and then only if his card was punched by the timekeeper at the gate, and the record does not show that Pelka went out through the gate at the midnight lunch hour. He did not appear at the casts that took place at 11:10 and 12:20 o'clock. There is no evidence that tends in any way to show why he was not present at the cast at 11:10 o'clock, for his fellow employé, Gojyak, testified that he saw him and talked with him a few minutes before the midnight whistle blew, in the vicinity of furnace No. 2, and so far as the record shows he was never seen alive after that. The foreman testified that he missed him between 11 and 12 o'clock and made a search for him for some time thereafter but could find no trace of him. He was found drowned in the slip about 200 feet west of furnace A two days after he disappeared.

[1, 2] The only question presented is whether there is any proof to warrant the conclusion that the accident resulting in Pelka's death arose out of his employment. The evidence shows that when the furnaces were in operation they produced heat around the outside of the base varying from 140° to 150° Fahrenheit; that gases were liable to, and did, escape, which, when inhaled by the workmen, at times necessitated their going or being taken to the door or outside the building to get fresh air. One witness testified he had been taken to the river for air when gassed. Men accustomed to working around these furnaces could not readily detect the odor of the gas and were liable to be overcome or affected by it before they realized that gas was escaping. Pelka was last seen at about 12 o'clock midnight in the vicinity of furnace No. 2, and the witness who saw and talked with him did not testify that there was anything in his appearance or talk to indicate he was then affected by gas. The foreman of the plaintiff in error testified he was around the furnace that night 13 hours and did not discover any gas. There was no proof that Pelka was affected by gas or heat the night of his disappearance. It is the theory of the

defendant in error that Pelka was oppressed by heat or became faint and dizzy from gas, went to the dock alongside the slip for fresh air, and fell and was drowned, or, if he was in the vicinity of furnace A and desired to go to the storehouse, the best route would be along the slip to the river, then along the bank of the river northeast to the storehouse, or, if he went on a tour of inspection of the water pipes, that would take him along the dock of the slip. It is said it will not be presumed that Pelka went to the slip or river for pleasure; that the reasonable inference is he went there in the performance of his duties, accidentally fell in, and was drowned. There is nothing in the evidence to indicate that Pelka committed suicide or was murdered, but the conclusion is warranted that his death was accidental. Does the proof tend to show that it occurred while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental to it? The burden is on the applicant to prove that the accident arose out of the employment by direct and positive evidence, or by evidence from which such inference can be fairly drawn and without being based on mere conjecture or surmise. *International Harvester Co. v. Industrial Board*, 282 Ill. 489, 118 N. E. 711; *Savoy Hotel Co. v. Industrial Board*, 279 Ill. 329, 116 N. E. 712; *Central Garage v. Industrial Com.*, 286 Ill. 291, 121 N. E. 587. In *Peterson & Co. v. Industrial Board*, 281 Ill. 326, 117 N. E. 1033, we said:

"Liability cannot rest upon imagination, speculation, or conjecture, upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them."

The foreman testified there were no repairs made by Pelka the night of the accident, that Pelka had no duties that would take him to the slip, and that he (the foreman) gave him no orders that would require him to go there. Pelka was present when the cast was made at furnace No. 2 at 10 o'clock p. m., but was not present when any of the later casts were made. He was at the Tomecal saloon, outside the grounds of the plant, without permission, 10 minutes after 10 o'clock, and was next seen at or in the vicinity of furnace No. 2 three minutes before midnight but was not present when any other cast was made. There was no proof, direct or circumstantial, to show why he went to the river or slip, or whether he went there in fulfilling any duty of his employment or in doing anything incidental to his employment. The inference is as reasonable from the evidence that he went to the place of the accident as a voluntary act outside the duties of his employment, without the knowledge of his employer, and was drowned, as it is that he was acting in the line of the duties of his employment or engaged in something

incidental to it. It can only be surmised or conjectured from the evidence how the accident happened and the reason Pelka came to the place where it occurred. Under all the authorities, this is not sufficient upon which to predicate a liability.

The judgment is reversed, and the cause remanded, with directions to the circuit court to set aside the award.

Reversed and remanded, with directions.

CARTER, J. (dissenting). I do not agree with the conclusion reached in the foregoing opinion. The principles involved in the opinion are so important and the facts so necessary to be understood that I am setting them out in this dissent at a little greater length and more in detail than they are set out in the opinion.

The evidence tends to show that there was more or less gas around the furnaces while a cast was being made. Workmen who are accustomed to working in the casthouses become somewhat used to the gas—acclimated as it were—so that they cannot detect the odor of gas as readily as one who is only temporarily there, and that frequently the workmen, because they do not appreciate the danger, will thereby be overcome before they realize that gas is escaping. There is evidence tending to show, also, that the air in the casthouses is worse when there is a good breeze, and that on the night deceased disappeared there was a wind blowing from the casthouses towards the slip with a velocity of from 16 to 20 miles an hour. It appears that when the furnaces are in operation an intense heat around the outside of the base is produced. The evidence tends to show Pelka had theretofore complained of headaches and dizziness caused by the gas fumes which he had inhaled about his work on the premises. There was evidence tending to show that there was a custom among employes, if they became overheated or gassed, to seek the fresh air outside the casthouses, and that sometimes they were taken by their fellow employes to the open places along the river or slip, and that there were no fences or barriers of any description to obstruct the passage of the workmen from the casthouses to the slip. The evidence shows that, after the accident and before the recovery of the body, a large boat had been towed west into the slip, and that the body of the deceased was lying just underneath the front of this boat.

There was evidence offered that no gas was noticed in the furnace room by the employes on the night in question. There was also some evidence to the effect that it was not the custom of the employes, when overheated or affected by gas, to go to the river or slip for the purpose of getting fresh air. The foreman testified that the best place to

recover from such an attack was in the door of the casthouse, as there was more air moving at that place. There is testimony also tending to show that it was not a hot night at the time of the accident and that deceased was wearing only overalls and jumper. There can be no question, however, from the record, that it is very hot when one is working about the furnaces.

It is conceded by both counsel that the only question at issue is whether the injury causing the death of the deceased took place in the course of and grew out of his employment. While the burden rests upon the applicant to furnish evidence from which an inference can logically be drawn that the injury arose out of and in the course of the employment, such proof may be made by circumstantial as well as direct evidence. *Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 149, and cases cited. It is impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn, but the evidence must be such as would induce a reasonable man to draw it. Where there is ground for comparing and balancing probabilities at their respective values and where the more probable conclusion is that for which the applicant contends, the arbitrator is justified in drawing an inference in favor of the applicant. *Peoria Railway Terminal Co. v. Industrial Board*, 279 Ill. 352, 116 N. E. 651. What is evidence of a fact and what is merely guessing at the fact cannot be defined by any formula that one can invent. What is wanted is to weigh the probabilities, to see if there be proved facts sufficient to enable one to have some foothold or ground for comparing and balancing the probabilities and their respective values, one against the other. *Owners of Ship Swansea Vale v. Rice*, 4 B. W. C. C. 298. There can be no question that the death of Pelka was caused by his falling into the river or slip. There is no evidence in this record in any way tending to show that he was pushed in by some third party, and the presumption here must be against suicide on his part. The evidence shows that he had been in good health, and there is an absolute absence of evidence showing suicide; therefore it must be presumed, under the authorities, that his death was accidental. *Wilkinson v. Aetna Life Ins. Co.*, 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269; *Devine v. National Safe Deposit Co.*, 240 Ill. 369, 88 N. E. 804; *Von Ette v. Globe Newspaper Co.*, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641. It has been held that an employe is engaged in the course of his employment when an injury occurs within the period of his employment at a place where he may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged

In doing something incidental to it. *Dietzen Co. v. Industrial Board*, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764. The deceased was seen alive and well just before midnight, was not present at the casting of the furnace at 12:20 o'clock, and immediately thereafter search was made for him; so it is a fair inference that he was drowned some time between 12 o'clock midnight and 12:30 thereafter, and that the accident occurred during the regular hours of employment, on the premises of plaintiff in error. If there is any evidence fairly tending to show that the duties of deceased, or anything which may be held to be fairly incidental thereto, took him along the slip at the time he fell in, then there can be no question, under the authorities, that the accident arose out of and in the course of his employment. The burden is on the applicant to prove his case. This does not mean that he must demonstrate it beyond all reasonable doubt. It only means that there must be evidence in his favor upon which a reasonable man can act. If the evidence, though slight, is sufficient to make a reasonable person conclude that the deceased fell into the water and was drowned while performing duties in the course of his employment or duties incidental to that employment, then the case is proved. *Marshall v. Owners of Ship Wild Rose*, 3 B. W. C. C. 514.

Many cases somewhat similar as to the facts have been decided in various jurisdictions under statutes worded similarly to our own. It has been stated that cases are valuable in so far as they contain principles of law and also to show the way in which the judges regard facts. *Peoria Railway Terminal Co. v. Industrial Board*, supra. In *Mackinnon v. Miller*, 2 B. W. C. C. 64, an engineer on board a small tug, when last seen, was asleep in his bunk at 5 o'clock a. m. An hour afterwards he had disappeared, leaving his working clothes lying at the side of his bunk. The tug was to move at 7 o'clock a. m., and steam had been ordered gotten up for that hour. The deck was a place where between 5 and 7 o'clock a. m. the deceased was entitled to be. The bulwark was 20 inches in height. Two days afterwards his body, clothed in his ordinary sleeping clothes, was found in the water near the place where the tug had been moored on the morning in question, but there was no direct evidence as to how he met his death. It was held that the arbitrator was entitled to draw, as he had drawn, the inference of fact that the deceased had accidentally fallen overboard and was drowned and that the accident arose "out of and in the course of" his employment, and it was therefore not for the court to interfere.

In *Owners of Ship Swansea Vale v. Rice*,

supra, the deceased was chief officer of the ship, whose duty it was to be employed on the deck. He disappeared in broad daylight, no one having seen him fall overboard, but there was evidence that not long before he complained of a headache and giddiness. It was held by a divided court that there was evidence under which the court might infer that he fell overboard from an accident arising out of and in the course of his employment. In deciding the case in the House of Lords, one of the judges writing the opinion, after discussing various things which might have happened, said (page 301):

"The only other alternative is suicide or murder, and if you weigh the probabilities one way or the other, the probabilities are distinctly greater in favor of the view that this man perished from accident arising out of his employment."

In *Kerr v. Ayr Steam Shipping Co.* (1915) App. Cas. 217, a steward of a ship in harbor was lying in his bunk when he was told by the captain to prepare some tea for the crew. Shortly afterwards he was missing. The next day his dead body, dressed only in his underclothes, was found in the sea near the ship. The bulwarks were three feet five inches above the deck. He was a sober man but was subject to nausea. Murder and suicide were negatived by the arbitrator, who drew the inference that the deceased went on deck and accidentally fell overboard and was drowned, and held that the accident arose out of and in the course of his employment as steward. The court of session (Lord Guthrie dissenting) reversed the decision on the ground that there was no evidence to support it. The House of Lords by a divided court upheld the finding of the arbitrator, and stated that, although upon the evidence it was open to the arbitrator to take a different view, his conclusion was one that a reasonable man could reach, and therefore, even though the court might take a different view if the judges themselves were deciding the question as to the facts, the only duty of the court was to decide whether the conclusion was one that could have been reached from the evidence by a reasonable man.

In *Marshall v. Owners of Ship Wild Rose*, supra, an engineer came on board a vessel, which was lying in a harbor basin, shortly after 10 o'clock p. m. Steam had to be gotten up by midnight. He went below and took off his clothes, except trousers, shirt, and socks. It was a very hot night. He subsequently got out of his berth, saying he was going on deck for a breath of fresh air. Next morning his dead body was found at the side of the vessel, just under the place where the men usually sat when they went on deck to get fresh air. The county judge found that he came to his death by an accident arising out of and in the course of his employment, and by a divided court

his decision was reversed; the court holding that there was no legitimate ground for drawing the inference that he died from an accident arising out of his employment.

In *Von Ette v. Globe Newspaper Co.*, supra, Von Ette was employed by the newspaper company as a compositor. He went to work on the evening of June 21, 1914, and his employment would have been finished at a quarter before 2 o'clock the next morning. He was last seen alive about 11 o'clock that evening. His dead body was found the next morning at a quarter before 4 o'clock upon the ground, six stories below the floor where he worked. The injuries which caused his death resulted from falling from the roof of the building adjoining the room in which he worked. He was apparently in good health, cheerful in disposition, and there was no evidence tending to show that he had any trouble of any kind. The evidence tended to show that there was an established custom among the employes, known to the employer, to go out upon that roof to obtain fresh air. The Industrial Board found that the accident arose out of and in the course of the employment, there being no evidence that indicated any other cause of death, and the court affirmed the finding.

A reading of the opinions in the cases just cited, a number of them being decided by divided courts, will show how close were some of the questions involved and how difficult it is for all men to agree whether an accident somewhat similar to the one here under consideration arose out of and in the course of the employment. The deceased was the only pipe fitter working on the night in question. He was required to look after and inspect and keep in good repair all the mechanical parts of the three furnaces and the six water pipes carrying the water from the river to the furnaces. In the performance of these duties, as I understand the record, he necessarily had to travel to and from the three casthouses, the boiler house, and the storehouse northeast of the casthouses, and might be required to go to a small storehouse just south of the casthouse in which was located furnace A and 70 or 80 feet north of the slip where his dead body was found. There were no regular roads or passageways on these premises. Buildings, railroad tracks, tanks, sheds, and structures of all kinds were located wherever convenience demanded. It might be impossible to take a direct course in going from one place to another. It was, however, possible to walk from the western extremity to the eastern extremity of the plant, and it would appear reasonable from the evidence in the record that in going from one extremity of the plant to the other a workman might think it more convenient to go to the Calumet river and walk on the

dock or cement walk alongside the river and the slip. In going from the large storehouse it would not require much of a detour to take the route along the river and slip to furnace A. The evidence tends strongly to show that there was always liable to be gas in and about the furnaces, and that deceased had complained theretofore to his family about headaches and dizziness caused by inhaling these gas fumes. In addition to the impurity of the air, the heat around the base of the furnaces must necessarily at all times have been somewhat oppressive, ranging from 140° to 150° Fahrenheit; the heat within the furnaces being from 500° to 1,500° Fahrenheit. The evidence tends to show that it was a custom, known to the foreman of plaintiff in error, for the men, when oppressed by the heat or troubled by the gas, to go outside the buildings to cool off or get fresh air to counteract the effect of the fumes; that generally the men so overheated or troubled by gas would satisfy themselves by simply stepping outside the casthouse, but that sometimes they would go even to the boundaries of the river or the slip, and that once outside the casthouse there were no fences or boundaries between them and the dock or cement walk alongside the river and slip.

The suggestion offered by plaintiff in error as to how the deceased came to his death is that he fell into the slip while returning from a secret visit to the saloon and while he was intoxicated. This question cannot be raised here, as it was specifically stated on the trial before the Industrial Board that plaintiff in error made no question as to deceased being intoxicated, therefore counsel acting for plaintiff in error, cannot for the first time raise that question here. *American Milling Co. v. Industrial Board*, 279 Ill. 560, 117 N. E. 147, and cases cited. Moreover, the direct evidence shows that the deceased was not under the influence of liquor when he visited Tomecal's saloon a little after 10 o'clock, and his fellow employe, Gojyak, stated that when he was last seen alive, just before midnight, he was not intoxicated. The suggestion also seems to be made that deceased may have gone down to the river or the slip to look at the stars or for some other reason not connected with his employment. There is no evidence tending to support in any way this theory. If, however, he was oppressed by heat or felt faint or dizzy from gas, the dock along the river or slip would be one of the most probable places where he would go for fresh air, or, if he were in the vicinity of certain casthouses and wanted to go to a certain storehouse, one of the easiest and most reasonable routes for him to take would be to proceed along the slip and river.

The authorities all agree that the arbitrator must not surmise, conjecture, or guess

in reaching his conclusion; that he must infer from the facts actually proven; and that, while it is impossible to lay down any rule as to the degree of proof sufficient to justify an inference being drawn, it must be such that the evidence would induce a reasonable man to draw it; that if the facts proved give rise to conflicting inferences of equal degrees of probability, so that the choice between them is a mere matter of conjecture, then the applicant fails to prove his case; but where there is ground for comparing and balancing probabilities at their respective values, when the more probable conclusion is that for which the applicant contends, the arbitrator is justified in drawing an inference in his favor. *Peoria Ry. Terminal Co. v. Industrial Board*, supra. The only question before the court is whether the arbitrator was justified, on the facts proved, in drawing the conclusion that he has drawn. As was stated in one of the opinions in *Owners of Ship Swansea Vale v. Rice*, supra, in weighing the probabilities in this case the probabilities are distinctly greater that this man perished through an accident arising out of and in the course of his employment than any of the alternatives suggested. Furthermore, as was said by the court in *Von Ette v. Globe Newspaper Co.*, supra, on page 59 of 223 Mass., on page 697 of 111 N. E., on page 643, of L. R. A. 1916D:

"A finding of the Industrial Accident Board is not to be set aside if warranted by the evidence, although we might feel that a different conclusion would have been reached by us if we had been called upon to decide the question in the first instance. If this claimant were required to prove all the facts and circumstances attending her husband's death by direct evidence, it is plain that her claim would fail, but she is not limited to such proof. She may show the existence of such facts as would warrant the inference that her husband did not commit suicide, and did not meet with his death as the result of intoxication. * * * We cannot say that the finding of the board that his death was accidental was not warranted."

The reasoning in the foregoing quotation applies here, and I think that a similar conclusion should be reached.

(238 Ill. 142)

CHICAGO TITLE & TRUST CO. v. CORPORATION OF FINE ARTS BLDG.
(No. 12184.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 4, 1919.)

1. EXECUTORS AND ADMINISTRATORS ¶93(1)
—FUNCTIONS—CONDUCTING RETAIL STORE.

An executor or administrator as such has no authority to conduct deceased's retail store

business, his function being to close up the estate for which he is acting.

2. EXECUTORS AND ADMINISTRATORS ¶93(1)
—ORDER AUTHORIZING EXECUTOR TO CONDUCT BUSINESS—EXTENSION.

Order directing that executrix "proceed to sell that part of personal property consisting of merchandise," etc., did not extend, beyond the 60-day period, an order authorizing executrix to conduct retail store business of deceased for a period of 60 days.

3. EXECUTORS AND ADMINISTRATORS ¶218—CLAIM AGAINST ESTATE DISTINGUISHED FROM CLAIM AGAINST REPRESENTATIVE.

A lien for installments of rent which arises out of a lease is a claim against the estate of deceased, while a claim for expenses of administration is a claim against the representative.

4. LANDLORD AND TENANT ¶246(4)—LIEN FOR RENT—PROPERTY SUBJECT—AFTER-ACQUIRED PROPERTY OF LESSEE'S ASSIGNEE.

Under lease providing that lessor shall have a first lien upon lessee's property now or hereafter located in said premises, lessor would not have a lien against after-acquired property of lessee's assignee in the absence of a provision in the contract of assignment expressly pledging the property of the assignee.

5. CHATTEL MORTGAGES ¶47—DESCRIPTION—SUFFICIENCY.

The rule that the description must be sufficiently specific to afford third persons the means of identifying the property refers to chattel mortgages as well as to mortgages of land.

6. LANDLORD AND TENANT ¶246(5)—LANDLORD'S LIEN—AFTER-ACQUIRED PROPERTY OF LESSEE—DESCRIPTION.

The language, "The lessee's property now or hereafter located in said premises," is too indefinite to create a lien on after-acquired property.

7. LANDLORD AND TENANT ¶246(4)—LANDLORD'S LIEN—PROPERTY OF LESSEE'S ASSIGNEE.

Covenant in lease that lessor should have a first lien upon lessee's property "now or hereafter located in said premises to secure the payment of all moneys due under this lease" was not a covenant concerning the thing granted or the enjoyment of it, but a collateral and personal covenant, not running with the land.

8. EXECUTORS AND ADMINISTRATORS ¶202 (2) — CLAIMS ALLOWABLE — "CONTINGENT CLAIM"—"CREDITOR."

Although executrix continued in occupation of leased premises after expiration of year allowed by Administration Act, § 70, for filing claims against decedents' estates, rent not due until after the year was a "contingent claim" which could not, though filed before the expiration of the year, be proved and allowed under section 67, the holder of a contingent claim not being a "creditor" of the estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contingent Claim; Creditor.]

Error to Appellate Court, First District, on Appeal from Circuit Court, Cook County; David F. Matchett, Judge.

In the matter of the estate of Winfield Scott Thurber, deceased, a claim was presented by the Corporation of the Fine Arts Building, which claim was opposed by the Chicago Title & Trust Company, administrator. Decree of the circuit court on appeal from an order of the probate court allowing the claim was reversed by the Appellate Court (209 Ill. App. 533), and the administrator brings certiorari. Judgment of the Appellate Court reversed, and judgment of the circuit court affirmed.

E. I. Frankhauser, Frederick A. Bangs, and Arthur M. Cox, all of Chicago (Richard H. Colby and Judah, Willard, Wolf & Reichmann, all of Chicago, of counsel), for plaintiff in error.

Tenney, Harding & Sherman and Wilson, Moore & McIlvaine, all of Chicago (Horace Kent Tenney, of Chicago, of counsel), for defendant in error.

STONE, J. This is certiorari to the Appellate Court for the First District to review a judgment of that court reversing a decree of the circuit court of Cook county, heard on appeal from an order of the probate court of that county allowing a certain claim against the estate of Winfield Scott Thurber, deceased, and a decree, also entered by that court, declaring said claim and other claims to be liens on the property of said estate by virtue of a certain lease in which deceased was lessee.

The defendant in error leased a six-story building, described as 208 Michigan boulevard, in the city of Chicago, to the Bissell-Cowen Piano Company for a term of ten years from April 30, 1909, for a rental of \$2,166.67 per month. One of the provisions of the lease is as follows: "The lessor shall have a first lien upon the interest of lessee under this lease, and upon lessee's property now or hereafter located in said premises, to secure the payment of all moneys due under this lease." This lease was assigned by the Bissell-Cowen Piano Company, with the consent of the defendant in error to the Æolian Company. On January 27, 1913, the Æolian Company assigned the lease to Thurber. All these assignments were made with the written consent of the lessor, defendant in error herein. Each assignment carried with it the continuing liability of the assignor, and contained the stipulation that the assignee would not assign the lease. Thurber sublet to other parties all of the building except the first and sixth floors, which he occupied up to the time of his death. Thurber died September 24, 1913, leaving a last will and testament, which was duly proven and admitted to probate, in which Martha C. Thurber,

his wife, was named sole legatee and executrix. Letters were issued to Martha C. Thurber, who continued to act as executrix of the last will and testament of W. Scott Thurber until the plaintiff in error, the Chicago Title & Trust Company, was appointed administrator de bonis non, etc. Two days after letters testamentary were issued to Martha C. Thurber, on petition of the executrix, an order was entered authorizing her to continue the business for a period of 60 days, provided that all profits revert to the estate and all losses be paid by the executrix individually, and that such time should not exceed 60 days. Within that time an order was entered in the probate court, upon petition filed by the executrix, to sell at public or private sale that part of the personal property consisting of the stock of merchandise, i. e., oil paintings, etchings, water colors, picture frame moldings, glass, etc., theretofore appraised at \$61,910.50, at not less than the appraised value. The executrix continued in possession of the property, executed subleases to tenants and collected rent from them and to enforce the collection of the rent brought suit in her name as executrix. In her report to the probate court filed July 2, 1915, she claims credit for payment of rents so made, and charges herself with collection of rent from subtenants.

The rent under the lease for the month of September, 1913, was due and unpaid at the time of Thurber's death, and a claim was filed and allowed by the probate court as a seventh class claim for the amount of \$2,166.67. On September 26, 1914, defendant in error filed a claim for rent for the months of July, August, and September of that year, which was allowed December 15, 1914, by the court in the amount of \$3,225.01 as of class 7, without prejudice to the claim of the defendant in error to the preferred and prior claim upon the assets of said estate. No appeal was perfected from these two claims so allowed. In addition to this, a claim was filed on September 26, 1914, three days before the close of the year for administration, for rent not due but to accrue for the premises for the period from October 1, 1914, to April 30, 1919, at the rate of \$2,166.67 a month, \$119,166.67. On June 24, 1915, this claim was allowed as of class 7 for the amount of \$8,042.77, being the rent due for the premises in question from October 1, 1914, to March 31, 1915, on which last date defendant in error had sold the building in question.

On December 24, 1914, the defendant in error filed its petition praying that the claims for rent theretofore allowed (\$8,391.68) be decreed to be first and prior liens upon the personal property of the deceased located within Cook county at the time of his death by virtue of the terms of the lease; that the same

be paid before other claims, including the widow's award; that the claim for rent for the months of October, November, and December, 1914, amounting to \$6,550.01, be paid as costs and expenses of administration, and made a first and prior charge against all the assets of the deceased; that the rent accruing thereafter as long as the executrix occupied or controlled the building, and the rent accruing in the future, be allowed as part of the costs and expenses of administration; that the executrix pay to the petitioner all rents in her possession collected from subtenants. On June 24, 1915, the date of the allowance of the claim above mentioned for \$8,042.77, the probate court heard this petition, and decreed that all the claims allowed, amounting to \$16,434.45, be given priority under the lien contained in the lease. The decree also included the claim on that day allowed for \$8,042.77, though it does not appear to have been included in the petition. The court ignored that part of the petition asking that rent after October 1, 1914, be allowed as expenses of administration. The decree specifically found that such lien arose from the lease. There is nothing in the decree finding that said claims were entitled to priority as expenses of administration, nor is there anything in the petition for lien from which it could be inferred that the petition was seeking to have the previously allowed claims reclassified as expenses of administration. No petition for a reclassification of these claims from the seventh class, in which they were allowed, appears anywhere in the record. It is evident that the probate court made no attempt to pass upon the question of what constitute proper allowances of rent as expenses of administration in the case. Its decree is based solely on the ground that the claimant is entitled to such lien under its lease. While pleadings in such a case are limited, yet it is evident from the record that no attempt was made to have these claims reclassified.

The estate perfected two appeals to the circuit court: One from the order of June 24, 1915, allowing as of the seventh class the sum of \$8,042.77 as rent after the year for administration had passed, and the other from the decree granting priority to the three claims, amounting to \$16,434.45.

It was admitted by the plaintiff in error in the circuit court, and likewise here, that the first claim for rent for the month of September, 1913, due and unpaid at the time of the death of Thurber, was properly allowed as a claim of the seventh class by the probate court, and that the claim as allowed by the court in the sum of \$6,225.01 as a claim of the seventh class was properly allowed, and that these two claims should stand as found. No appeal was perfected from either of these claims. Plaintiff in error contended in the circuit court, as it does here, that the claim allowed by the court to

the amount of \$8,042.77 was, at the time the claim was filed, for rent not due until after the expiration of the period for filing claims, and is contingent and should not have been allowed, and that the defendant in error is not entitled to a lien on the assets of the estate under the lease.

The circuit court held that the claim upon which an allowance of \$8,042.77 was made was a contingent claim when filed, and that, although it was filed before the close of the period for filing claims, it was not an absolute debt provable against the estate of the deceased, and denied said claim. That court also held that the terms of the lease were not sufficient to give to the landlord a lien on the property of the estate sought to be made subject thereto. The circuit court made no attempt to pass upon the priority of the claims as expenses of administration, expressly holding that such matter was not in the record and was not passed upon.

The claimant appealed to the Appellate Court for the First District, and that court held that it was not necessary to pass upon the holding of the circuit court that the claim for rent after the period for filing claims was a contingent claim, and also held that it was not necessary to pass upon the holding of that court that the lease was not sufficient to grant a lien, for the reason that (as it held) \$16,434.45, the total of the three claims allowed, were proper charges against the estate as expenses of administration and allowable as such. The Appellate Court reversed the decree of the circuit court, and remanded the cause, with directions to that court to enter judgment for the sum of \$16,412.77 as expenses of administration. It appears from the record that neither the probate nor circuit court had that issue before it. The original petition was for a lien under the lease and not for a reclassification. Neither the estate nor its creditors have had an opportunity to appear and be heard on what constitutes a proper allowance as expenses of administration. The questions involved and urged in the appeal to the Appellate Court were the effect of the lease as to its constituting a lien and that of the allowance of rent under the lease after the period for filing claims had passed. The Appellate Court, however, arrived at the conclusion, from the record, that the full amount of the three claims was properly costs of administration. We have examined the record with a view to determining whether this conclusion can be sustained on the record and are of the opinion that it cannot.

[1] The functions of an administrator or executor are to close up the estate for which he is acting. He has no authority, as such officer, to conduct a retail store business. Such is beyond the scope or functions of his office. *Grace v. Seibert*, 235 Ill. 190, 85 N. E. 308, 22 L. R. A. (N. S.) 301; *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688.

[2] The record does not disclose any authority from the probate court to conduct the business of the deceased further than is found in an order entered October 1, 1913, which authorized the executrix to conduct the business for a period not to exceed 60 days. It is urged that this authorization was extended indefinitely by a subsequent order of November 13, 1913. That order directed that the executrix "proceed to sell that part of the personal property consisting of the stock of merchandise," etc., "at public or private sale, as provided by law, for not less than the appraised value," etc. We are unable to agree with the contention of counsel for defendant in error that this was an extension of authority to conduct business. On the contrary, that order, in effect, directs the closing out of this stock. It is an order to sell, with no authorization to buy to replenish the stock as contemplated in conducting a retail business. It follows that the order of November 13, 1913, did not extend the authority of the executrix beyond the period of 60 days.

It is unnecessary to pass upon the question as to whether the probate court had authority to authorize an extension of time for the conduct of the business by the executrix, as the record discloses no such extension. Nor is there in the record any further evidence of such authority. There appears to have been no report of account filed by the executrix prior to July 2, 1915.

What, under all the circumstances of this case, would constitute a proper allowance as expenses of administration is not before this court. There has been no hearing on that matter. No evidence has been offered upon that subject in the probate or circuit court, other than that of the occupancy of the premises by the executrix, which would enter into the determination of that question. The petition of defendant in error in the probate and circuit courts asked that a lien be declared for the sum of \$3,391.68 arising out of the contract of lease of the deceased. While the petition prayed that installments of rent accruing after October 1, 1914, be declared expenses of administration of the estate, yet the probate court made no disposition of that question, and the defendant in error, as such petitioner, appears to have taken no appeal from the decree of the probate court, but followed the appeal of the executrix in the circuit court, and there defended the decree giving priority, under the lease, to this item for rentals. The decree was based solely on the ground that a lien was given by the lease. It is evident that this was the theory upon which the case was tried in the probate and circuit courts, and that the other creditors of the estate have not had their day in court or a hearing on what would be proper expenses of administration.

[3] There is a broad distinction between a

lien for installments of rent which arises out of a lease and the classification of a claim as expenses of administration. The former arises out of the contract of the deceased, while the latter arises wholly out of the action of the representative. The former is a claim against the estate of the deceased, while the latter is a claim against the representative. *Smith & Co. v. Williams*, 178 Ill. 420, 53 N. E. 358; *Schouler on Wills, Executors and Administrators* (5th Ed.) par. 1256. Such claims are inconsistent. 18 Cyc. 880; *Myer v. Cole*, 12 Johns. (N. Y.) 349.

We are of the opinion that the record does not afford any basis for the holding of the Appellate Court, and without passing upon what would in the present case constitute proper items of expenses of administration, as that matter must be passed upon by the probate court, we are of the opinion that the Appellate Court erred in finding, from this record, that said amount should be classified and allowed as expenses of administration and given priority as such.

[4] The defendant in error contended in the Appellate Court that the circuit court erred in holding that the lease did not create a lien on the property of the deceased in the premises in question at the time of his death. Section 12 of the lease provides as follows: "That lessor shall have a first lien upon the interest of lessee under this lease, and upon lessee's property now or hereafter located in said premises, to secure the payment of all moneys due under this lease." It is contended by the defendant in error that the language, "lessee's property now or hereafter located in said premises," is a description of the property of the estate sufficient to create a lien against such property. Regarding such a lien this court said in *Borden v. Croak*, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23:

"The lien claimed is one where the property is left in the possession of the debtor, and it is therefore in the nature of a mortgage rather than a pledge, and is to be governed by the rules of law applicable to chattel mortgages."

Also:

"The question then is whether a contract for the sale or mortgaging of subsequently acquired chattels will be specifically enforced in equity, where no chattels are specifically described, the only description being that contained in the general word 'property.' It is undoubtedly the rule that the equitable title to goods as well as to land is confined to specific property, and does not extend to goods which are undetermined. As said by the Lord Chancellor in *Holroyd v. Marshall*, 10 H. L. Cas. 191: 'A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse is a contract relating to specific property and which would be specifically performed.' In *Tadman v.*

D'Epineuil, 20 L. R. Ch. Div. 758, a party, by a written instrument, charged 'all his present and future personalty' to secure future indebtedness to the plaintiff, and afterwards became indebted to him; and upon the principles laid down in *Holroyd v. Marshall* it was held that the instrument operated to charge all the personal property belonging to the debtor at the date of the instrument, but did not operate to charge subsequently acquired property. In *Belding v. Reed*, 3 Hurl. & Colt. 955, a debtor assigned to his creditor by bill of sale all his household furniture, plate, linen, etc., and all his other personal estate and effects whatsoever, then being or thereafter to be upon or about his dwelling house, farm, or premises, or elsewhere in Great Britain, upon trust to sell and satisfy his debt. Power was given the creditor to enter the premises where the goods assigned might be and take possession thereof, but it was provided that, until he should see fit to do so, the debtor might retain possession. After five years, the debtor having in the meantime become a bankrupt, the creditor, after having demanded payment, entered, and, with other goods of the debtor, seized goods which the debtor had acquired subsequent to the execution of the bill of sale. In an action of trover by the assignee in bankruptcy, it was held that, as the goods were not identified by the bill of sale, the creditor took no title to them, and that the action might be maintained."

[5] The rule that the description must be sufficiently specific to afford third persons the means of identifying the property refers to chattel mortgages as well as to mortgages of land. *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483, 28 N. E. 955.

[6] The language, "lessee's property now or hereafter located in said premises," does not in any way describe or specify the nature or character of the property, nor in any way attempt to determine what the after-acquired property shall be, and is therefore too indefinite to create a lien on after-acquired property. *Borden v. Croak*, supra; *First Nat. Bank of Joliet v. Adam*, supra. Even though this language were sufficiently definite to create a lien on after-acquired property of the lessee, it might well be doubted whether it should be held to cover the property of the assignee of such lease, in the absence of a specific undertaking of the assignee that it should do so. By the terms of the assignment *Thurber* agreed to assume the lease, and agreed "to make all payments yet to be made, and to perform and abide by all the obligations of the lessee under this lease." There appear to be no decisions in this state directly in point on this question. It is said in *Tiffany on Landlord and Tenant* (volume 2, p. 1969):

"There has apparently been no decision upon the question whether the goods of an assignee of a leasehold, or of a subtenant, brought by him upon the premises, can be subjected to a lien created by the lessee; but it would seem that they cannot be so subjected, since the lessee has no right to create a lien upon property in which he has no interest, and the provision for a lien

cannot be regarded as a covenant which will run with the land, since it concerns chattels and not land; and there is, moreover, some difficulty in construing a provision for a lien intended to create a 'real' obligation, as creating a personal obligation by way of a covenant. * * * To create a lien on chattels thereafter brought onto the premises, however, they must, it has been decided, be specifically referred to, and a provision for a lien on lessee's property is consequently insufficient for this purpose."

It is evident that a lessee has no authority to bind the goods and chattels of his assignee under a lease, as he has no interest in the goods pledged by such a contract, and the transaction lacks the first essential of a valid pledge—that the pledgor have title to the property pledged. Nor would an undertaking on the part of an assignee to pay rent and to keep all covenants to have been kept by his assignor have the effect of bringing his property under such a lien. An agreement of an assignee to keep such a covenant of the original lessee is an agreement to keep a covenant which the original lessee had no power to keep. A contract for lien on the property of an assignee of a lease is a contract which the original lessee did not make and could not have made. It is separate and collateral to the contract for the payment of rent. It follows, therefore, that, in the absence of a provision in a contract of assignment expressly pledging the property of the assignee for the payment of rent, no such lien exists against the after-acquired property of the assignee of a lease.

[7] But it is contended this is a covenant to pay rent, and therefore a covenant that runs with the land. We do not think so. This court held in *Purvis v. Shuman*, 273 Ill. 286, 112 N. E. 679, L. R. A. 1917A, 121, Ann. Cas. 1918D, 1175:

"The test whether a covenant runs with the land or is merely personal is whether the covenant concerns the thing granted and the occupation or enjoyment of it, or is a collateral and personal covenant not immediately concerning the thing granted. If a covenant concerns the land and the enjoyment of it, its benefit or obligation passes with the ownership; but to have that effect the covenant must respect the thing granted or demised, and the act to be done or permitted must concern the land or estate conveyed. An illustration of the rule is found in *Wiggins Ferry Co. v. Ohio & Mississippi Railway Co.*, 94 Ill. 83. * * * The court said, that, in order that a covenant may run with the land, its performance or nonperformance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or must affect the mode of enjoyment."

The covenant in question was not a covenant concerning the thing granted or the enjoyment of it, but was a collateral and personal covenant, and as such it does not run with the land. *Purvis v. Shuman*, supra; 24 Cyc. 918; *Farrington v. Kimball*, 126 Mass. 313, 30 Am. Rep. 680.

It follows from the foregoing that the provisions of the lease were not sufficient to create a lien on the property of the deceased, and the circuit court did not err in so holding.

[8] The remaining question in the case is whether the claim of \$8,042.77 allowed for rent after the period of administration was passed was a valid charge against the estate or was a contingent claim, and not so provable.

On September 26, 1914, defendant in error filed in the probate court a claim for rent, as follows:

"To rent not due but to accrue for the premises 202 Michigan boulevard, Chicago, Ill., for the period October 1, 1914, to April 30, 1919, at the rate of \$2,166.67 a month, \$119,116.67."

While this claim was filed three days before the expiration of the year fixed by the statute for the filing of claims, the claim is for rent not due until after the year for filing claims was passed. There appears to have been no hearing on this claim until June 24, 1915, when, as we have seen, \$8,042.77 was allowed as a balance due to March 31, 1915, as a seventh-class claim, and on the same day decreed to be a lien on the property of the estate on the premises by virtue of the lease. It is contended by plaintiff in error that rent not due at the death of the testator and unearned during the period for filing claims was a contingent claim and should not have been allowed. The defendant in error contends that, as the executrix continued in occupation after the year for filing claims, this entitled the landlord to have this claim allowed for the period of occupation, and that, in any event, it was not a contingent claim.

It is well settled in this state that claims dependent on a contingency which may or may not ripen into a liability cannot be proved and allowed under section 67 of the Administration Act (Hurd's Rev. St. 1917, c. 3). Said section refers only to claims on which there is an absolute liability although the time of payment is postponed, and has no reference to contingent claims. The holder of a contingent claim is not a creditor of the estate. If his claim remains contingent during the whole of the year allowed for the exhibition of the claims against the estate he cannot participate in the distribution by the administrator. *Union Trust Co. v. Shoemaker*, 258 Ill. 564, 101 N. E. 1050; *Pearson v. McBean*, 231 Ill. 536, 83 N. E. 173; *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448; *Snydacker v. Swan Land & Cattle Co.*, 154 Ill. 220, 40 N. E. 466; *Dugger v. Oglesby*, 99 Ill. 405; *Stone v. Clarke's Adm'rs*, 40 Ill. 411. If this claim for rent was a contingent claim, and remained such during the year allowed for the exhibition of claims, then the holder of that claim was not, during such year a creditor of the estate, and such claim can-

not be allowed against the estate under said section 67, to be paid, on distribution by the executor or administrator de bonis non, from the estate inventoried. By section 70 of the Administration Act claims which are not exhibited or filed during the first year allowed for administration are barred from sharing in the estate inventoried. While this claim was exhibited during the year following the issuance of letters testamentary, this fact will avail nothing if the claim was in fact a contingent one. Nor will the fact that it was allowed at a much later date aid the claimant, for the reason that the power of the probate court to allow the claim at all must be based on two premises: First, the filing of the claim within the year; and, second, the absolute liability of the deceased though the claim is not due during said year.

Is this claim for the rentals covering the balance of the term a contingent claim? We are of the opinion that it is. There are different contingencies in a lease of this character, the happening of which is not within the control of either party to it, which may defeat all right to recover rents, as where the building shall be so injured by fire as to be untenable, then, unless it be repaired in 30 days, the lessee as well as the lessor may terminate the lease; also it is provided in the lease that, in case the lessor desires to rebuild the building, he may terminate the lease. This cannot be said, therefore, to present such an absolute liability as that contemplated in section 67 of the Administration Act, and, indeed, such a rule would be most far-reaching in its consequences; for if A. leases a building for a term of years to B., and B. dies, and A. be allowed to have out of the assets of the estate inventoried by its representatives the total rentals less the discount provided for by the statute, a solvent estate might be rendered insolvent to the exclusion of all other creditors. Such a result could not have been contemplated by the Legislature in the enacting of section 67. This is to be distinguished from a contract to purchase land on installments, for in the latter case the obligation is to pay at all events. The fact that such a claim cannot be proved against an estate does not bar the claimant from bringing an action against the representative personally, or the heirs of the deceased, for installments that actually accrue under the contract of the deceased. As was said in *Snydacker v. Swan Land & Cattle Co.*, supra, concerning claims arising on contract of the testator which did not accrue till after the estate was closed, quoting with approval *Hall v. Marten*, 46 N. H. 337:

"The general principle laid down is this: That the heir is liable, to the extent both of the personal and real estate received from his ancestor, for the contracts or liabilities of the ancestor, and that, where these claims have not accrued until after the administration of the estate is closed, suit may be brought and maintained

against the heir to the extent of such assets which he derived from the ancestor."

While it appears from the record here that the estate was not closed when this claim was filed, it further appearing that the executrix's report of account has not yet been approved nor the estate closed, yet so far as the right to have this claim allowed and paid out of the assets inventoried is concerned the situations are analogous. Nor does the fact of confusion and failure to close up the estate on the part of the executrix change the law applicable to the allowance of claims payable out of the assets inventoried.

As the claim for \$119,166.87 for unaccrued rentals is a contingent claim there is no authority, under the statute, for its allowance. The allowance of any part of such a claim was an allowance under the terms of the lease. That such allowance was so made is evidenced by the fact that the probate court allowed the sum of \$8,042.77 as a seventh-class claim. Any allowance of this claim as a liability under the lease must have been made by authority of section 87. The allowance of any portion of this claim under said section was, as we have seen, erroneous. We are of the opinion that the circuit court did not err in holding said item of \$8,042.77 to be a claim which cannot be allowed to participate in the distribution of the assets inventoried.

As we understand the record, the claim of \$2,166.87 for rent for the month of September, 1913, and the claim of \$6,225.01 balance for the year of administration, having been allowed as seventh-class claims, and no objection thereto being made by the estate, by the records of the probate and circuit courts stand allowed as seventh-class claims. The question what should be allowed as expenses of administration may properly be brought before the probate court for determination.

For the foregoing reasons the judgment of the Appellate Court will be reversed and the decree of the circuit court will be affirmed.

Judgment of Appellate Court reversed.

Decree of circuit court affirmed.

(288 Ill. 91)

ABBOTT v. CHURCH et al. (No. 12617.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 6, 1919.)

1. WILLS §370—CONTEST—STRIKING EVIDENCE FROM TRANSCRIPT.

In a contest of a will for undue influence of principal beneficiary, it was error to strike from the certificate of the evidence before the probate court evidence by the attesting witnesses as to where and by whom the will was drawn.

2. WITNESSES §250—CERTAINTY OF TESTIMONY—"THINK."

When a witness prefaces his testimony with "I think," he is to be taken as testifying to what he remembers; "think" meaning "believe."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Think.]

3. WILLS §166(4)—CONTEST—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

In a suit to set aside a will on the ground that it was executed through undue influence exercised on testator by the principal beneficiary, evidence by attesting witnesses improperly excluded *held* sufficient to establish prima facie that the will was the result of undue influence.

4. WILLS §165(2)—CONTEST—EVIDENCE—ADMISSIBILITY.

In a suit by testator's brother to set aside the will as having been procured by the undue influence of one of testator's friends, who was the principal beneficiary, letters of deceased, written to contestant, having no relation to the suit, and being written several years before the will was executed, were too remote.

5. WILLS §165(1)—CONTEST—EVIDENCE—ADMISSIBILITY.

Letters of a testator are not admissible generally for the purpose of destroying or invalidating his will, but may sometimes be admissible for the purpose of sustaining it.

Appeal from Superior Court, Cook County; Denis E. Sullivan, Judge.

Suit by Edwin F. Abbott against William T. Church and others to set aside the will of George B. Abbott, deceased, on the ground of undue influence. From a decree dismissing the bill, and sustaining the will, complainant appeals. Reversed and remanded.

Edwin F. Abbott, of Lane, Kan., and C. Helmer Johnson, of Chicago, for appellant. James H. Wilkerson, of Chicago, for appellees.

DUNCAN, C. J. This appeal is prosecuted by Edwin F. Abbott, complainant below, in a bill to set aside the will of his brother, George B. Abbott, from a decree dismissing the bill and sustaining the will of the testator. The only ground upon which appellant relied in the court below, and is relying on here is that the execution of the will was procured through the undue influence of Frank L. Shepard, who was made a beneficiary and one of the executors and trustees in the will.

The testator left property valued at approximately \$16,000. One thousand dollars of his property was personal property, and the remainder was real estate. By his will he bequeathed to Frank L. Shepard all of his Sons of Veterans and Masonic badges, jewels, decorations, and medals, and all pic-

tures, books, clothes, papers, jewelry, furniture, and personal effects. The remainder of the estate, real, personal, and mixed, he devised and bequeathed to his executors, William T. Church and Frank L. Shepard, with directions to convert the same into money within two years after his death. He then directed (1) that they pay to George Abbott Buckley the sum of \$500; (2) that they pay to his brother, Edwin F. Abbott, "one-fourth of the remainder of my said estate, less the sum of \$2,000"; (3) that they then divide the residue into three equal parts, and that they pay one such part each to Mrs. Margaret Abbott Walker, William T. Church, and Frank L. Shepard, and, in case of the death of any one or more of said three persons, then in such case her, his, or their share should pass to the heirs at law of such deceased person or persons. Neither executor was required to give any bond or security as executor. The will was executed April 8, 1911.

The bill alleged, in substance, that the testator at the time of making his will was ill, and by reason of domestic troubles and of his illness was easily influenced; that the will was prepared by William T. Church and Frank L. Shepard, and under their advice and direction; that they were practicing law as partners in Chicago at the time the will was executed, and were the legal and confidential advisers of the testator, and that they took advantage of the confidence he reposed in them and by undue influence procured the alleged will to be executed and whereby they were made the principal beneficiaries thereunder. All charges of undue influence were denied in the answer of appellees.

It is disclosed by the evidence that at the time the will of the testator was executed he was 55 years of age, and was possessed of a sound mind and of a strong mentality. There is no evidence of his being in an enfeebled condition, either mentally or physically. Six years prior to the execution of his will he was divorced from his wife, but the record does not show that that incident affected him in any way whatever. He was a practicing physician, and in 1888 was elected commander in chief of the Sons of Veterans and served 2 years. He afterwards spent a few years in Honduras, and returned to the United States in 1897. In 1898 Frank L. Shepard was elected commander in chief of the Sons of Veterans, and the testator was made his national secretary. William T. Church was at this time commander of the Illinois Division of the Sons of Veterans. The three had offices in the Tacoma Building, and, being engaged in the same work in said organization, their association ripened into very strong friendships, which continued until the death of the testator, June 14, 1917. In 1902 Shepard and Church became partners in the law firm of Barker, Church & Shepard.

Church and Shepard became partners largely through the influence and persuasion of the testator, who thereafter had a desk in their office, and used the office as it suited his convenience, received his mail there, kept an account with them, and deposited with them his rents, and sometimes his salary, and this account and deposit continued with them up to his death. They rendered a great deal of service for him until the time of his death—kept his accounts, took charge of his money, received his rents, took care of his property, superintended the rebuilding of his houses in 1914, and made contracts and paid the bills. Shepard was his attorney in 1905 in the divorce proceedings. One Haynes represented him in a suit in the United States court; Church and Shepard being therein consulted as friends, but not as lawyers, as Church in his testimony put it. They helped him secure his bond in that suit. Shepard and Church represented him as attorneys in 1915 before the board of review. During a part of the time, in his absence from the state, they looked after all of his personal affairs, paid his lodge dues, insurance premiums, and kept his private papers in a tin box in their vault. His moneys received by them were deposited in the partnership account in a bank. Sometimes he had large sums thus deposited in their account, at other times it would all be checked out by the testator; but he drew checks whenever he wanted money, whether he had much, little, or none left in his account, and all such checks were paid by them.

There is no dispute in the evidence, most of it being given by Church, who was called as a witness for the appellant. Church testified that the first time he knew anything about the will or its contents was when it was opened after the death of Dr. Abbott, and that he had nothing to do whatever, by suggestion or otherwise, in its preparation. On the introduction of the testimony taken in the probate court in the proceeding to probate the will, and which was offered by appellant, the appellees objected to the evidence contained in the following examination of the witness R. W. Lewis, one of the witnesses to the will, to wit:

"Q. Where was this will executed? A. In our office—the office of Church, Shepard & Day. The firm then was Barker, Church & Shepard, at that time.

"Q. Who drew the will; do you know? A. Well, I don't remember positively, but, judging from the form of that certificate, I think Frank L. Shepard.

"Q. You did not draw it? A. No; I don't think I did. I may have, but I think not."

The same character of evidence offered by appellant, found in the testimony of Anna L. Ekval before the probate court, was also objected to by appellees; the testimony objected to being the following:

"Q. Where was this will signed? A. Why, over at the attorney's office—Church, Shepard & Day.

"Q. How did you happen to be in their office at the time? A. I am employed there.

"Q. Still employed there? A. Yes, sir.

"Q. How long had you known Mr. Abbott before this time? A. Oh, I had known him about 15 years.

"Q. Do you know who drew this will? A. Why, I think Mr. Shepard—Frank L. Shepard.

"Q. He is one of your employers? A. Yes."

The court sustained the objections of appellees aforesaid, and struck out of the certificate of evidence all of said questions and answers of the attesting witnesses. There was no other testimony in the certificate of evidence before the probate court bearing upon the question as to where the will was signed and by whom it was prepared. These two witnesses were stenographers and employés of Church and Shepard at the time the will was drawn and executed, and Lewis was an attorney at law and in their employ at the time of the trial in the superior court. They were both called to testify on behalf of appellant. In his cross-examination Lewis testified that he did not remember whether or not he did the mechanical part of typewriting the will, but thought he did not; that he did not know positively who drew the will, but based his answer in the probate court, that Shepard drew the will, on the form of the certificate. Miss Ekval was not examined in the superior court touching the question as to where the will was drawn and executed and by whom prepared. There is no other evidence in the record on the question whether or not Shepard did prepare the will for the testator, except the evidence before the probate court, and which was stricken from the certificate as aforesaid. The testimony of both attesting witnesses does show that the will was duly signed and properly witnessed, and that they witnessed the signing of the will at the request of the deceased, and that they do not think Shepard was present when the will was so signed by the testator and attested. At the close of all the evidence the court excluded the evidence, and directed the jury to return a verdict for the proponents of the will, appellees.

[1] It is first contended by appellant that the court erred in striking from the certificate of the evidence before the probate court the questions and answers of the attesting witnesses, and in this contention he is right. This evidence was not further explained or contradicted in the probate court, and no objection was made to it in the probate court. It was proper evidence, and the certificate should have been admitted as a whole. *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410. Had this evidence not been excluded, the positive testimony of Miss Ekval would have been in answer to a direct question who prepared the will, "I think Mr. Frank L. Shepard." Her

answer was not further qualified or explained in the probate court, although, when recalled as a witness in the superior court, she did state that she did not positively know who did the work. Lewis' testimony was positive to the effect that Shepard drew the will, and he testified both in the probate court and in the superior court that he based his testimony upon the form of the attestation clause. The attestation clause is substantially in the usual form, yet it contains language somewhat unusual and sufficient to characterize it. It reads thus:

"The above instrument was subscribed by the said George B. Abbott in our presence and acknowledged by him to each of us, and he at the same time declared the above instrument so subscribed to be his last will and testament; and we, at his request, have signed our names as witnesses hereto in his presence and in the presence of each other and written opposite our names our respective places of residence, believing the said George B. Abbott to be of sound mind and memory, this 8th day of April, A. D. 1911."

[2] "Think" means "believe," and when a witness prefaces his testimony with "I think," he is to be taken as testifying to what he remembers. 8 Words and Phrases, 6959; *Galveston, Harrisburg & San Antonio Railway Co. v. Parrish* (Tex. Civ. App.) 43 S. W. 536. The witness Lewis might have been able to have given a number of good reasons for thinking Shepard wrote the certificate or drew the will, if he had been further questioned.

[3] All the testimony offered and excluded by the court from the jury tended to prove that a fiduciary relation existed between testator and the devisee Frank L. Shepard, who received a substantial benefit, and, in fact, the chief benefit, under the will, and it further tended to show that the will was prepared and drawn by Shepard. This proof established prima facie that the execution of the will was the result of undue influence exercised by that beneficiary, and, standing alone and undisputed, would entitle appellant to a verdict. *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908; *Teter v. Spooner*, 279 Ill. 39, 116 N. E. 673. Any relation existing between parties to a transaction, wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other, is a confidential or fiduciary relation. Such a relation arises whenever a continuous trust is reposed by one person in the skill or integrity of another. 12 Corpus Juris, 421; *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808. While it may be said that the evidence of appellees in this record tends somewhat to rebut the presumption of undue influence, considering all the relevant testimony that should be in the record, still it was error in the court to exclude all the evidence and to direct a verdict. It was appellant's right to have the case submitted to a jury. The vital

question in this case was whether or not all the legitimate and proper evidence offered made a prima facie case, because, if it did not, the simple error in excluding the evidence in the transcript of the evidence before the probate court would not necessarily be fatal error. It was reversible error to exclude all the evidence and to direct a verdict.

[4, 5] Two letters of the deceased written to appellant, one in 1907 and the other in 1909, were offered by appellant merely for the purpose of proving that a friendly relation existed between them at those times. Both letters were in relation to a patent on a safety vault lock device, but portions of the letters were concerning family matters. The letters do disclose that a rather close and affectionate relation existed between the two brothers, but they have no relation whatever with any matters connected with this suit, and are rather too remote proof of friendly relationship, even if that were a contested issue in this case. The general rule is that letters of a testator are not admissible for the purpose of destroying or invalidating his will, but may sometimes be admissible for the purpose of sustaining his will. *Crumbaugh v. Owen*, 238 Ill. 497, 87 N. E. 312. It was not error in the court to exclude those letters in this case.

For the errors indicated, the decree of the superior court is reversed, and the cause remanded.

Reversed and remanded.

(283 Ill. 170)

HEINRICH, County Clerk, v. HARRIGAN et al. (No. 12104.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 4, 1919.)

1. COURTS §219(7)—APPELLATE JURISDICTION—SUPREME COURT OF ILLINOIS—APPEAL INVOLVING QUESTION OF REVENUE.

The question of revenue is involved on an appeal within Practice Act, giving Supreme Court jurisdiction of such appeal, when some recognized authority of the state or some of the municipalities authorized by law to assess and collect taxes are attempting to proceed under the law to collect the same, and questions arise between them and those of whom taxes are demanded, or where controversy is whether funds in dispute belong to the revenue of the county or state, or some division thereof.

2. COURTS §219(7)—APPELLATE JURISDICTION—SUPREME COURT OF ILLINOIS—APPEAL INVOLVING QUESTION OF "REVENUE."

Where question on appeal is whether county has a lien on a fund by virtue of former proceedings to collect taxes, and is entitled to have fund applied on its demand for taxes, and the proceeding is one to collect or enforce county's demand for taxes, the Supreme Court has juris-

diction; a question of revenue being involved within Practice Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Revenue.]

3. EXECUTORS AND ADMINISTRATORS §85(9)—REVIEW OF PROCEEDINGS—MATTERS REVIEWABLE.

Where citation is issued commanding executors to show cause why property claimed by executors as their own should not be inventoried, decree that property be so inventoried is conclusive on appeal by executors in their official capacity, where no appeal is taken by executors individually, though the parties stipulated that the proceeding shall be considered as one involving claim by administrator against estate, under Administration Act, §§ 81, 82; such proceeding being one against them as individuals.

4. EXECUTORS AND ADMINISTRATORS §85(9)—CLAIM AGAINST ESTATE BY ADMINISTRATOR—NATURE OF PROCEEDINGS.

A proceeding against an administrator to have property inventoried that he claims in opposition to the estate he is administering, under Administration Act, §§ 81 and 82, is a proceeding against the administrator individually.

5. EXECUTORS AND ADMINISTRATORS §59—OWNERSHIP OF PROPERTY—SUFFICIENCY OF EVIDENCE.

Evidence held to show that tax certificates in the possession of testator's sister at time of his death and notes and mortgages found in safe in the home of another sister where testator lived at time of death were the property of testator.

6. TAXATION §507—"PERSONAL PROPERTY"—LIEN—TAX CERTIFICATE—"GOODS AND CHATTELS."

No lien for taxes attaches to tax certificates, such certificates being merely choses in action, and not personal property within Revenue Act, §§ 137, 254; the words "personal property" and "goods and chattels," as used in such statutes, having same meaning and comprehending only such personalty as may be subjected to levy and sale under an execution upon a judgment at law.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Goods and Chattels; First and Second Series, Personal Property.]

7. EXECUTORS AND ADMINISTRATORS §431 (1)—CREDITORS' SUIT—CONDITIONS PRECEDENT.

Creditors' bill against the estate of a deceased cannot be maintained, unless the claim has been reduced to a judgment or the estate is shown to be insolvent.

8. APPEAL AND ERROR §13—PENDENCY OF APPEAL—DEFECT IN BOND.

On appeal involving question of whether redemption money in hands of county can be applied to payment of delinquent taxes owed by deceased holder of tax certificates, where it appeared that county had filed claim against estate of deceased, and that appeal therefrom had been taken, court properly held that such ap-

peal was pending, notwithstanding that a number of questions had been raised in such appeal as to the validity of the appeal bond; such questions as to validity of appeal bond being for the determination of the court on such appeal.

9. EXECUTORS AND ADMINISTRATORS ¶22(2)
—ADMINISTRATOR'S CLAIM AGAINST ESTATE
—APPOINTMENT PRO TEM.

An appointment of an administrator pro tem is unnecessary where executor claims property as his own in opposition to the estate he represents; Administration Act, § 72, authorizing such appointment only where the administrator or executor files out and out claim against the estate.

10. EQUITY ¶192—PLEADING—DISCLAIMER.
A disclaimer is a mode of defense.

11. COSTS ¶47—DISCLAIMER—DISMISSAL.

Where defendant's disclaimer prevails, and defendant is dismissed, as a general rule he has a right to be dismissed with costs.

12. EQUITY ¶192—PLEADING—DISCLAIMER.

If a defendant attempts to disclaim in a case, where his disclaimer does not entitle him to a dismissal, but he must, notwithstanding his disclaimer, still be retained as a party defendant in order that the subject-matter of the case be finally disposed of, he should be retained in the suit, and his disclaimer stricken.

13. EQUITY ¶263 — STRIKING OUT DISCLAIMER.

Where disclaimer filed by a defendant on bill of interpleader is a mere obstruction to a final decision of the case, and a final disposition of the funds in controversy, the court of its own motion should have stricken it from the files.

Appeal from Circuit Court, Peoria County;
John M. Niehaus, Judge.

Bill of interpleader by Oscar Heinrich, County Clerk, against Christopher Harrigan and the County of Peoria, at which Christopher Harrigan, administrator, was later made a party defendant, and in which Louis Gauss, County Treasurer and ex-officio Collector of Peoria County, was denied the right to become a party, tried and considered together in circuit court, with appeal by Christopher Harrigan, as executor, from county court's decree that certain property be inventoried as property of the estate; such appeal by stipulation of the parties being treated as a petition for citation under Administration Act, §§ 81 and 82. From decree rendered Louis Gauss, County Treasurer and ex officio Collector of Peoria County, and the County of Peoria, appeal, and Christopher Harrigan, individually and as sole executor, cross-appeals. Reversed in part and remanded, with directions.

C. E. McNemar, State's Atty., of Peoria (Dan R. Sheen, of Peoria, of counsel), for appellants.

Mansfield & Cowan, of Peoria, for appellees.

DUNCAN, C. J. Michael Harrigan died in the county of Peoria on October 8, 1911, having in his possession certain tax certificates of purchase amounting to about \$5,000. He left a will, by which he bequeathed and devised all his property, real, personal, and mixed, equally to his brother Christopher Harrigan, and his two sisters Maggie and Kate Harrigan, after the payment of his debts. The executors, Christopher and Kate Harrigan, at first refused or neglected to probate the will. An administrator was appointed by the probate court of Peoria county, and, being advised that there was a large amount of notes and choses in action belonging to the estate of the testator, made strict search for the same in the home where the testator had lived and died, but for some time could learn nothing about such assets from the executors or otherwise. He finally found a small safe owned by the deceased in a small room or closet adjoining the kitchen. The safe was under a stairway, and was skillfully concealed by hanging clothes and other such articles on the wall over it. He finally succeeded in getting the safe open, and then for the first time the executors named disclosed that there was a will, and two of them, Christopher and Kate Harrigan, filed the will for probate, and were qualified as executors, the other, Maggie Harrigan, declining to become an executrix. The testator up to his death lived with his sister Maggie, where the safe was found, and Christopher and Kate lived in Chicago. About two weeks after the testator's death Kate delivered the tax certificates to Christopher, claiming that she had been told by the deceased to deliver them to Christopher because they were his property. At the time of his death Michael was in arrears to the county of Peoria for back taxes for ten years previous to his death, amounting to the sum of \$5,228.13. The county clerk of said county had in his possession \$1,523.46 in redemption money collected by him since the death of the testator from landowners named in some of the tax certificates. The county of Peoria served notice on the county clerk to hold said redemption moneys and to apply the same as a payment upon the indebtedness of Michael for taxes to the county. Thereafter Christopher demanded of the county clerk that he pay to him said redemption moneys in exchange for the proper tax certificates then in his possession and indorsed in blank "M. Harrigan," but the clerk declined to do so. Christopher then brought suit in assumpsit against the clerk to recover the re-

redemption money. The county clerk, Oscar Heinrich, then filed a bill of interpleader in the circuit court of said county, making Christopher and the county of Peoria defendants, praying that they be required to interplead and settle their right to said funds, that complainant might bring the funds into court, and that Christopher be enjoined from further prosecuting his suit against him. The court so ordered, and the complainant turned over the redemption money to the circuit clerk, and the court discharged the complainant from any further liability, and referred the cause to the master in chancery, with directions to take and report the evidence, together with his conclusions of law and fact.

The first inventory filed by the executors included as property of the deceased at the time of his death cash on hand, \$5; tender money in the hands of the circuit clerk in an unsettled suit, \$356.40. This inventory was approved in open court on June 17, 1912. Another inventory was thereafter filed in which were scheduled items of wearing apparel of the deceased of trifling value and was not approved. Another inventory was then filed on the order of the court which included, in addition to the items inventoried in the first two inventories, \$750 in the hands of the county clerk and in litigation. The executors further reported in the inventory that in the safe owned by Christopher Harrigan and in the residence where Michael Harrigan died, which residence was owned by Maggie Harrigan, were certain notes and mortgages (describing them) totaling \$9,025, all of which were prior to the death of Michael Harrigan, and "are now, the property of Kate Harrigan"; that there was another note signed by H. R. Wolland for \$3,000, and also certain tax certificates amounting to about \$3,000, which note and certificates "were owned by Christopher Harrigan and are now the property of Christopher Harrigan;" that all the notes and mortgages and tax certificates aforesaid were listed, not as the property of the deceased, but merely for the purpose of complying with the order of the court. Objections were filed to this inventory by the county, the state of Illinois, and William and Winifred Harrigan, a brother and sister of the testator not named in his will. A citation was issued by the county court commanding the executors to show cause by July 8, 1912, why all the property described in said last inventory should not be inventoried as the property of the estate. They answered the citation by claiming that said property was their individual property, as aforesaid, and was not the property of the deceased. On the hearing the court found and decreed that all of said property, including the tax certificates, was the property of Michael Harrigan at the time of his death, and not the property of

Christopher and Kate or either of them, and ordered a complete inventory to be filed, and that they include said property therein, by October 5, 1912. The executors in their representative capacity perfected their appeal to the circuit court, but did not appeal as individuals. In the circuit court it was stipulated that the two causes should be tried and considered together, and that the appeal case be treated as a petition for citation, under sections 81 and 82 of the Administration Act (Hurd's Rev. St. 1917, c. 3, §§ 80, 81), in proper form, and that both causes be referred to the master in chancery, and they were so referred in like manner as were the issues in the interpleader case. The master found and reported that the certificates of purchase were not the property of Christopher, but were the property of the estate; that the redemption money aforesaid belonged to Michael Harrigan's estate, and not to Christopher; that the county had no lien on the redemption money, and was not entitled to it under the interpleader; and that the appeal of the executors, as executors, from the probate court should be dismissed, as they had no appealable interest, etc.

The county of Peoria filed objections and exceptions, and on the hearing before the court Christopher Harrigan, as sole executor of the estate, Kate Harrigan being then dead, was made a party defendant to the bill of interpleader. He then filed a joint and separate answer, individually and as executor, in which he claimed the money and the certificates as his individual property and disclaimed having any interest therein as executor. The cause was then referred, the same evidence offered, and practically the same report made by the master in chancery, and the objections and exceptions were again filed by the county of Peoria. The court sustained the master's report and his findings. He further found that it was the duty of the executor to have had appointed in the probate court, and also in the circuit court, an administrator pro tem. to defend both of these suits, and that the estate of Michael Harrigan was the owner of the certificates of purchase, and that the redemption money belonged to the estate, that no reason appeared for further action by the court, and that the interpleader case should be continued until the legal owner should appear and ask for a proper order for the money in the hands of the circuit clerk, and disallowed the claims of Christopher Harrigan and the county of Peoria to the certificates and the funds, and dismissed from the suit the county of Peoria without prejudice to its rights in its claim probated in the probate court and pending on appeal in the circuit court, and gave judgment for costs against the county of Peoria and Christopher Harrigan, each to pay one-half. It further appears from the record that before final decree Lou-

Is Gauss, county treasurer and ex officio collector of Peoria county, presented an intervening petition in the interpleader suit and asked to be made a party thereto, and sought thereby to claim the funds in dispute as tax collector for said back taxes. The court denied him leave to intervene, and he and the county of Peoria both perfected their appeals to this court. Christopher Harrigan individually and as sole executor has assigned cross-errors.

[1, 2] It is insisted on the part of the appellee assigning cross-errors that this appeal is improperly brought to this court because the revenue is not involved within the meaning of our Practice Act (Hurd's Rev. St. 1917, c. 110). The question of revenue is involved when some recognized authority of the state or some of the municipalities authorized by law to assess and collect taxes are attempting to proceed under the law to collect the same and questions arise between them and those of whom taxes are demanded. *Reed v. Village of Chatsworth*, 201 Ill. 480, 66 N. E. 217; *Wilson v. County of Marion*, 205 Ill. 580, 68 N. E. 793. The revenue is also involved, within the meaning of said act, when the controversy is whether the funds in dispute belong to the revenue of the county or state or some division thereof. *People v. Holten*, 259 Ill. 219, 102 N. E. 171; *People v. Hibernian Banking Ass'n*, 245 Ill. 522, 92 N. E. 305. Some of the questions here are: Has the county a lien on the fund by virtue of former proceedings to collect the taxes in question? Is the county entitled to have it applied on its demand for taxes? And is it entitled to the fund as taxes? And it is a proceeding to collect or enforce its demand for such taxes. The revenue is involved.

[3, 4] The court properly held that Christopher and Kate Harrigan, as executors, could not appeal from the order and judgment of the probate court, as that order and judgment were in favor of the estate. They did not appeal as individuals, and as such are bound by that order and judgment. The proceeding was one against them as individuals. A proceeding under sections 81 and 82 of the Administration Act against an administrator is one against him individually when it is sought to have property inventoried that he claims in opposition to the estate he is administering. *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694. The judgment in the probate court being against the executors as individuals, and not being appealed from by them as individuals, it is binding on them as res judicata whether this proceeding be considered as under section 81 or 82 aforesaid, or otherwise. They could not change, by stipulation, the proceeding in the probate court to one under sections 81 and 82, and thus escape the binding force of the probate order and judgment, from which they had not appealed, as the court properly held.

[5] The evidence in this record is overwhelmingly against the appellees assigning cross-errors even if the executor had the right to consider the probate case as appealed by them as individuals or if it be treated as a proceeding under section 81, and there is no theory upon which their claim as individuals can be sustained. The evidence clearly and conclusively shows that the property belonged to Michael Harrigan at the time he died. It appears therefrom that he had been a purchaser at tax sales over 30 years, and had purchased a large amount of tax certificates every year. He loaned large sums of money, and at one time he owned over \$20,000 of valuable bonds besides his notes, etc. He was a lawyer by profession, conducted his business in the name of M. Harrigan, while his sister Maggie during his lifetime did business as Maggie Harrigan, and deposited the money in her bank in that name. He conducted his business with the express purpose and intent to at all times keep his property covered up to avoid taxes, and to permit him at any time, at a moment's notice, to pass it to any one else, or to his legatees and devisees in case of death, so that they could baffle the public authorities in collecting the legal demands for taxes and other claims. He kept no bank account subject to check; yet he carried large amounts in the banks, evidenced by certificates of deposit. All certificates of deposit, notes given him for loans, and tax certificates were immediately indorsed in blank by him as "M. Harrigan"—a convenient name that might be treated as his own name or as that of Maggie Harrigan, as best suited his or his legatees' purpose. The property in question, the tax certificates, were indorsed in the same way and were in his own safe when he died, as were also the notes inventoried by the executors along with the tax certificates. When he took mortgages to secure loans, he immediately executed release deeds, apparently so they could be recorded at any time thereafter, either by himself or by his executors after his death, so that the record would leave no trace against them when they collected his notes. His will was executed after the same fashion, apparently as a further instrument to baffle the public authorities in establishing and collecting their demands against him and his estate. It described no property specifically. It covered any property wherever the same might be found or located. He made two quitclaim deeds to his sister Maggie on September 27, 1911, one to a tract of land and to all real estate that he owned or had tax deeds for in Tazewell county, and one to a lot in Peoria and to all other real estate that he owned or had tax deeds for in Peoria county, each being for a nominal consideration of \$1 and other valuable consideration. She is shown to have received a lot of notes from the testator's safe since his death, and

since his death has adopted the plan of doing her banking business in the name of "M. Harrigan." The evidence further shows, clearly and conclusively, that his legatees and devisees and executors have since his death taken advantage of the testator's method of doing business to conceal, as far as possible, all the property left by him, and to put every obstacle possible in the way of the county and the state finding out the property, and the amount thereof, that was owned by him at his death. Their individual testimony to the effect that they owned it all and it was theirs before the testator died is so unsatisfactory, so contradictory, and so unreasonable that it cannot be relied on at all, and has little or no probative force in their favor. In our view of the matter no useful purpose can be served in referring to it in detail or further discussing it. We have considered the evidence with great care, and our conclusion is that the finding of the court on the facts is well sustained on the issues in both cases.

[6] The court also properly held that the county of Peoria had no legal claim by which it could hold the redemption money. Its claim is based on the theory that the tax assessments and the collector's warrants became a lien on the property in question, and would continuously be a lien thereon until the taxes are paid. No lien ever attached to the tax certificates for said taxes. They were but choses in action. The words "personal property," employed in section 254 of the Revenue Act (Hurd's Rev. St. 1917, c. 120), and the words "goods and chattels," used in section 137, are to be construed as having the same meaning and as comprehending only such personalty as may be made subject to levy and sale under an execution upon a judgment at law. They do not extend to personal property of the character in question, tax certificates, which are mere choses in action. The money in question was collected by the clerk on such certificates, and was never in the possession of the deceased so as to be impressed with a tax lien. *Loeber v. Leininger*, 175 Ill. 484, 51 N. E. 708. The power of the collector is to demand and receive pay or enforce a lien on his warrant. If payment is not voluntarily made to him, and he has no lien, he has no further authority to institute an action to recover the amount of the taxes. *Loeber v. Leininger*, supra. The court properly refused to allow the collector to intervene.

[7] The court also properly held that the county of Peoria could not hold the fund upon the theory that the interpleader suit was, in effect, a creditors' bill to reach assets, etc. There is no judgment upon which a creditors' bill can be based. Appellants' claim that the estate is insolvent is not sustained by the proof. In such a case, in a proceeding by a creditors' bill against an estate, there

must be a judgment or the estate shown to be insolvent or a bill cannot be maintained. *Steere v. Bigelow*, 39 Ill. 264; *Garvin, Bell & Co. v. Stewart's Heirs*, 59 Ill. 229.

[8] It appeared from the evidence in the case that the county filed its claim for taxes in the probate court, and that its claim was allowed in the sum of \$4,801.13, and that the executor of the testator took an appeal to the circuit court. A number of questions have been raised by appellants as to the validity of the appeal bond, and by appellees on the question of the right of the county to have a claim allowed for taxes in the probate court against the estate of the deceased. None of those questions are pertinent to the issues in this case. It appears that the appeal is still pending in the circuit court, and it is even said by the county collector that the appeal case has not been docketed in the circuit court. All such questions are only proper for consideration on the hearing of that case, as their determination is not before this court as an issue in the court below. The court properly held that the appeal is still pending, regardless of any irregularities in the appeal bond.

[9-13] The court erred in its conclusion that it was necessary that an administrator pro tem. should have been appointed before final disposal of the case. Such an appointment is not authorized where the executor claims property as his own in opposition to the estate he represents. *Day v. Bullen*, 226 Ill. 72, 80 N. E. 739. It was not necessary to have such an administrator appointed in the probate court case. Such a case proceeds just as well without the appointment of such an administrator as with it. No administrator is necessary in any such case where there is already an administrator or executor duly appointed. *Emerick v. Hilleman*, 177 Ill. 368, 52 N. E. 311. The statute authorizes such an appointment, under section 72 of the Administration Act only where the administrator or executor files an out-and-out claim against the estate. The sole executor in this case had entered his appearance herein, and the court found that the property in question was property belonging to the estate. The proper course, in the first place, was to strike his disclaimer from the files. A disclaimer is a mode of defense. If it prevails, the defendant must be dismissed, and, as a general rule, he will have a right to be dismissed with costs. If a defendant attempts to disclaim in a case where his disclaimer does not entitle him to a dismissal, but he must, notwithstanding his disclaimer, still be retained as a party defendant in order that the subject-matter of the case be finally disposed of, he should be retained in the suit, and his disclaimer stricken. The disclaimer in this case simply amounts to an obstruction to the remedy of the complainant in this case to have

the funds finally disposed of. He was entitled to a final decision of this case and to a final disposition to the funds in controversy, and the court erred in not so holding. *Alley v. Adams County*, 78 Ill. 101. The disclaimer being a mere obstruction to this end, the court, of its own motion, should have stricken it from the files. *Isham v. Miller*, 44 N. J. Eq. 61, 14 Atl. 20; 6 Ency. of Pl. & Pr. 722. We think the court should also have dismissed the appeal of the executors from the order of the probate court commanding them to inventory said property, etc.

The order of the circuit court, in so far as it held that the appellants and Christopher and Kate Harrigan had no interest in the property in question and entered a final decree against them, is affirmed without prejudice to the said county in prosecuting its claim for taxes against said estate, but the other part of the decree is reversed, and the cause is remanded, with directions that it dismiss the appeal from the probate court, strike the disclaimer of the executor from the files, and that it enter a decree herein holding that the property is the property of the estate of Michael Harrigan, deceased, and that the clerk of the court be directed to pay the same to Christopher Harrigan as sole executor, and that said executor hold said funds as the property of the estate of Michael Harrigan, to be paid out by him in due course of administration of the estate, and that the appellant the county of Peoria and Christopher Harrigan pay all the costs in the court below individually, one-half each.

Reversed in part and remanded, with directions.

(233 ILL. 190)

WESKALNIES v. HESTERMAN, Sheriff.
(No. 12527.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 5, 1919.)

1. FRAUDULENT CONVEYANCES — 47 — SALE OF GOODS IN BULK — STATUTES — LIVE STOCK AND FARM IMPLEMENTS.

Bulk Sales Law 1913, § 3, making sales of property in bulk other than in regular course of business fraudulent and void as to creditors, applies to the sale of live stock and machinery used on a farm.

2. EXECUTIONS — 125 — EXEMPTIONS — 119(1) — LEVY — TIME OF LEVY — DENIAL OF OWNERSHIP.

Although the statute allows a judgment debtor desiring to avail himself of the benefits of personal property exemption ten days after notice of execution to make and deliver a schedule of property to the officer having the execution, it was proper to make a levy within seven days after the execution was issued,

where the judgment debtor denied ownership, alleging ownership in another who had advertised the property for sale on the day of the levy, since exemption could be claimed within the ten days, although after levy.

3. APPEAL AND ERROR — 1073(1) — HARMLESS ERROR — JUDGMENT AND VERDICT CORRECTED BY STIPULATION.

A verdict in a replevin action finding the ownership of the property in the defendant sheriff, who merely had a right to possession by virtue of a levy under execution against one other than plaintiff and a judgment thereon that defendant "have and retain the property replevined" by virtue of the writ, while erroneous, were harmless, in view of a stipulation after verdict that title to all property described in the writ except that included in the verdict is in plaintiff.

4. WITNESSES — 275(5) — CROSS-EXAMINATION OF PLAINTIFF — PLAINTIFF AS DEFENDANT'S WITNESS — DISCRETION OF COURT.

Where upon trial of a replevin action plaintiff testified in his own behalf, it was within the sound discretion of the trial court during cross-examination of plaintiff to permit defendant to make plaintiff his own witness and examine him as such.

Error to Appellate Court, Second District, on appeal from Circuit Court, Dupage County; Mazzini Slusser, Judge.

Action by Hugo Albert Weskalties against John F. Hesterman, Sheriff. To review a judgment of the Appellate Court affirming a judgment of the Circuit Court for defendant, plaintiff brings certiorari. Affirmed.

Bunge, Harbour & Schmidt, of Naperville, for plaintiff in error.

Joseph A. Reuss and William R. Friedrich, both of Naperville, and Mighell, Gunsul & Allen, of Aurora, for defendant in error.

FARMER, J. The Appellate Court for the Second District affirmed a judgment of the circuit court of Dupage county for defendant in an action of replevin. On the petition of plaintiff this court granted a writ of certiorari, and the record is brought here for review.

The undisputed facts are that the father of plaintiff in error, Albert Weskalties, was engaged in the business of farming and dairying on a rented farm of 165 acres in Dupage county. He raised grain, hogs, and horses, and kept 15 milk cows. He shipped the milk daily to Chicago. His son, Hugo Albert Weskalties, plaintiff in the replevin suit and plaintiff in error here, lived with his father and worked for him on the farm from January, 1916. Plaintiff was 33 years old. On November 18, 1916, the plaintiff's father executed a bill of sale to him for all the property on the farm except household furniture and 40 acres of corn in the shock, for the expressed consideration of \$2,873.50. The bill of sale

purported to evidence a sale to plaintiff from his father of 15 cows, one bull, one boar, one sow, 17 shoats, 6 horses, 3 colts, and a large number of various kinds of agricultural and other implements used on the farm. It embraced all the live stock and farm machinery used on the farm. The bill of sale was recorded in the recorder's office the day it was dated. On December 14, 1916, William Ehrhart, a creditor of Albert Weskalnies, obtained a judgment against him in the circuit court of Dupage county for \$890.50 and costs. Execution was issued and delivered to the defendant, as sheriff of Dupage county, the same day the judgment was rendered, and on the 21st of December he levied on the property as the property of Albert Weskalnies. Thereupon plaintiff, Hugo Albert Weskalnies, replevined it from the sheriff, claiming he had bought it from his father and that it belonged to him. He had advertised the property for sale at public auction the day it was levied upon. After much effort and labor the issues were finally joined and the cause heard by jury. It was stipulated during the trial that the only property involved in the suit was the live stock. At the conclusion of all the evidence the plaintiff's counsel moved the court to instruct the jury to find the issues for the plaintiff and that the right of property in the live stock (describing it) and possession thereof were in him. The court denied the motion. Thereupon counsel for defendant moved the court to instruct the jury to find the right of property and right of possession of the live stock to be in defendant, describing in the motion 15 cows, one bull, one boar, one sow, 17 shoats, 6 horses, and 3 colts. The motion was allowed, and the court instructed the jury to find the issues for the defendant and that the right to possession of the live stock (describing it) was in defendant. The jury returned a verdict finding "the ownership and right of possession" of the live stock (describing the same live stock in the same manner it was described in the instruction) were in defendant. Motion for new trial was overruled, and the court rendered judgment that defendant have and retain the property replevined by virtue of the writ and that he recover his costs.

[1] No real effort appears to have been made by defendant to prove that no consideration was paid for the property by plaintiff. The only testimony we find in the abstract which has any bearing on that question is the testimony of plaintiff himself, who testified he was 33 years old, and that from 1906 to 1910 he had worked for his father on another farm for \$300 per year. Whether he had been paid for his services is not shown. He worked for his father on the farm he was living on in 1916 from January to the time the bill of sale was made, but what, if anything, he was to be paid for his

work is not shown. The circuit court and the Appellate Court held that the sale was fraudulent and void because it was made in violation of the act of 1913 called the Bulk Sales Act, and plaintiff contends this was erroneous; that said act does not apply to one engaged in farming, but applies only to those engaged in the business of selling merchandise, commodities, and other wares; that the property sold by Albert Weskalnies was the tools and instrumentalities used in conducting his farming operations, and the Bulk Sales Act does not apply in such case. No attempt was made by Albert Weskalnies to comply with the Bulk Sales Act, and if the act applied to him, then the sale of the property to plaintiff was fraudulent and void as to creditors. The first Bulk Sales Act in this state was passed by the Legislature in 1905. Laws of 1905, p. 284. That act was expressly limited in its application to the sale of stocks of merchandise, and in *Off & Co. v. Morehead*, 235 Ill. 40, 85 N. E. 264, 20 L. R. A. (N. S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434, it was held unconstitutional. It was pointed out in that case that the act did not apply to farmers, hotel keepers, livery or transfer companies, publishers, mine owners, and others mentioned, and the court held that there was no reason or qualification connected with a stock of merchandise, or persons dealing in the same, which authorized the Legislature to mark it or them for special protective legislation from which all other classes of persons and property were excluded. In 1913 the Legislature passed another Bulk Sales Act. Laws of 1913, p. 258. That act declares fraudulent and void as against creditors "the sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business," without compliance with the provisions of the act. Section 3 provides that the act shall include corporations, associations, copartnerships, and individuals who are parties to any sale of goods in bulk, but not to sales by executors, administrators, receivers, trustees in bankruptcy, or by any public officer under judicial process, nor to the sales of exempt property, nor to sales made in the ordinary course of trade and in the regular and usual prosecution of the vendor's business, nor to sales made in good faith at public auction when notice is published in a newspaper of general circulation in the county where the sale is made, ten days before the sale, or by posting notices in five public places ten days before the sale. That act was held valid in *Johnson Co. v. Bellosky*, 263 Ill. 363, 105 N. E. 287. The court said:

"It must be assumed that the Legislature, in passing the new act, had before it the decision of this court holding the former act unconstitutional because it was special class legislation, and that it was the intention of the General Assembly, in passing the later act, to obviate this objection by passing a general act applicable indiscriminately to the sale of any goods and chattels in the manner inhibited by section 1 of said act. Construing the new act as a general law which prohibits the sale of any goods and chattels in bulk, otherwise than in the ordinary course of trade in the regular and usual prosecution of business, the objection to which the former statute was open is obviated."

It seems very clear from the history of the legislation and the language of the act that it was intended to, and does, apply to the sale of the property made by Albert Weskalnies to plaintiff. It was a sale in bulk of the major portion of the vendor's property, and was not made "in the ordinary course of trade and in the regular and usual prosecution of the vendor's business." There was no error in the holding of the circuit and Appellate Courts that the sale was fraudulent and void as to creditors.

[2] Plaintiff also contends the levy of the execution on the property was void because it was made less than ten days after the execution was issued and received by the sheriff. It is conceded the judgment debtor was notified of the execution, although the printed notice to him was not signed by the sheriff. The point relied upon by plaintiff as rendering the levy void is that it was made seven days after the execution was issued, whereas the statute gives a judgment debtor desiring to avail himself of the benefits of the personal property exemption allowed him ten days after notice of execution to make and deliver a schedule of his personal property to the officer having the execution. This position of plaintiff is untenable. In the first place, the judgment debtor, so far as this record shows, never desired or intended to claim his exemptions out of the property in controversy. He denied it was his property, and, of course, he could not claim his exemptions out of the property without claiming to own it. He had made a purported sale of it to plaintiff, who claimed it as his and had published notice of his intention to sell the property at public auction the day the levy was made. Under the circumstances the sheriff was not required to await the expiration of the ten days before levying the execution when he knew the property would be sold and disposed of before that time. Further, the levying of the execution before the ten days expired would not operate to deprive the judgment debtor of the full period allowed by law to make and present his schedule. He would have a right to the ten days to make and present his schedule, and if levy was made before the expiration of that time he could present his schedule after

levy and within the ten-day period. The levy before that time could not deprive him of the right to claim his exemptions if he desired to do so. Here the judgment debtor did not desire to claim his exemptions out of the property in controversy, because he claimed it was not his property. This was known to the sheriff, who also knew if the property was not levied upon the day the levy was made it would be sold and disposed of by plaintiff, who claimed it was his property. The levy was not void.

[3] The verdict found "the ownership and right of possession" of 15 cows, one bull, one boar, one sow, 17 shoats, 6 horses, and 3 colts were in defendant. The judgment was that the defendant "have and retain the property replevined" by virtue of the writ of replevin, and it is claimed the verdict and judgment are erroneous and require a reversal. The finding of the verdict that the ownership of the property described therein was in the defendant was wrong and should be treated as surplusage. All defendant claimed was the right to the possession of the property by virtue of the levy of the execution upon it as the property of the judgment debtor. There is a stipulation between the parties in the record which from its language could only have been made after the verdict was returned. The stipulation recites the parties had agreed that the title to the property described in the replevin writ, except "that portion thereof which is included and recited in the verdict this day signed and returned by the jury in this suit," is in the plaintiff, and that no verdict of the jury or judgment of the court shall be necessary to vest title to such property in the plaintiff, and it was also agreed that there should be no action on the sheriff's bond on account of the title to said property being in the plaintiff, and it was further stipulated that the sole controversy was as to the right of possession of the live stock; that the right of possession of the other property taken in the replevin writ had been agreed to by the parties and was no longer involved in the controversy. In view of this agreement of the parties we cannot see how plaintiff can be prejudiced by the error in the verdict and judgment.

[4] On the trial plaintiff testified as a witness in his own behalf. During his cross-examination the defendant was permitted by the court to make plaintiff his witness and examine him as such. This ruling of the court is complained of as reversible error. It was a matter resting in the sound discretion of the court. *Wheeler & Wilson Mfg. Co. v. Barrett*, 172 Ill. 610, 50 N. E. 325; *First Nat. Bank v. Lake Erie & Western Railroad Co.*, 174 Ill. 36, 50 N. E. 1023. There was no abuse of discretion in the ruling of the court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(233 ILL. 133)

McCUNE et al. v. REYNOLDS et al.
(No. 11927.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 4, 1919.)

1. TRIAL §178—MOTION TO INSTRUCT JURY.

A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the testimony, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of plaintiff.

2. WILLS §163(1) — UNDUE INFLUENCE — BURDEN OF PROOF.

Contestant has the burden of proving charge of undue influence.

3. WILLS §157—UNDUE INFLUENCE—FIDUCIARY RELATIONSHIP.

Proof of fiduciary relationship between testator and beneficiaries does not sustain charge of undue influence.

4. WILLS §163(2)—UNDUE INFLUENCE—FIDUCIARY RELATIONSHIP—BURDEN OF PROOF.

That beneficiaries are in fiduciary relationship to testator does not place upon them the burden of showing absence of undue influence, where there is no evidence that they were in any way instrumental in procuring execution of the will.

5. WILLS §158—UNDUE INFLUENCE—EXERCISE OF INFLUENCE.

Undue influence, to avoid will, must be directly connected with the execution of the will, and be operating at the time it was made.

6. WILLS §155(1)—“UNDUE INFLUENCE”—NATURE.

“Undue influence,” to avoid a will, must be influence specially directed toward procuring a will in favor of particular parties, and be such as to destroy the freedom of the testator's will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

7. EVIDENCE §226(4)—ADMISSIONS BY CO-DEVISEES.

Statements or admissions made by devisee concerning the testamentary capacity of testator, or acts of undue influence in procuring the execution of the will, while admissible in evidence where the interests of all the devisees are joint, are not admissible where such interests are separate.

8. EVIDENCE §226(4)—ADMISSIONS OF DEVISEES — TESTAMENTARY CAPACITY — UNDUE INFLUENCE.

On bill to set aside will upon ground of undue influence and want of testamentary capacity, evidence of conversation of one of the devisees with testator was inadmissible; the interests of the devisees being separate, and not joint, in view of act of 1821 (Laws 1821, p. 14), abolishing joint tenancies.

9. WILLS §324(3) — UNDUE INFLUENCE — JURY QUESTION.

Where there was no evidence fairly tending to prove the issue of undue influence, the chancellor properly withdrew such issue from the jury.

10. WILLS §55(1)—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain finding that testator was of sound and disposing mind and memory at the time of the execution of the will.

11. COURTS §74—EXERCISE OF FUNCTIONS.

Courts have no authority to exercise their functions in any place, except that provided by law.

12. WILLS §303(2)—TESTAMENTARY CAPACITY—EVIDENCE—EXECUTION.

On the contest of a will by bill in chancery, where the execution and probate of the will are admitted by the bill, and the only issue is the testator's soundness of mind, the evidence of the subscribing witnesses is unnecessary to prove testamentary capacity.

13. WILLS §400—REVIEW—HARMLESS ERROR.

Where contestant's bill admitted the execution of the will and its probate, and the only issues were those of testamentary capacity and undue influence, the taking of testimony of a subscribing witness at his home to prove such issues was harmless error.

14. WILLS §164(1)—ACTION TO SET ASIDE PROBATE — ADMISSIBILITY OF EVIDENCE — CONTENTS OF FORMER WILL.

On bill to set aside probate of will upon ground of undue influence, testimony as to contents of former will is inadmissible, where the terms of such will are variant from the will in suit.

Error to Circuit Court, Whiteside County; Frank D. Ramsay, Judge.

Bill by Mary A. McCune and others against Raymond A. Reynolds and others. Decree for defendants, and plaintiffs bring error. Affirmed.

George F. Ort, of Chicago (R. W. E. Mitchell, of Sterling, and Frank W. Joslyn, of Elgin, of counsel), for plaintiffs in error.

Stager & Stager, of Sterling, and McCalmont & Ramsay, of Morrison, for defendants in error.

STONE, J. This cause comes on a writ of error to the circuit court of Whiteside county to reverse the decree of that court dismissing the bill filed by Mary A. McCune, one of the plaintiffs in error, to set aside the will of Chauncey W. Reynolds, deceased. The bill as amended charges undue influence on the part of the testator's three sons and want of testamentary capacity on the part of the testator, and makes Walter D. Reynolds, Raymond A. Reynolds, and Chauncey

W. Reynolds, Jr., his sons and Gertrude Morley and Beatrice O. Morley, granddaughters, defendants. Mary A. McCune is a daughter of the deceased. The will was executed in 1902, and devises the real estate in part to the three sons, and the balance to the executors to pay legacies to the grandchildren and gives the residue of his property to his sons. The eighth clause of the will provides as follows:

"Having already advanced and deeded to my daughter, Mary A. McCune, property that is now of greater value than that herein willed to either of my said sons, it is my will that she receive nothing whatever from my estate."

The case was heard before a jury. At the close of the contestants' testimony the chancellor, on motion of proponents, withdrew from the jury the issue of undue influence, on the ground that the contestants' evidence did not tend to support such allegations of the bill and instructed the jury accordingly. The only remaining controverted question to go to the jury was that of the testamentary capacity of the testator. The jury returned a verdict sustaining the will.

The questions involved in this cause arise on the assignments of error on the part of the chancellor in withdrawing the issue of undue influence from the jury, error in receiving and rejecting testimony, the granting and refusal of certain instructions, and that the verdict of the jury was against the manifest weight of the evidence.

[1] A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the testimony so demurred to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. *Geiger v. Geiger*, 247 Ill. 629, 93 N. E. 314; *Lloyd v. Rush*, 273 Ill. 489, 113 N. E. 122. Undue influence has been defined to be:

"Any improper or wrongful constraint, machination or urgency of persuasion, whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do if left to act freely." *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227.

[2-6] The burden rests upon contestant to prove the charge of undue influence. This cannot be done by the establishment, alone, of a fiduciary relation existing between the testator and the beneficiaries. The mere fact that beneficiaries in a will may stand in a fiduciary relation to the testator does not put upon them the burden of showing an absence of fraud and undue influence, where there was no evidence tending to show that they were in any way instrumental in procuring the execution of the will. *Lloyd v. Rush*, supra; *Bauchens v. Davis*, 229 Ill. 557, 82 N. E. 365. "Undue influence which will avoid a will must be directly connected with

the execution of the instrument and be operating when the will is made. *Wickes v. Walden*, 228 Ill. 56 [81 N. E. 798]. It must be influence specially directed toward procuring the will in favor of particular parties, and be such as to destroy the freedom of the testator's will and render the instrument obviously more the offspring of the will of others than of his own." *Snell v. Weldon*, 239 Ill. 279, 87 N. E. 1022; *Lloyd v. Rush*, supra; *Bowles v. Bryan*, 254 Ill. 148, 98 N. E. 230. The question presented on a motion to withdraw an issue from the jury, as in this case, is whether there is any evidence fairly tending to prove the issues involved. *Yess v. Yess*, 255 Ill. 414, 99 N. E. 687.

The evidence of the contestants shows that the testator made his home with one of his sons, Raymond, after the death of his wife, which occurred prior to 1900. He had a room upstairs, which he had himself furnished. Adin McCune a son of Mary A. McCune, testified to visits paid by him to the testator at the home of the son, Raymond; that the testator would close the door to his room while the witness was there; that he complained that since his wife died "the place did not seem like home"; that Raymond and his wife acted as though they did not want him there; that witness had seen acts of disrespect, which he describes as indicating that the testator lived in fear of his children; that testator frequently cried when talking to him of family affairs, especially when talking of his deceased wife. Witness does not give the dates of these conversations or visits, though it appears from his testimony that a part of the incidents testified to occurred during the year in which the will was made.

Richard A. Morley, husband of a deceased daughter of testator, testified to various conversations with the testator and with Raymond. The evidence of conversations with said son was objected to on the ground that the statement of one heir could not bind the rest of the heirs. On statement of counsel for contestants that it would be shown that the other two sons made substantially the same statement and were cognizant of the statement made by Raymond, the court permitted the evidence to go in, with the ruling that it would be stricken, if not connected up. Morley, on the same statement of counsel and ruling of the court, testified that on one occasion shortly after the death of the testator's wife, Raymond asked witness to request his (witness') wife to urge the testator to move in with him (Raymond); that it would not do to have complainant move in with testator, and he asked that a conference be arranged with the testator to that end. Witness also testified to a conversation at this conference between Raymond and the testator in which the former urged his father

to make his home with him, saying complainant had too many children and that if he moved in with her it would end in trouble. Witness testified to a conversation with Raymond the following day in which he said:

"It is to our interest to keep Minn [complainant] out of there; with Walt on the farm and Minn in the house here there won't be anything left for the rest of us."

Witness also testified to conversations with the sons Raymond and Walter, in which they declared that their sister had received all that she was entitled to, and more, too, from her father, and that Walter told his father so. Witness also testifies to a conversation with Raymond in August, 1902, about a month before the making of the will in question, when the latter was complaining about complainant having received her mother's watch, in which conversation he said:

"She is welcome to it, but I will see to it that it is the last thing—the last article of mother's—she ever gets from him, and she will never get another dollar of our father's estate."

Witness also testified that the testator appeared nervous when discussing his family affairs and at times showed fear of his sons and at times an unfriendly attitude toward them. On withdrawing the issue of undue influence from the jury the chancellor, on motion of proponents, struck from the record this testimony on the ground that there was no evidence connecting the other sons with such statements or the purpose evidenced thereby, as counsel for the contestants had stated would be done, and on the further ground the statements of one are not admissible as binding on the others, without being so connected up. This ruling is assigned as error.

[7] There is no charge that said sons conspired with one another to use the undue means charged by the bill to have been used by each of them. The rule is that statements or admissions made by a devisee concerning the testamentary capacity of the testator or acts of undue influence in procuring the execution of a will, while admissible in evidence where the interests of all the devisees are joint, are not admissible where the interests of the devisees are separate. *McMillan v. McDill*, 110 Ill. 47; *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. 1080; *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140; *Dowle v. Driscoll*, 203 Ill. 480, 68 N. E. 56.

In the case of *McMillan v. McDill*, supra, cited in the later cases on the subject, the testator devised his property in equal shares to certain persons. In the bill to contest the will all devisees were made parties defendant, and on the hearing contestants were allowed, over objections of the defendants, to prove declarations of different ones of the

devisees to the effect that the testator did not have mental capacity to make a will. The court, however, ruled that the declarations of each devisee were admissible against him but not against the codefendants. In that case this court said:

"In the case under consideration, the court, in deciding the question, admitted the declarations only as against the party who made them; but this did not relieve the evidence of its injurious effect. The evidence was admitted upon the issue involved in the case. It was incompetent as against the other defendants, and as it could not affect the issue without affecting the other defendants, it was, in our judgment, incompetent to go to the jury on the issue involved. If the interest of the devisees had been joint, the evidence might have been admitted against all of them, as we understand it to be a rule of evidence where the parties have a joint interest in the matter in suit, an admission made by one is in general competent evidence against all. But here the devisees did not have a joint interest under the will, but they had separate interests in one subject—the validity of the will—as held in *Dietrich v. Dietrich*, 1 Pen. & Watts, 306. If this was a case where a judgment could be rendered against one of the defendants without affecting the rights of the others, there might be some ground for admitting in evidence the declarations as against the defendant who made them; but such is not the case. The only question here is as to the validity of the will, and testimony which defeats one defendant—one devisee—defeats all, and a judgment against one necessarily defeats all. While it might be proper to defeat a will on the admissions of a party who was a sole devisee, it would be manifestly unjust, where there are several devisees, to suffer the rights of all to be concluded and swept away by the admissions of one, and these admissions made in their absence and without their knowledge or sanction. If the admissions here could have gone to the jury and affected the rights of none but the one making them, no error would have been committed; but such was not the case. The admissions, notwithstanding the ruling of the court, went to the issue *devisavit vel non*, in which all the devisees were equally interested."

In the case of *Campbell v. Campbell*, supra, certain witnesses testified to statements made by devisees as to what they had done to influence the testator in making his will. This court there said:

"In no view could the evidence of the declarations of Campbell be received against any one but himself, since the interests of appellees are in common, and not joint; but to admit the evidence upon the issue in this case for any purpose would affect the interests of all claiming under the will, and we have therefore held, in an analogous case, it is not admissible at all."

[8, 9] Joint tenancies have been abolished in this state since the act of 1821 (*Laws 1821*, p. 14), entitled "An act concerning partitions and joint rights and obligations." This act as it is preserved in the present

law applies to personalty as well as to realty (*Hay v. Bennett*, 153 Ill. 271, 38 N. E. 645), except where joint tenancy and not tenancy in common is expressly declared in the conveyance of real estate, as provided in section 5 of the Conveyance Act. *Mette v. Feltgen*, 148 Ill. 357, 36 N. E. 81. The interests of the devisees under this will were not joint, and the testimony of the statements referred to was properly stricken from the record. There was no evidence fairly tending to prove the issue of undue influence, and the chancellor did not err in withdrawing the same from the consideration of the jury.

The record contains much testimony on the issue of the testamentary capacity of the testator. Contestants offered the testimony of 8 witnesses on the issue of testamentary capacity. George James, Charles Detra, and Robert S. James testified that they were for years neighbors of the testator; that at times he was sociable and at times would pass them on the road without speaking and apparently without seeing them. None of them testified that in their judgment he was not mentally capable of making a will. L. J. Lively, a traveling salesman, testified, in effect, that he lived near the testator; that he spent most of his time away from home; that at times testator would speak to him and at times he would not; that he had had no lengthy conversations with him; that he had observed his appearance in a casual manner; that he considered the testator hardly a normal man. This witness gave no other opinion touching the testamentary capacity of the deceased. Jane Lane, another neighbor, testified that she had known the testator since he moved into Morrison, about 1895; that she did not see him very often; that she sometimes saw him sitting on the porch or leaving the house; that he seldom talked to any one. This witness gave as her opinion that he was weak in mind and body, but did not testify further as to an opinion of his testamentary capacity. Richard A. Morley, son-in-law of the testator, testified to frequent visits and conversations with him and that in his judgment he was not capable of making a will. On cross-examination he admitted that he felt an interest on behalf of the complainant and that he assisted her in securing counsel in the case. Adin McCune testified as before set out and that in his opinion the testator was not mentally capable of making a will. The testimony of Cora McCune, wife of Adin McCune, was to the same effect.

The proponents offered the testimony of 39 witnesses, including men and women from many avocations of life, who had known the testator for periods varying from ten years to the life of the witness and some for the life of the testator. Most of them had seen him frequently and many of them testified

to conversations or business transactions with him. All of these witnesses testified in legal effect, and many of them in terms, that in their opinion the testator was of sound mind and memory at the date of the execution of his will.

[10] We have examined the evidence in this case and are of the opinion that the chancellor was justified in finding that the testator was of sound and disposing mind and memory when the will was executed. It appears from the evidence that he was 81 years of age at the time of his death, which occurred in 1916. In his more vigorous years he was a stern and at times a taciturn man. He was a successful farmer and accumulated considerable property. After retiring from his farm he continued to personally attend to the renting of it and to transact his various affairs and business. This continued to be true up to the time of his last illness. While there is evidence in the record that during the latter years of his life his memory was at times poor, that he was at times nervous and appeared melancholy after the death of his wife, yet the overwhelming weight of the testimony supports the finding on the issue of testamentary capacity.

[11-13] The contestants also assign as error the removal of the court to the home of the witness Woodford during the trial for the purpose of taking the testimony of said witness, he being ill and unable to attend the hearing. It is insisted that such a proceeding is *coram non iudice* and void, and that as Woodford was one of the subscribing witnesses to the will his testimony was essential to the proponents' *prima facie* case as to its validity, and that since the testimony of Woodford and the proceedings in taking the same were void, the record contains the testimony of but one subscribing witness to the will. It appears from the record this testimony was so taken by the express agreement of counsel as shown by a stipulation in the record, it being stipulated that no advantage would be sought by or objection raised to such proceeding. While courts have no authority to exercise their functions in any place except that provided by law (*People v. McWeeney*, 259 Ill. 161, 102 N. E. 233, Ann. Cas. 1916B, 34), yet in this case there was no objection to the validity of the will nor its introduction in evidence on the ground of want of proper execution or lack of proof thereof, nor was such an issue raised on the pleadings. This is not a proceeding to probate a will but to set aside a will probated. On the contest of a will by bill in chancery when the execution and probate of the will are admitted by the bill and the only issue is the soundness of mind of the testator, it is not essential that the subscribing witnesses should be called to prove either the due execution of the will or the testamen-

tary capacity of the testator. *Graybeal v. Gardner*, 146 Ill. 337, 34 N. E. 528. Here the bill of the contestants admits the execution of the will and its admission to probate. The only issues raised were those of testamentary capacity and undue influence. The testimony of Woodford was not essential to make a prima facie case. There was in the record abundant evidence, aside from that of Woodford, to sustain the finding of the jury. It follows that the error complained of was a harmless one.

[14] Various errors are assigned as to the ruling of the chancellor on the admissibility of evidence, the main contention being that the court erred in refusing testimony offered by contestants of the contents of a former will of the testator. From the statements of counsel in connection with the offer of said testimony it is apparent that the terms of said will were variant from the will here in question. Testimony regarding the contents of a former will is not admissible where the terms of such will are variant from the will in suit. *Roe v. Taylor*, 45 Ill. 485; *Pilstrand v. Swedish M. E. Church*, 275 Ill. 46, 113 N. E. 958. The chancellor did not err in refusing this testimony.

Error is also assigned as to the rulings of the chancellor in the giving and refusing of certain instructions. We have examined said instructions, together with all instructions given, and are of the opinion that the jury were fully and fairly instructed.

There being no reversible error in the record, the decree of the circuit court will be affirmed.

Decree affirmed.

(283 Ill. 132)

PEOPLE v. DARE. (No. 12524.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 5, 1919.)

1. HOMICIDE §342—APPEAL—NONPREJUDICIAL ERROR—CONVICTION OF LESSER OFFENSE.

One charged with willful murder cannot complain because he was found guilty only of manslaughter, if the case was in fact one of willful murder.

2. CRIMINAL LAW §1150(2)—APPEAL—SUFFICIENCY OF EVIDENCE.

The court will interfere with a verdict of guilty only where there is clearly a reasonable and well-founded doubt of defendant's guilt.

3. HOMICIDE §268—REASONABLE DOUBT—QUESTIONS FOR JURY.

In a homicide case, whether the circumstances are such as to raise a reasonable doubt of defendant's guilt is for the jury.

4. HOMICIDE §151(1)—BURDEN OF PROOF—MITIGATION—JUSTIFICATION OR EXCUSE.

In a prosecution for murder, where it clearly appeared that accused killed decedent, the burden was upon him to show circumstances in mitigation, justification, or excuse.

5. HOMICIDE §295(2, 3)—INSTRUCTIONS—PROVOCATION.

Where evidence showed that accused had been called foul names by deceased a few minutes before the homicide, an instruction that such fact did not justify an attack on deceased was proper, and was not objectionable as ignoring theory of defense, where it stated that before conviction it must appear that defendant's action was not in self-defense.

6. HOMICIDE §300(13)—INSTRUCTIONS—THEORY OF DEFENSE.

In a homicide case, where accused and decedent had had a difficulty shortly prior to the homicide, an instruction expressly requiring the jury to believe that accused, without further provocation, made an attack upon deceased with an intent to kill him, was not objectionable, as not taking into consideration that accused claimed deceased made a second attack upon him.

7. HOMICIDE §286(1)—INSTRUCTION—INTENT—PREPARATION—EVIDENCE.

In a homicide case an instruction submitting the question of whether accused armed himself with a knife with intent to use it on deceased, held justified by the evidence.

8. CRIMINAL LAW §1172(1)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

An instruction, though not sensible, because of apparent omission of some words, is not prejudicial, where there is nothing in the instruction which could mislead the jury.

9. CRIMINAL LAW §1092(14)—APPEAL—BILL OF EXCEPTIONS—CERTIFICATE.

An assignment of error as to overruling of peremptory challenges in a homicide case will not be considered where the bill of exceptions does not contain the judge's certificate as to what actually took place in his presence.

Error to Circuit Court, Peoria County;
T. N. Green, Judge.

William Dare was convicted of manslaughter; and he brings error. Affirmed.

J. Frank Lasley and Scholes & Pratt, all of Peoria, for plaintiff in error.

Edward J. Brundage, Atty. Gen., O. E. McNemar, State's Atty., of Peoria, Edward C. Fitch, of Chicago, and George A. Shurtleff, of Peoria, for the People.

DUNN, J. On August 27, 1917, in the Lehmann building, in Peoria, William Dare stabbed and killed Herman Schwarz. He was indicted for murder, and convicted of manslaughter, and has sued out a writ of error to reverse the judgment.

The Lehmann building was an office building in process of construction, parts of it hav-

ing been completed and occupied by tenants. A room in the basement designed as a bar-room had been let and possession had been given to the tenant. The doors were finished in mahogany, and the contractor who was putting in the bar fixtures and wainscoting for the tenant was changing this finish to silver gray. In this work he employed a young man, Fred Rothan, who was not a member of the Painters' Union, to remove the varnish, using a paint brush and varnish remover. Plaintiff in error was the business agent of the Painters' Union, and on the morning of the homicide went to the building and endeavored to get Rothan to join the union, but without success. Schwarz was the foreman of the subcontractor for the painting, and Dare went to an upper floor of the building, where he saw Schwarz, and as a result of the interview Rothan quit the work of removing the varnish. Later Rothan returned to work, using a rag instead of a paint brush, and about 2 o'clock Dare returned to the building, and, finding Rothan at work, went to the fourth floor and had another interview with Schwarz, which resulted, as Dare testified, in his saying to Schwarz, "I gave you this morning until twelve o'clock to get this matter settled, and now at five o'clock, if you don't get this matter adjusted, I will have to take the men off this job." As Dare turned to leave Schwarz said, "I will tend to my business;" and Dare replied, "I will fix you." Dare went down to the barroom, and Schwarz immediately followed him, arriving at almost the same time. The elevators in the building go down to the basement. North of and immediately in front of the elevators is a corridor about 10 feet wide, running east and west. At the east side of the elevators a stairway leads up from the basement, and a little further to the east, at the end of the corridor, is a door leading into the barroom. At the west end of the corridor is a door leading into a poolroom, and a stairway by the side of this door leads to the sidewalk on the street. The barroom and poolroom lie north of the north wall of the corridor, and are separated by a partition extending north from the north wall of the corridor, in which, at some distance from the south end, is a door between the two rooms. There were window openings in the wall between the corridor and the barroom, but at the time of the homicide the windows were not hung. Schwarz and Dare met in the barroom and a quarrel occurred between them. J. W. Elmore, the business agent of the Carpenters' Union, and Frank Dougherty, were present, and were with Dare and Schwarz at the time and others were in the room. Elmore testified that the first remark he heard was, "I am running this business," made by Schwarz, to which Dare replied, "I am taking care of my part of the business, too." Then Dare hit Schwarz in

the face with his fist. Schwarz went through the door into the poolroom and returned with an iron bar raised above his head, going toward Dare, but he was stopped by those present, who took the bar away from him, and Schwarz then said, "I will prefer charges against you." Dare testified that he struck Schwarz because of the foul and obscene names which Schwarz applied to him, and one of the witnesses testified to the use of such words, but the other witnesses did not hear any such language. After the iron bar was taken from him Schwarz left the barroom through the door leading into the poolroom, and went around through the poolroom to the door at the west end of the corridor, through which he entered the corridor about the same time that Dare came into the corridor at the other end from the door leading into the barroom. Schwarz went east toward the stairway leading to the upper floor, and Dare went west toward the stairway leading to Main street. Two janitors were at work in the corridor baling paper. They saw Schwarz come into the corridor, but saw nothing in his hand. They went on with their work. There was a short scuffle, which they heard but did not see. They turned and saw Schwarz backing away from Dare and facing west, with his hands to his side, and heard him say, "My God! That man has got a knife and cut me!" He backed through the door into the barroom and fell, saying, "See the man with the knife in his hand! He stabbed and killed me!" A witness testified that Dare was standing in the corridor with his hat off and the knife in his right hand. The weapon called a knife was a long, slender paper knife used for opening letters, which Dare was carrying in his inside coat pocket. It was found after the accident lying on the floor, with blood on it. Charles W. Keys, a painter, testified that a short time before Dare had shown him the knife similar to the one in evidence, saying that he was "fixed for the next [using an opprobrious term] that jumps me." Schwarz was carried to a physician's office on the tenth floor of the building, where he died in a few minutes.

Dare testified that after he had taken two or three steps down the corridor Schwarz made a jump toward him, calling him by a foul name, and grabbed him and commenced pressing him back over a crate that was there, with his head against the wall; that Dare felt the knife in his pocket prick his arm and presumed that he got it; that he had no intention of killing Schwarz; that it didn't enter his mind; that he thought Schwarz had a brick in his hand and he was afraid of him; that Schwarz backed him, pushed him over, twisting him around until he was facing the other way, and went away from him over to the door, and when he got in the door faced him, saying, "See! He has got a knife!" that then Schwarz turned and

walked into the door and Dare turned and walked outside.

There was evidence as to Dare's actions and statements to the policeman when he was arrested and when he was in the office of the chief of police, but they are not essential to be referred to here.

The plaintiff in error argues that the verdict was clearly against the weight of the evidence; that he was not guilty of manslaughter, but the case was one either of willful murder or self-defense.

[1] If it was a case of willful murder, plaintiff in error cannot complain that he was found guilty only of manslaughter, so that part of the argument may be disregarded.

[2] The court will interfere with a verdict of guilty only where there is clearly a reasonable and well-founded doubt of the defendant's guilt.

[3] Whether the circumstances are such as to raise such reasonable doubt it is the special province of the jury to determine.

[4] It was clearly shown that Dare killed Schwarz, and the burden, therefore, devolved upon him to show circumstances that mitigated the act or justified or excused it. Even if his account of the homicide, if true, might have excused him, yet the credit to be given to his account was for the jury to determine under all the facts and circumstances in the case, and their verdict cannot be set aside because not sustained by the evidence.

[5] Objections are made to various instructions given to the jury. It is claimed that instruction No. 20 was misleading because it instructs the jury that mere words or names would not justify an assault, while it was not claimed that the plaintiff in error attacked the deceased in the corridor because of being called names by the deceased. The plaintiff in error, according to his testimony, had been called foul names by the deceased a few minutes before they met in the corridor, and it was not improper to tell the jury that this fact would not justify an attack on the deceased. The objection that the instruction ignores the theory of the defense is not valid, for it contains the condition that before a verdict of guilty can be rendered it must appear that the action of the defendant was not in self-defense.

[6] Instruction No. 21 is based upon the hypothesis that the first trouble between Schwarz and Dare was over and that Dare made a new attack upon Schwarz, and objection is made that it does not take into

consideration that Dare claimed that Schwarz made the second attack on him. But the objection is not well founded, for the instruction contains the express requirement that the jury believe from the evidence, beyond all reasonable doubt, that Dare without any further provocation made an attack upon Schwarz with intent to kill him.

[7] It is argued that there was no evidence on which to base instruction No. 22, in so far as it submitted to the jury whether Dare armed himself with the paper knife with intent to use it on Schwarz, and that the evidence clearly shows there was no such intent. The instruction was justified by the testimony of Keys that Dare exhibited the weapon, saying he was "fixed" for the next one that jumped him, by Dare's own statement that he told Schwarz he would "fix" him, and by the testimony of another witness that immediately after striking Schwarz in the barroom Dare had his hand on his inside coat pocket, where the knife was. This answers also the substantially similar objection made to instruction No. 23.

[8] A general objection is made to instruction No. 24 that it is misleading, confusing, and prejudicial, and sets out certain facts which were not in evidence. Our attention is not called to any special thing in the instruction to which this criticism applies, and, though a part of it, because of an apparent omission of some words, is insensible, it contains nothing by which the jury could have been misled or the plaintiff in error prejudiced.

[9] Included among the reasons for a new trial was one that the court erred in overruling the peremptory challenge of the defendant to the juror Zeigler although the defendant had still six unused peremptory challenges. In support of this reason the plaintiff in error presented the affidavits of himself and his attorneys as to what took place during the examination of the jurors while the jury was being empaneled. Affidavits in opposition were filed by the state's attorney and his assistants. The bill of exceptions contains no certificate of the judge as to what actually did take place, and this is the only way of showing what the judge does or what occurs in his presence. *People v. Capello*, 282 Ill. 542, 118 N. E. 927. This assignment of error, therefore, cannot be considered.

The judgment will be affirmed. Judgment affirmed.

(233 Ill. 233)

PEOPLE v. KARPOVICH. (No. 12546.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 5, 1919.)

1. CRIMINAL LAW §753(2) — DIRECTION OF VERDICT OF ACQUITTAL.

Trial court cannot entertain motion to instruct jury to find defendant not guilty because jury are judges both of the law and the facts, though it is proper practice for court, if it is his judgment new trial must be granted, if conviction is had upon any count or counts, so to advise prosecutor for exercise of his official discretion.

2. CRIMINAL LAW §1168(6) — APPEAL — HARMLESS ERROR — DIRECTION OF VERDICT.

Error committed by trial court in instructing jury to find defendant not guilty as to first three counts of indictment was error of which defendant cannot complain, as it was beneficial to him.

3. WITNESSES §40(1), 77 — COMPETENCY OF CHILD—PRELIMINARY EXAMINATION.

The competency to testify of a witness below the age of 14 is to be determined by a preliminary examination to advise the court, the requirement of competency not being one of age, but one of understanding.

4. CRIMINAL LAW §1153(2)—REVIEW—DISCRETION—COMPETENCY OF CHILD WITNESS.

Whether the child with whom defendant was charged to have taken indecent liberties possessed the understanding necessary to be competent to testify is reviewable only where there has been an abuse of discretion or manifest misapprehension of legal principle, and may be determined on review from the preliminary examination and her testimony before the jury.

5. WITNESSES §40(2) — CHILD WITNESS—DISCRETION OF COURT.

Where eight year old child, with whom defendant was charged with having taken indecent liberties, was examined before the court by the state's attorney touching her competency to testify, it was within discretion of court to permit her to testify.

6. CRIMINAL LAW §1159(2)—APPEAL—REVIEW OF VERDICT.

Verdict in a criminal case will not be set aside unless the finding is so palpably against the weight of the evidence as to indicate that the verdict was based on passion or prejudice.

7. ASSAULT AND BATTERY §92 — INDECENT LIBERTIES WITH CHILD — SUFFICIENCY OF EVIDENCE.

In a prosecution for taking indecent liberties with a girl of the age of eight, evidence held sufficient to sustain a conviction.

8. CRIMINAL LAW §415(1)—RAPE §48(1)—COMPLAINT BY INJURED PERSON—HEARSAY.

Complaint made by complaining witness to others, and not a part of the res gestae, is incompetent as hearsay testimony in all cases except prosecutions for rape.

9. RAPE §48(1) — TESTIMONY TENDING TO SHOW COMPLAINT.

In prosecution under indictment first three counts of which charged rape, and the fourth charged taking of indecent liberties with a child of eight, testimony of child's mother that she went to defendant's office at once after the child came home, to look for defendant, held clearly competent under counts charging rape, and not inadmissible as impressing jury child had previously complained to her mother about defendant, though verdict on rape counts was directed for defendant.

10. ASSAULT AND BATTERY §92 — INDIOTMENT AND INFORMATION §191(8)—RAPE—INDECENT LIBERTIES WITH CHILD—PROOF.

Defendant could be convicted under Cr. Code, § 42ha, of taking indecent liberties with a child of eight, on proof sustaining a charge of assault with intent to commit rape, on such a child, as the elements of the former charge are included within those of the latter.

11. CRIMINAL LAW §369(2) — PROOF OF CRIME CHARGED — INVOLVEMENT OF OTHER CRIME.

Where proof of offense charged involves proof of another offense, such evidence may be received, and conviction will be sustained, notwithstanding such proof of a separate offense.

12. CRIMINAL LAW §813, 829(1)—ABSTRACT INSTRUCTIONS—REPETITION.

Requested instructions which purported to present abstract propositions of law, and were, so far as they presented correct propositions, covered by other instructions given, were properly refused.

Error to Criminal Court, Cook County; Thomas J. Windes, Judge.

Evan Karpovich was convicted of taking indecent liberties with a child of the age of eight, and he brings error. Affirmed.

George B. Cohen, of Chicago (Joseph H. Lawler, of Chicago, of counsel), for plaintiff in error.

Edward J. Brundage, Atty. Gen., Maclay Hoyne, State's Atty., of Chicago, and Noah C. Balfum, of Springfield (Edward E. Wilson, Eugene L. McGarry, and Grover O. Nlemeyer, all of Chicago, of counsel), for the People.

STONE, J. The plaintiff in error was convicted in the criminal court of Cook county under the fourth count of an indictment charging him with taking indecent liberties with Rose Rozhon, a child of the age of eight years.

The indictment consisted of five counts, the first three of which charged plaintiff in error with the offense of rape, and the fifth of which charged him with having committed certain acts tending to contribute to the delinquency of said child, Rose Rozhon.

At the close of all the evidence the court

overruled a motion of the plaintiff in error to exclude the evidence and to instruct the jury to return a verdict finding the plaintiff in error not guilty. Thereupon the plaintiff in error entered a motion to exclude the evidence and direct a verdict of not guilty on the three counts charging rape. This motion was allowed, and instructions given by the court to the jury to find the plaintiff in error not guilty on counts 1, 2, and 3 of the indictment, and the jury so found. The cause was submitted to the jury on the fourth and fifth counts of the indictment.

It is contended by plaintiff in error that the trial court erred in overruling his motion to exclude the evidence and in refusing to give the instruction directing a verdict of not guilty as to each and every count in said indictment; that the plaintiff in error was convicted on the uncorroborated evidence of Rose Rozhon, a child of eight years, and that the evidence, taken as a whole, is insufficient to sustain the conviction; that if the evidence tends to prove the committing of any crime it is that of assault with intent to commit rape on the said prosecutrix, which was not charged in said indictment; that the court erred in admitting and refusing testimony and in refusing certain instructions of plaintiff in error.

[1, 2] As to the first contention, the rule in this state is that the trial court cannot entertain a motion to instruct the jury to find the defendant not guilty in a criminal case, for the reason that the jury are the judges of both the law and the facts, although it is proper practice for the court, in case it is his judgment that a new trial must be granted if a conviction is had on any count or counts of the indictment, to so advise the prosecutor, for the exercise of his official judgment and discretion. *People v. Zurek*, 277 Ill. 621, 115 N. E. 644. While the ruling of the court in instructing the jury to find the defendant not guilty as to the first three counts of the indictment was error, it was not an error that the defendant could complain of, as he received the benefit of it.

[3-5] It is urged that the court erred in not making proper and sufficient examination of the complaining witness, Rose Rozhon, touching her intelligence and knowledge of the moral and legal consequences of a violation of her oath, before permitting her to testify. The rule obtains as laid down by this court in *Shannon v. Swanson*, 208 Ill. 52, 69 N. E. 869, in the following language:

"Section 10 of division 2 of the Criminal Code provides that every person who is neither an idiot nor lunatic, nor affected with insanity, and who has arrived at the age of fourteen years, shall be considered of sound mind, and that persons who have not reached that age shall be considered of sound mind if they comprehend the distinction between good and evil. In analogy to this rule of the criminal law, a witness who has reached the age of fourteen

years should be presumed, *prima facie*, competent. If below that age, his competency to testify is to be determined by an inquiry as to the strength of his mental faculties and his power to understand and appreciate the moral duty to speak the truth. This inquiry is to advise the trial judge, whose duty it is to determine whether the person is competent to testify. The decision of this matter may be reviewed, but as the intelligence of the witness is to be ascertained, to some extent, by his appearance and conduct while in the presence of the court, and as the judge is vested with a degree of discretion, it is only when there has been an abuse of discretion or a manifest misapprehension of some legal principle that the decision will be reviewed."

The requirement is not one of age but of understanding. Whether such child possessed the understanding necessary to be competent to testify may be determined, on review, from the preliminary examination and her testimony before the jury. *Featherstone v. People*, 194 Ill. 325, 62 N. E. 684. It appears from the record that Rose Rozhon was examined before the court touching her competency to testify by the state's attorney. It lay within the discretion of the trial court to permit her to testify, and from her answers and her testimony in the case it is evident that there was no abuse of that discretion.

[8, 7] It is very earnestly urged by plaintiff in error that he was convicted on the uncorroborated evidence of Rose Rozhon and that the evidence is insufficient to sustain the conviction. Rose Rozhon testified that on Sunday, August 18, 1918, about noon, the defendant came to her while she was at a lumber pile near her home, and pulled her about a block, to an office at Homan avenue and Twenty-First street, where the alleged immoral, improper, and indecent liberties detailed by the witness took place; that the plaintiff in error laid her on the floor and lay upon her; that he put his privates in contact with hers; that she screamed and tried to get away; that while they were in the room in question somebody called "Roesky," after which plaintiff in error left the room; that while plaintiff in error was out of the room witness ran away to her home and told her mother of the occurrence; that she never saw plaintiff in error before the day in question; that she pointed him out in the office to the policeman; that plaintiff in error wore black clothes, a white shirt, and had a mark on his nose.

Helen Sotana, a witness called on behalf of the state, testified that on the day in question, between 11 and 12 o'clock, while playing on a water pipe, she heard some one say, "No!" "No!" "No!" in Bohemian; that she went to the corner and saw plaintiff in error pulling her (Rose); that she had seen plaintiff in error frequently; that he is the man she saw that day; that she could tell by the hat and suit he had on; that they went about one-half block; that she did not

see him drag Rose into the office; that about one-half hour later she saw Rose running home; that she was not close enough to identify Rose when she first saw her, but that when she saw her running home she recognized her and could tell by her dress that she was the same child she had first seen.

Annie Sikora testified that on the day in question, at about noon, she went to the office in question with bread and milk for some dogs housed in said building; that she knocked on the door twice, and receiving no response from within, she opened the door and entered the office; that she called, "Roesky," to which plaintiff in error responded, "All right;" that she said, "Here is the bread and milk," and then went home; that plaintiff in error came to her, but that she was unable to determine the part of the premises from which he came; that she heard no unusual noises and saw nothing unusual in his dress.

The plaintiff in error testified that while he was at the office in question, at or near the time testified to by the other witnesses, the telephone rang; that he could not speak English, and so went to the railroad track for the purpose of meeting some one who could speak English; that he met this little girl, Rose Rozhon, sitting on some wood and asked her in the Russian language if she could speak English; that she answered, "Yes;" that he said, "Come along with me and nothing will happen to you;" that she said "No" and then went home; that a patrol wagon came soon thereafter for him; that Mrs. Sikora came to the office, knocked or rapped on the door, and called, "Roesky," and that he said, "All right;" that when he made the answer he was out in the yard with the dogs; that he went in and met her in the office. The plaintiff in error denied in toto the statement of the complaining witness as to what occurred in the office.

Counsel cite, in support of plaintiff in error's contention that the evidence does not support the verdict, the case of *People v. Freeman*, 244 Ill. 590, 91 N. E. 706. The proof in this case is to be distinguished from the proof in the *Freeman* Case. In that case this court found that the evidence of the complaining witness was not corroborated and was of doubtful credibility. There is nothing in the evidence of the complaining witness nor the physical facts proven which tends to discredit her story. In addition, it is evident from the record that her story does not stand uncorroborated. In her statement that she was pulled into the office by plaintiff in error she is corroborated by the testimony of Helen Sotana that she saw plaintiff in error dragging the prosecuting witness toward said office building and that she later saw her running toward her home. The complaining witness is further corroborated by the testimony of her mother, who

stated that the child came home crying. She is further corroborated in her statement that some one called plaintiff in error from the room while they were in the toilet by the testimony of Annie Sikora, who stated that she called him concerning some food she had for dogs on the premises. This testimony, and numerous circumstances shown in the evidence, tend to corroborate her story. Crimes of this character are usually committed under circumstances that do not admit of corroborative testimony by eyewitnesses. It would be unreasonable to assume that this child could detail the facts and surroundings of this crime so that they would be substantiated by disinterested witnesses if her story were not true. The rule uniformly applied in criminal cases is that the verdict of the jury will not be set aside unless the finding is so palpably against the weight of the evidence as to indicate that the verdict of the jury is based upon passion or prejudice. *People v. Lutzow*, 240 Ill. 612, 88 N. E. 1049; *People v. Deluce*, 237 Ill. 541, 86 N. E. 1080; *Cronk v. People*, 181 Ill. 56, 22 N. E. 862; *Steffy v. People*, 130 Ill. 96, 22 N. E. 861. The jury here were justified from the evidence in believing the defendant guilty beyond a reasonable doubt.

[8, 9] It is also urged that the testimony of Tillie Rozhon, mother of Rose, that she went to the place in question at once after Rose came home, to look for the plaintiff in error, must have impressed the jury that Rose had previously complained to her mother about the defendant, and that the evidence of what she told her mother was clearly incompetent under the fourth count of the indictment, upon which plaintiff in error stands convicted. The rule in this state is that complaint made by the complaining witness to others, and not a part of the *res gestæ*, is incompetent as hearsay testimony in all cases except those of rape. *People v. Scaturra*, 238 Ill. 313, 87 N. E. 832. Tillie Rozhon here did not testify that the complaining witness told her what occurred between her and plaintiff in error. Her testimony that she went to the office where plaintiff in error was employed, at once after Rose came home, was not hearsay and was competent. While the complaining witness did testify that she ran home and told her mother what occurred, yet at the time this testimony was offered and put in evidence the three counts of the indictment charging rape were still issues before the jury, and no objection was raised to the competency of such evidence, nor was there a motion made by the plaintiff in error to limit the application of such evidence to those counts charging rape, or to exclude this evidence after the court directed a verdict of not guilty on the first three counts of the indictment, nor was there any instruction offered by the plaintiff in error directing the jury not to consider this evidence in ar-

living at their verdict on the fourth and fifth counts of the indictment. This evidence was clearly competent under the first three counts of the indictment. *People v. Scattura*, supra.

[10, 11] Plaintiff in error contends that if there is any crime proven it is the crime of assault with intent to commit rape, and that a conviction on the charge of taking indecent liberties with children cannot be sustained if the facts show the crime of assault with intent to commit rape. Plaintiff in error was convicted under section 42ha of the Criminal Code, which reads as follows:

"That any person of the age of seventeen years and upwards who shall take, or attempt to take, any immoral, improper or indecent liberties with any child of either sex, under the age of fifteen years, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or any such person who shall take any such child or shall entice, allure or persuade any such child, to any place whatever for the purpose either of taking any such immoral, improper or indecent liberties with such child, with said intent, or of committing any such lewd, or lascivious act upon or with the body, or any part or member thereof, of such child with said intent, shall be imprisoned in the penitentiary not less than one year nor more than twenty years: Provided, that this act shall not apply to offenses constituting the crime of sodomy or other infamous crimes against nature, incest, rape or seduction." *Hurd's Rev. St. 1917*, c. 38.

It will be noted that while the crime of rape is expressly excluded from this statute, the crime of assault with intent to commit rape is not excluded. While the crime of taking indecent liberties with children may be shown without proving the crime of assault with intent to commit rape, yet it is impossible to prove the crime of assault with intent to commit rape upon a child under fifteen years of age without proving the taking of, or attempting to take, "immoral, improper or indecent liberties" with such child with the intent of "gratifying the lust or passions or sexual desires" of at least the person charged with said crime. Proof of these facts establishes the essentials of the crime of taking indecent liberties with children. It follows, therefore, that proof which sustains a charge of assault with intent to commit rape will sustain the charge of taking indecent liberties with children, since the elements of the latter crime are included within those of the former. If the evidence proves the commission of the crime charged in the indictment, the fact that it

may also prove the elements of another crime does not make void the conviction for the crime charged. When A is charged with larceny and the proof shows the commission of the crime of robbery, such proof will nevertheless sustain a conviction for larceny, as the latter is included within the former. Where the defendant stands charged with one offense, and the proof of that offense involves the proof of another offense, such proof may nevertheless be received, and a conviction of the crime charged will be sustained, notwithstanding the fact that the proof by which such charge was sustained also discloses the commission of another and separate offense. *Parkinson v. People*, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; *People v. Rardin*, 255 Ill. 9, 99 N. E. 59, Ann. Cas. 1913D, 282.

[12] Plaintiff in error further contends that the court erred in refusing instructions Nos. 26 and 27 offered by him. These instructions purported to present abstract propositions of law, and were, so far as they presented correct propositions of law, covered by other given instructions.

We have examined the record and find no reversible error in the rulings of the trial court on the admissibility of evidence. The defendant was in open court when sentenced, and sentence was passed upon him according to law.

There being no reversible error in the record, the judgment of the criminal court of Cook county will be affirmed.

Judgment affirmed.

PEOPLE v. SINGER. (233 Ill. 113)
(No. 12496.)

(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 4, 1919.)

1. CRIMINAL LAW §1151 — REVIEW — CONTINUANCE.

The question of granting a continuance because accused's counsel was engaged in another case is largely in the discretion of the trial court, and will only be disturbed on appeal when it is shown that such discretion has been abused.

2. CRIMINAL LAW §593 — CONTINUANCE — ABSENCE OF COUNSEL.

Trial court did not abuse its discretion in refusing a continuance on account of absence of accused's counsel, who was engaged in another case, trial of which would last for a long time, where it appeared that several weeks before trial judge had informed accused that case must be tried in the near future, and that trial would not be put off until accused's counsel was through with the other case, especially where accused's interests were well taken care of by other counsel, who acted for him during the trial.

3. CRIMINAL LAW §1036(4)—APPEAL—SECONDARY EVIDENCE—OBJECTION.

Accused cannot raise objection for first time in Supreme Court that trial court improperly admitted parol proof as to contents of an instrument without first showing that original instrument could not be produced in court.

4. CRIMINAL LAW §706—CONDUCT OF PROSECUTION—PRESENTATION OF EVIDENCE.

It was error for state's attorney to ask accused with reference to any other offenses, or with reference to having gone under assumed names, unless he had proof as to such matters, and thereafter offered such proof and showed it to be material and admissible.

5. CRIMINAL LAW §1137(5)—HARMLESS ERROR—EVIDENCE.

Reference by state's attorney, in cross-examination of defendant, to other offenses with which accused had been charged, was harmless, where first reference to such other offenses was brought out on the cross-examination of a state's witness by accused's counsel, and the examination by state's attorney was made in an attempt to have accused explain the details.

6. CRIMINAL LAW §726—STATEMENTS IN COURT—HARMLESS ERROR.

Accused cannot complain of statement by assistant in prosecution of case that accused was not a new man in the courts, either in the criminal or in the United States courts, made for purpose of refuting statement of accused's counsel that he had not had sufficient time to properly prepare for trial of case, and that therefore a continuance ought to be granted, especially where there is nothing in record to show that any of jurors heard the statement, it being made before jury were brought into the box.

7. CRIMINAL LAW §1170½(6)—HARMLESS ERROR—VOLUNTARY ANSWER OF WITNESS.

In a prosecution for obtaining money by means of a confidence game, an answer volunteered by a state's witness, on cross-examination by accused's counsel, that accused had beaten witness' old father out of \$3,500, a matter not connected with the subject of the prosecution, was not reversible error, where it was promptly stricken out on motion of accused's counsel, and where witness was being sharply cross-examined to show that he was as much responsible as accused for condition of the bank owned and used by accused as the means of obtaining the money.

8. CRIMINAL LAW §29—DIFFERENT OFFENSES IN SAME TRANSACTION—CONFIDENCE GAME.

If the transaction for which one was being prosecuted was such as to show that he was guilty of a felony under the confidence game statute, there was no error in trying and convicting him under such statute, even though he was also guilty of a misdemeanor by reason of the same acts, under Cr. Code, § 102d.

9. FALSE PRETENSES §2—CONFIDENCE GAMES—FRAUDULENT CHECKS—REPEAL OF STATUTE.

Cr. Code, § 102d, making it a misdemeanor to draw checks on banks where no sufficient

funds are held for payment thereof, does not repeal that part of the general statute on confidence games which refers to fraudulent checks.

10. STATUTES §163—REPEAL—SPECIAL STATUTES.

A general act is not repealed pro tanto by a subsequent special act, when the two acts can stand together.

11. FALSE PRETENSES §16—"CONFIDENCE GAME."

Any scheme whereby a swindler wins the confidence of his victim, and swindles him out of his money by taking advantage of such confidence, is a "confidence game," and it is immaterial that valid contracts are used.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confidence Game.]

12. FALSE PRETENSES §49(1)—CONFIDENCE GAME.

In a prosecution of an owner of a private bank, who obtained money from another bank by means of a dummy account kept by a fictitious person, evidence held sufficient to sustain a conviction of obtaining money by means of a confidence game.

Error to Criminal Court, Cook County; John J. Sullivan, Judge.

Edward Singer was convicted of obtaining money by means of a confidence game, and brings error. Affirmed.

Cavender & Kaiser, of Chicago, for plaintiff in error.

Edward J. Brundage, Atty. Gen., and Maclay Hoyne, State's Atty., and Edward C. Fitch, both of Chicago (Edward E. Wilson and Marvin E. Barnhart, both of Chicago, of counsel), for the People.

CARTER, J. Plaintiff in error, Edward Singer, was found guilty by a jury in the criminal court of Cook county of unlawfully obtaining from the West Side National Bank a large amount of money by means of the confidence game, and was sentenced on this verdict to an indeterminate term in the penitentiary. This writ of error has been sued out of this court to review the judgment of the criminal court.

The evidence in the record shows that plaintiff in error in 1917 was the president and principal owner of a small private bank in Chicago known as the Wentworth Avenue Savings Bank, and was also at the same time engaged in the real estate business; that on July 14, 1917, he opened an account with the West Side National Bank, located in Chicago in the same general locality as his business; that on July 17 he deposited to his account in the West Side National Bank three checks, for \$200, \$500, and \$800, respectively, signed by M. Klein, payable to Singer, and drawn on the Wentworth Avenue Savings Bank, and

marked as certified by the last-named bank by Nat Naso, assistant cashier; that on July 20 Singer presented to the West Side National Bank a check payable to the order of cash for \$800, signed by himself, and requested the bank to pay him the money thereon; that the paying teller refused to cash this check, because, as he stated to Singer, the three certified checks which Singer had deposited to his account had not been paid; that Singer then went to Elenbogen, vice president of the West Side National Bank, whom he personally knew and through whom he had opened his account in said bank. The evidence tends to show that Elenbogen and Singer had theretofore been acquainted for some time as members of the same lodge. It appears that some discussion ensued between Elenbogen and Singer, the latter stating that he had just come from the Wentworth Avenue Savings Bank, and that the three certified checks had been paid. One of the officials of the West Side National Bank called upon the phone the Wentworth Avenue Savings Bank, and was told by Naso, the assistant cashier, that these three certified checks were all right. Elenbogen then O. K'd the \$800 check, and the money was paid to Singer.

Nat Naso testified on behalf of the state. He had been included with Singer in the indictment upon which Singer was tried and convicted. The evidence tends to show that he was not present at the opening of the trial, but had forfeited his bail. It is argued by counsel for plaintiff in error here that he had turned state's evidence because of a promise of immunity on the part of the state's attorney's office. Naso denied that he had been promised immunity, and there is no evidence in the record other than his own testimony on the question. He testified that he was 28 years old and married; that from May, 1916, until July 25, 1917, when the authorities closed the Wentworth Avenue Savings Bank, he had worked for Singer at said bank, being called assistant cashier; that he did everything about the bank, from janitor to bookkeeper; that before the bank opened at 9 in the morning he went out with a wagon and peddled fruit; that he knew of no person by the name of Klein; that no such man had ever been in the bank to his knowledge or made any deposit there; that Singer had told him to start a "dummy" account in the name of Klein, which he did, but that no money had ever been deposited in Klein's account; that at Singer's direction he made the entries in the books which were offered in evidence; that Singer signed the name "M. Klein" to a large number of checks and that the money to pay these checks always came from the general funds of the bank, or from money that Singer would bring in cash for the purpose of paying these checks when they came in; that at the close

of business July 17 the total amount of money in the bank was \$331.53, on July 18 it was \$405.73, and on July 20, \$258.67. He also testified that Singer had looked over the statement as to the amount of business done on these days and the balance on hand and O. K'd the same.

Singer testified, denying that he had anything to do with making out the statements showing the amount of money on hand on those days, although he admitted that he had O. K'd some of the statements; and he testified, as shown by the record, that on July 20 the balance in the bank was \$503.67. Naso further testified that in making up the Klein account he frequently did not make the entries when the transaction occurred, but figured them up on Sundays at Singer's direction, so that the books would show all right as to that account if the state's attorney's office ever began to investigate the bank's business. Singer told the officials of the West Side National Bank, when discussing the question of these three certified checks, that Klein was a wealthy customer of his who loaned money through his bank, and for which Singer received commissions. Singer admitted at the time of the trial that Klein was a fictitious person, but claimed that he had used that name and opened that account because he loaned money out on weekly payments, and if he loaned it in his own name he could not charge commission; that he was also accommodating one of his friends by checks signed "M. Klein," and did not want it to appear that his checks were used for accommodation paper. The evidence also tends to show that at the time of the discussion between Singer and the officials of the West Side National Bank with reference to the payment of the three certified checks in question, and shortly thereafter, Vice President Elenbogen went to the Wentworth Avenue Savings Bank and saw Naso; that this was after banking hours, and Naso told him that he could not pay those checks until he saw Singer. Naso testified that on that same day Singer had given him a check for \$745 and \$55 in currency to apply on the payment of these certified checks; that the next morning after he had told Vice President Elenbogen that he did not want to do anything about those checks until he had seen Singer, Singer took back from him the check for \$745. Naso further testified that he had never seen the three certified checks in question after he gave them to Singer to be deposited in the West Side National Bank. These three certified checks were sent by the West Side National Bank to the federal reserve bank for collection. Assistant Cashier Carr of this last-named bank testified that three checks for the amounts in question were received from the West Side National Bank drawn upon the Wentworth Avenue Savings Bank; that in the due course of the

business of the federal reserve bank they would be sent by mail for collection to the Wentworth Avenue Savings Bank; that the employes of that bank who then had charge of mailing out such checks were at the time of the trial absent in government service in France; that witness did not know positively that these checks had been mailed out, and did not know that the men who had charge of that work would be able to swear positively, if they were here, that such checks had been mailed to the Wentworth Avenue Savings Bank. Carr further testified that these three certified checks had never been paid to the federal reserve bank, but had been charged back to the account of the West Side National Bank. The evidence tends to show that there was a balance against Singer in the West Side National Bank's account, at the time the Wentworth Avenue Savings Bank was closed out, of \$1,250.18, and that neither this balance nor the amount of the three certified checks had ever been paid to said bank.

Counsel for plaintiff in error first argue that Singer should have been granted a continuance, and not forced to go to trial at the time he did. The record shows that Singer was indicted September 28, 1917, and the case was continued from time to time until October 7, 1918, when it came up for trial, and that attorneys Owens and Herson appeared in court on his behalf. Attorney Owens, former county judge of Cook county, stated that he was not the attorney of record in the case and had not intended to try it; that Attorney Christensen, who was the attorney of record, was then engaged in the I. W. W. cases in the federal court before Judge Landis, and had been engaged there for some weeks before, and that plaintiff in error's case ought not to be forced to trial until after Attorney Christensen was through with the trial of the I. W. W. cases. Judge Owens stated that he had only discussed the merits of the case briefly with plaintiff in error, and had not attempted to go into the details, and had not prepared for the trial, and could not fairly present the merits of the case for the plaintiff in error. Attorney Herson stated that he had never tried a criminal case and only appeared for plaintiff in error as his friend; that he had understood that the case was to be settled along the line of a civil case; that there had been several civil cases started by the West Side National Bank against Singer, and that he understood some agreement was to be made between the bank officials and Singer with reference to the settlement of the account, and he asked for a continuance until Attorney Christensen should be prepared to take up the trial of the case for Singer. The trial judge stated that he had told Singer and one or both of the attorneys then present, two weeks before, in open court, that Singer must be prepared

to have his case tried in the near future; that he had told Singer, in effect, that he could not grant him a continuance, until Christensen finished the trial of the I. W. W. cases and that the case must go to trial. It appears that the trial was entered upon at once, Attorneys Owens and Herson remaining in court and looking after the interests of Singer until the verdict was reached.

[1,2] Counsel for plaintiff in error argue that under the rule of the criminal court which states, in substance, that when the state's attorney, or the attorney for the accused, is necessarily engaged in the trial of a case in another court, the case shall be passed until the assistant state's attorney or the attorney for the accused has finished his present engagement, this case should have been passed or continued; but the rule also states that a continuance shall only be granted in the sound discretion of the court, and if the party asking for the delay shows that he used due diligence to be ready for the trial, and would have been ready but for the engagement of counsel. This rule, fairly construed, is in accordance with the established practice in such matters. The question of granting a continuance because counsel is engaged in another case is largely in the sound judicial discretion of the trial court, and will only be disturbed on appeal when it is shown that that discretion has been abused. *Long v. People*, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48; *Condon v. Brockway*, 157 Ill. 90, 41 N. E. 634. We think it is clear, from a reading of this record as to what took place at the time the judge insisted upon the trial going on, that there was no abuse of the discretion on the part of the trial court. Of course, no person accused of crime ought to be forced to the trial of his case without a reasonable opportunity to employ counsel and properly prepare for trial; but proper practice does not require, nor does the rule of the criminal court of Cook county, that if the counsel of record for the accused is engaged in another trial the trial must be put off indefinitely to permit his regular counsel to finish the other trial, if it appears that such trial will last for a considerable length of time thereafter. The trial judge had informed plaintiff in error, some two weeks before, that the case must be tried. In view of the nature of the case, this would give him time to employ other counsel and be properly prepared to try the case when it was called. We do not think any error was made by the court in compelling plaintiff in error to go on with the trial without waiting until after Attorney Christensen was through with his work in the trial of the I. W. W. cases in the federal court. Moreover, we think from the record that the interests of plaintiff in error were well taken care of by the attorneys who acted for him during the trial.

[2] Counsel for plaintiff in error further argue that the court improperly admitted parol proof as to the contents of the three certified checks in question without first showing that the original checks could not be produced in court. This objection seems to be raised for the first time in this court. Furthermore, we think that the proof does show that the checks could not be found. The argument for the state is that these checks were sent for collection by the federal reserve bank by mail to Singer's savings bank, and that, as Naso testified that as a rule all mail was opened by Singer; it is a fair conclusion that these checks were received by Singer and destroyed. It is true that Singer himself denied that he opened all the mail or that he knew anything about where these checks were. However that may be, we think the evidence in the record clearly shows that the checks could not be found, and that therefore parol evidence as to the contents was admissible.

[4, 5] It is also argued by counsel for plaintiff in error that error was committed in the trial court in permitting the state's attorney to ask plaintiff in error on the witness stand if he had not previously been accused of a crime or misdemeanor, if he had not theretofore gone under assumed or different names, and if Judge Landis, of the federal court, had not threatened to send him to jail for 30 days. The record shows that the first reference to his trouble with Judge Landis was brought out on the cross-examination of Naso by Singer's own counsel, and that the examination by the state's attorney with reference to that trouble was made in an attempt to have him explain the details of it. We do not think it was proper for the state's attorney to ask plaintiff in error with reference to any other offenses or with reference to having gone under assumed names, unless he had proof as to such matters, and thereafter offered such proof and showed it to be material and admissible. In view of this record, however, we do not think that the action of the state's attorney in this regard is of such a nature as to cause a reversal of the case.

[6] Counsel also complain of a statement made by one Healy, who, they allege, was one of the assistants in the prosecution of this case, that plaintiff in error was not a new man in the courts, either in the criminal or in the United States court. So far as we can judge from this record, Healy was not one of the attorney's in the case, but was advising in the prosecution because he was the president of the West Side National Bank, and knew the facts with reference to the transaction for which Singer was being prosecuted. This statement was made by Healy in open court in answer to the suggestions of Attorney Herson about an attempted settlement with the bank, and was made for the purpose of refuting the statement of

attorneys for Singer that he had not had sufficient time in which to properly prepare for the trial of his case, and that therefore a continuance ought to be granted. In view of the statements made by Attorney Herson on these questions, we do not think reversible error was committed by this statement of President Healy as to Singer not being a new man in the courts. There is nothing in the record to show that any of the jurors who tried the case heard this statement of Healy. Indeed, it was made before the jury were called into the box, and the fair inference would be from this record that none of those who served on the jury heard it.

[7] Counsel for plaintiff in error also insist that the interests of Singer were improperly prejudiced by an answer of witness Naso when he was on the stand, to the effect that Singer had beaten Naso's old father out of \$3,500. This answer was volunteered by Naso when he was being cross-examined by the attorney for Singer, and was promptly stricken out by the court on the motion of said attorney. Of course, the answer was entirely improper; but Naso was being sharply cross-examined in an attempt to show that he was as much responsible for the condition of the bank as Singer, if not more so, and it was quite natural that Naso should resent such questions. The fact that he volunteered such improper evidence was not reversible error.

[8] It is further insisted by counsel for plaintiff in error that he was wrongly indicted for the confidence game; that his act, even though he was guilty, only made him guilty under section 102d of the Criminal Code (Hurd's Stat. 1917, p. 973); and that he could only be convicted under that statute for a misdemeanor, whereas under the confidence game statute he was convicted of a felony. If the transaction for which he was prosecuted was such as to show that he was guilty under the confidence game statute, there was no error in trying and convicting him under such statute, even though he was also guilty, by reason of the same acts, under said section 102d of the Criminal Code. By the same act a party may be guilty of several offenses. The crime of murder may embrace an assault with a deadly weapon with intent to inflict a bodily injury, or an assault and battery. By the same act a person may be guilty of several distinct larcenies. *Freeland v. People*, 16 Ill. 380; *Nagel v. People*, 229 Ill. 598, 82 N. E. 315, and cases cited.

[9, 10] Counsel also argue earnestly that section 102d of the Criminal Code, heretofore referred to, being passed as a special statute, repeals the general statute on confidence game so far as it refers to fraudulent checks. We cannot so hold. Section 98 of the Criminal Code was passed for the purpose of covering confidence games, regardless of whether or not a false or fraudulent check was part

of the means, instrument or device used to carry out the scheme. The special statute passed in 1917 (section 102d of Criminal Code) was plainly enacted for the purpose of covering the intent to defraud by making or using in any way a check, draft or order for the payment of money upon any bank or other depository when no sufficient funds were held by such bank or other depository for the payment thereof. This last section of the Criminal Code had nothing to do with the crime of the confidence game and in no way referred to it. We shall have occasion hereinafter to refer to what is understood to be a confidence game under the Criminal Code of this state. It is plain on this record that the making of false or bogus checks was only one act in a series of acts which tended to prove that plaintiff in error had practiced the confidence game in swindling the West Side National Bank. It is true that if the Legislature had enacted section 102d of the Criminal Code for the purpose of covering the same identical offense covered by said section 98, so far as it referred to fraudulent or bogus checks, then, under the reasoning of the authorities cited by counsel for plaintiff in error (36 Cyc. 1152; 26 Am. & Eng. Ency. of Law [2d Ed.] 738; *People v. Kipley*, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; *Deneen v. Unverzagt*, 225 Ill. 378, 80 N. E. 321, 8 Ann. Cas. 396), there might be merit in their argument that plaintiff in error should have been indicted under said section 102d instead of being indicted for the confidence game, but the law is that a general act will not be repealed pro tanto by a subsequent special act when the two acts can stand together (26 Am. & Eng. Ency. of Law [2d Ed.] 743, and cases there cited). Holding, as we do, that the proof shows that plaintiff in error was guilty of the confidence game by a series of acts which, taken together, so prove, we cannot hold, on this record, that he was simply guilty of violating the provisions of section 102d in passing fraudulent checks upon a bank when he did not have sufficient funds in the bank to pay such checks.

[11, 12] Counsel for plaintiff in error earnestly argue that there is no competent evidence in the record showing that plaintiff in error was guilty of the confidence game. This court has stated more than once that any scheme whereby a swindler wins the confidence of his victim and swindles him out of his money by taking advantage of such confidence is a confidence game. *People v. Poindexter*, 243 Ill. 68, 90 N. E. 261; *Morton v. People*, 47 Ill. 468; *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183. The use of valid contracts in a swindling scheme does not prevent said scheme from being a confidence game. *Chilson v. People*, 224 Ill. 535, 79 N. E. 934. In the present case plaintiff in error had two bank accounts, according to his own testimony, before he

opened his account with the West Side National Bank. The evidence shows that there was never any money in Klein's account in the Wentworth Avenue Savings Bank; that, in order to show there was money in that account, at the direction of plaintiff in error his assistant cashier had made a number of false entries in the books; that thereafter plaintiff in error, pursuant to a scheme, sought to cash checks in the West Side National Bank to a much greater amount than the actual amount of money in his bank; that he told the West Side National Bank officials that M. Klein was a rich man on the north side, when Klein was a fictitious person. The evidence shows, without contradiction, that Singer's bank was at that time in a failing condition, and tends strongly to show that it was unable to pay its depositors, and that, as he himself admits, he was rapidly losing his depositors on account of the agitation against private banks; and while there is merit in the suggestion that a business man of reasonable sense would not attempt to get the money from the West Side National Bank in the manner contended by the state, yet we think the evidence conclusively shows that Singer did attempt to get the money from the West Side National Bank in the way contended for by the state when he did not have any cash or other assets in his bank sufficient to pay the three certified checks here in question. While it is true that the vice president of the West Side National Bank stated, at the time Singer complained because the \$600 check was not cashed, that if they cashed the new checks before the certified checks were paid they would simply be loaning him money, it is apparent from the record that Elenbogen would not have cashed this \$600 check if it had not been for the fact that the three certified checks had been deposited by Singer with the West Side National Bank, and that he was told by Singer that these certified checks had been already cashed by the Wentworth Avenue Savings Bank, and if Naso, as assistant cashier of the Wentworth Avenue Savings Bank, had not informed the officials of the West Side National Bank that these certified checks were good. It is true that some of the principal incriminating testimony against plaintiff in error was given by his former employé, Naso; but it is not true that the evidence justifying his conviction depends solely upon the uncorroborated testimony of Naso. There was much evidence in the record that tended strongly to support Naso's testimony as to the business of the bank and the condition it was in at the time of this transaction, and also to corroborate him as to the transaction with reference to the Klein account in the savings bank, and that said account was a "dummy" account, made up at the direction of Singer. Indeed, Singer's own testimony in its material features corroborates Naso's

testimony on many of the vital questions in the case. The evidence fully justified the verdict of the jury and the judgment of the trial court.

We find no reversible error in the record. The judgment of the criminal court will therefore be affirmed.

Judgment affirmed.

(233 Mass. 45)

EDELSTONE et al. v. SCHIMMEL
(two cases).

(Supreme Judicial Court of Massachusetts.
Suffolk. May 21, 1919.)

1. CARRIERS ⇨83—DELIVERY OF GOODS—ABSENCE OF BILL OF LADING.

In the absence of explanatory evidence and finding respecting the bill of lading issued by the carrier of goods sold by plaintiffs to defendant, and its effect on delivery to defendant at destination, it must be assumed that mere failure of plaintiff sellers to forward it to defendant had no effect on his right to demand delivery of the goods in New York.

2. CARRIERS ⇨83—CARRIAGE OF GOODS—DELIVERY WITHOUT PRODUCTION OF BILL OF LADING.

The general rule is that a nonnegotiable contract of shipment by a common carrier is discharged by delivery to the consignee without surrender or production of the bill of lading; the fact that one is consignee being evidence of ownership.

3. SALES ⇨201(4)—DELIVERY TO CARRIER.

Ordinarily, in case of a sale of goods to be shipped by the seller from one place to another, delivery to the carrier is delivery to the buyer, unless there is a special agreement to the contrary.

4. SALES ⇨199—DELIVERY TO CARRIER.

Delivery of the goods to a common carrier, together with the taking of a nonnegotiable bill of lading in the name of the buyer, was strong proof of intention by the sellers to transfer title to the buyer.

5. TRIAL ⇨404(1)—ACTION BY SELLERS—GENERAL FINDING—EFFECT.

The general finding of the trial judge in favor of the sellers of goods suing for the price imported a finding in their favor on the point of delivery to the buyer.

6. SALES ⇨201(4)—DELIVERY TO CARRIER—PASSING OF TITLE.

Where the sellers delivered goods to a railroad for carriage to the buyer, taking a nonnegotiable bill of lading in name of buyer, contract was executed and title passed, despite attempt of sellers by notice to carrier to prevent delivery to buyer at destination, and despite letters whereby sellers endeavored to get buyers to pay before due date.

7. SALES ⇨183—REPUDIATION BY BUYER—INSISTENCE ON ERRONEOUS MEMORANDUM.

Where goods were sold by oral negotiation at 5¼ cents a pound, but an unsigned memo-

randum, dictated by the sellers, mistakenly stated the price as 4¾ cents a pound, of which the buyer attempted to take advantage by persistently declaring the memorandum expressed the correct terms, his conduct constituted a repudiation of the contract and a breach.

8. SALES ⇨384(2)—REPUDIATION BY BUYER—MEASURE OF DAMAGES.

Where the buyer of goods without right repudiated the contract, the measure of the sellers' damages was the difference between the contract price and the fair market price at the time and place.

9. SALES ⇨383—REPUDIATION BY BUYER—DAMAGES—EVIDENCE.

In action for damages for breach of contract to buy car of willowed picker at 5¼ cents a pound, testimony of sellers that at time buyer repudiated by his insistence on an erroneous statement of price in the sales slip, the goods were worth 6 to 6½ cents a pound, held sufficient to warrant finding for the sellers.

Appeal from Municipal Court of Boston, Appellate Division; James P. Parmenter, Judge.

Actions by Harry Edelstone and others against Harry Schimmel. In the first case there was finding for plaintiffs, and the case was reported to the appellate division of the Municipal Court of the city of Boston, which vacated the finding, and directed judgment for defendant, and plaintiff appeals. In the second case there was finding for plaintiffs, and the case was reported to the appellate division, which dismissed the report, and defendant appeals. In the first case, finding for plaintiffs ordered to stand, and judgment ordered accordingly; in the second case, order dismissing report affirmed.

The evidence on the issue of plaintiffs' damages in the second case was their testimony that there was no general market price for the willowed picker sold by them, but that in early January, 1917, the price of such goods had advanced, and they were worth 6 to 6½ cents a pound. The controversy between the parties as to the mistake in plaintiffs' sales slip in its statement of the price occurred early in January.

Leon R. Eyges and Samuel B. Finkel, both of Boston, for appellant.

Philip Rubenstein, of Boston, for appellees.

RUGG, C. J. These are two actions of contract based upon sales of goods. For convenience we treat each case separately.

First Case.

This is an action to recover for goods sold and delivered. On December 29, 1916, the defendant at the plaintiffs' place of business in Boston made an agreement to buy of the plaintiffs—

"ten (10) bales of oil mill notes at $4\frac{1}{4}$ c. per pound, f. o. b. Boston terms 1% 10 net 30 days, to be shipped by the N. Y., N. H. & H. R. R.—to be shipped at once to New York."

There was no dispute between the parties as to the terms of this agreement. These goods were shipped to the defendant by the carrier named on December 30, 1916, and a nonnegotiable bill of lading was issued on that date, the defendant being named as consignee. This bill of lading was not forwarded to the defendant, but was retained by the plaintiffs, who sent no notice to the defendant respecting it. Owing to other differences between the parties, the plaintiffs on January 11, 1917; and again four days later wrote in substance to the defendant that they would not deliver to him the oil mill notes unless he accepted and paid demand or sight draft less one per cent. discount. The plaintiffs also notified the carrier at Boston on January 9 not to deliver the mill notes to the defendant. The defendant on January 11, 1917, brought suit in New York City for breach of contract and there attached goods of the plaintiffs alleged to be in the possession of the New York, New Haven & Hartford Railroad.

[1, 2] The bill of lading is not printed in the record. The plaintiffs testified that the "defendant could get the goods on arrival without bill of lading." The defendant testified that without the "bill of lading, as matters stood, he could not get possession of the mill notes." The court refused to grant the defendant's sixth request for ruling, which amongst other matters contained a statement of fact to the effect that the defendant could not obtain the possession of the notes without the bill of lading. There was no other evidence and no express finding respecting the bill of lading and its effect on delivery to the defendant in New York. Under the circumstances it must be assumed that mere failure of the plaintiffs to forward it to the defendant had no effect on his right to demand delivery of the goods in New York. See in this connection *In Matter Bills of Lading*, 14 *Interst. Com. Com'n R.* 346, and *New York Central & Hudson River Railroad Co. v. York & Whitney Co.*, 230 *Mass.* 206, 213, 217, 119 *N. E.* 855. It is the general rule that a nonnegotiable contract of shipment by a common carrier is discharged by delivery to the consignee without the surrender or production of the bill of lading. The fact that one is consignee is evidence of ownership. *Brown v. Floerscheim Mercantile Co.*, 206 *Mass.* 373, 375, 92 *N. E.* 494; *Rosenbush v. Bernheimer*, 211 *Mass.* 146, 149, 151, 97 *N. E.* 984, *Ann. Cas.* 1913A, 1317.

[3-5] The contract between the parties was plain. The ordinary rule is that, in case of sales of goods to be shipped by the vendor from one place to another, delivery to the carrier is delivery to the buyer unless there is special agreement to the contrary. *Fech-*

teler v. Whittemore, 205 *Mass.* 8, 11, 91 *N. E.* 155; *Twitchell-Champlin Co. v. Radovsky*, 207 *Mass.* 72, 75, 92 *N. E.* 1038; *Levy v. Radkay*, 232 *Mass.* —, 123 *N. E.* 97; *Sales Act*, *St.* 1908, c. 237, §§ 19 and 46. Delivery of the goods to the carrier together with the taking of a nonnegotiable bill of lading in the name of the defendant was strong proof of intention by the plaintiffs to transfer the title to the defendant. *Wigton v. Bowley*, 130 *Mass.* 252. The general finding of the trial judge in favor of the plaintiffs imported a finding in their favor on the point of delivery.

[6] The attempt of the plaintiffs by notice to the carrier not to deliver to the defendant was not of decisive consequence. The goods theretofore had been delivered to the carrier; it held as bailee for the defendant to whom the title had passed. The letters of the plaintiffs endeavoring to get the defendant to pay before the due date of the contract were ineffectual to restore to them a title which already had vested in the defendant. These subsequent acts of the plaintiffs had no effect upon substantial elements of the contract which were already executed. *R. H. White Co. v. Remick*, 198 *Mass.* 41, 48, 84 *N. E.* 113; *Daley v. People's Building, Loan & Saving Ass'n*, 178 *Mass.* 13, 18, 59 *N. E.* 452. The finding of fact of the trial judge in favor of the plaintiffs was warranted by the evidence. No error of law is disclosed on the record. The finding of the judge for the plaintiffs is to stand and judgment is to be entered accordingly.

So ordered.

Second Case.

[7] This is an action to recover damages for breach of a contract by the defendant to buy of the plaintiffs a car of willowed picker at 5 $\frac{1}{4}$ cents per pound. The negotiations were oral. When the bargain was struck, an unsigned memorandum dictated by one of the plaintiffs was written, in which the price was stated as 4 $\frac{1}{4}$ cents per pound. The judge found on conflicting evidence that this was a mistake and that the price agreed upon was 5 $\frac{1}{4}$ cents per pound, that the defendant repudiated the sale, and that until such repudiation the plaintiffs were ready and willing to perform the contract, and that thereafter the plaintiffs resumed control of the property. The evidence disclosed by the record plainly warranted the finding that the terms of the agreement actually made were clear, that the defendant seized upon the clerical error in the sales slip or memorandum and persistently declared that that expressed the terms of the contract. His conduct in this connection constituted a repudiation of the only contract made. Utter denial of an essential term of a contract may be equivalent to a disavowal of the contract. Moreover, the defendant refused seasonably to give shipping instructions. *Mullaly v. Austin*, 97 *Mass.* 30; *King*

v. Faist, 161 Mass. 449, 37 N. E. 456; Kehlor Flour Mills Co. v. Linden, 230 Mass. 119, 130, 119 N. E. 698.

[8, 9] The correct rule of law was followed in assessing damages. It was the difference between the contract price and the fair market price at the time and place fixed by the contract for performance. *Barrie v. Quinby*, 206 Mass. 259, 268, 92 N. E. 451. The evidence, while slight upon this point, cannot be pronounced insufficient to warrant the finding. *Houghton v. Furbush*, 185 Mass. 251, 70 N. E. 49; *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 8, 85 N. E. 877.

Order dismissing report affirmed.

(233 Mass. 104)

AMODIO'S CASE. In re JOHN S. LANE & SON. In re ROYAL INDEMNITY CO.

(Supreme Judicial Court of Massachusetts.
Hampden. May 21, 1919.)

MASTER AND SERVANT §417(7) — WORKMEN'S COMPENSATION ACT — REVIEW OF FINDING OF ACCIDENT BOARD.

On a matter of fact the conclusion of the Industrial Accident Board is final, and cannot be reversed, unless quite unsupported by evidence.

Appeal from Superior Court, Hampden County.

Proceeding for compensation for injuries, under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571), by Salvatore Amodio, opposed by John S. Lane & Son, the employer, and the Royal Indemnity Company, the insurer. Additional compensation was denied, the denial affirmed by the superior court, and from its decree, the employé appeals. Affirmed.

Silvio Martinelli, of Springfield, for appellant.

Thomas H. Calhoun and Edward J. Sullivan, both of Boston, for appellee insurer.

PER CURIAM. This case comes before us by appeal from a decree of the superior court affirming a decision of the Industrial Accident Board, which in turn adopted and confirmed the finding of the single member. The record presents no question of law whatever. Whether the employé was entitled to a finding in his favor was wholly a matter of fact. On a matter of fact the conclusion of the Industrial Accident Board is final and cannot be reversed unless quite unsupported by evidence. There is no ground for disturbing their finding in the case at bar, which is covered in every particular by the Case of Pass, 232 Mass. 515, 122 N. E. 642, and decisions there collected.

Decree affirmed.

(233 Mass. 127)

PODREN v. MacQUARRIE.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 26, 1919.)

1. FRAUDS, STATUTE OF §63(2)—TITLE OF SUBLESSEE—EVICTION.

Under Statute of Frauds (Rev. Laws, c. 127) § 3, where premises were leased by defendant, and the lessee, not individually, but as a trustee, executed a written lease to plaintiff, but there was no written assignment of the lease from the lessee to the trust, having no title under his lease from the trust, plaintiff cannot recover against defendant for an eviction.

2. FRAUDS, STATUTE OF §158(4) — LEASE — ASSIGNMENT IN WRITING—SUFFICIENCY OF EVIDENCE.

In an action for eviction by the lessee of a trust against the owner of the premises who leased to a trustee individually, evidence held insufficient to show an assignment in writing satisfying Statute of Frauds (Rev. Laws, c. 127) § 3, from the trustee as an individual to the trust or to himself as trustee.

3. FRAUDS, STATUTE OF §144—LEASE—ESTOPPEL.

The lessee from a trust of premises leased by the owner to a trustee as an individual cannot recover from the owner on any ground of estoppel, on account of the statute of frauds, there having been no written assignment of the lease from the individual to the trust, or to himself as trustee, despite assurances by the owner's agent to plaintiff lessee that the lease to him from the trust was all right, which were followed by the lessee's payment of rent and making of repairs.

4. LANDLORD AND TENANT §108(1), 275 — FAILURE TO PAY RENT—RIGHT TO ENTER.

Lease of a building to a trustee as an individual, the trustee as such thereafter leasing to plaintiff, was broken by the failure of the trustee as an individual to pay rent according to its terms, and the owner had the right to enter for the breach of covenant under her right reserved in the lease.

5. LANDLORD AND TENANT §180(1) — TENANT AT WILL—RIGHT TO RECOVER FOR EVICTION.

A tenant at will cannot recover damages as for an unlawful eviction.

Report from Superior Court, Suffolk County; Charles F. Jenney, Judge.

Action of contract for damages for eviction by David Podren against Eliza B. MacQuarrie, wherein demurrer as to the second count of the declaration was overruled, and defendant appealed. Verdict for plaintiff was rendered, and the case reported to the Supreme Judicial Court. Judgment ordered for defendant.

The report of the case follows:

This is an action of contract in which the plaintiff seeks to recover damages for eviction

from a store formerly occupied by him, and comprising a part of the building numbered 75 and 77 Broad street, Boston, Mass., said store being situated on the corner of Battery-march and Broad streets.

The plaintiff's writ and declaration contained two counts, to each of which the defendant duly demurred. The superior court sustained the defendant's demurrer as to the first count and overruled the defendant's demurrer as to the second count. The defendant duly appealed from the decree of the superior court overruling her demurrer as to said second count. The pleadings may be referred to.

During the entire time involved in this case, the defendant was the owner of said building. On February 21, 1913, she made a written lease under seal of the entire building to Fred L. Hewitt for a term of five years, beginning March 1, 1913. This lease was made subject to a lease of the three upper stories to the Stork Company, dated October 1, 1912, for five years from that date, which lease was assigned to said Hewitt. The lease contained the following clauses:

"And the lessee further covenants and promises with and to the said lessor, that the lessee will not assign this lease, nor make nor allow to be made any unlawful, improper or offensive use of said premises, nor any use which will invalidate the lessor's insurance, nor any alterations or additions which shall make the premises less valuable for general occupancy during the term aforesaid, without the consent of the lessor thereto first being obtained in writing (the lessor agrees that the lessee may sublet all or portions of the demised premises for all or a part of said term), and that it shall be lawful for the lessor, at seasonable times to enter into and upon the leased premises to examine the condition thereof and to make repairs, if the lessor shall so elect."

"No assent, express or implied by the lessor, to any breach by the lessee of any of the covenants herein contained shall operate as a waiver of any succeeding breach of covenant."

"If the whole or any part of the premises shall be destroyed or damaged by fire, water or otherwise, or by the use or abuse of the city water or by the leakage or bursting of water or steam pipes in any part of the building, or from the electric wires, pipes, mains or machinery, or in any other way or manner, no part of said loss or damage is to be charged to or be borne by the lessor, in any case whatever, and that in no case whatever shall the lessor be liable to the lessee for any injury or damage to any person on the leased premises or in or about the said building occasioned by any cause whatsoever, except such injury or damage to person or property as may be directly caused by the negligence of the lessor or his agents or servants."

"And provided also that these presents are upon condition that if the lessee does or shall neglect or fail to perform or observe any or either of the covenants contained in this instrument, which on the lessee's part are to be performed or observed * * * or if a receiver of the whole or any part of the property of the lessee shall be appointed, then, and in either of the said cases the lessor lawfully may, immediately or at any time thereafter and whilst such neglect or default, if any, continues, and with-

out further notice or demand, enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the lessor's former estate and expel the lessee and those claiming under the lessee and remove their effects forcibly (if necessary) without being taken or deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant and that upon entry as aforesaid the said term shall cease and be ended."

"The lease contained no express covenant of quiet enjoyment."

On May 25, 1914, said Hewitt, as trustee of the Briggs trust, under a declaration of trust dated April 10, 1913, recorded with Suffolk Deeds, Book 3721, page 161, and hereinafter referred to as Hewitt, trustee, executed a lease under seal to the plaintiff, Podren, of the store referred to in the first paragraph of this report for a period of three years and eight months, commencing June 1, 1914, at a rental of \$50 per month, payable in advance; said Hewitt executed said lease "as trustee, but not individually." A copy of said lease is annexed to the declaration. The defendant duly excepted to the admission of this lease in evidence. On July 21, 1915, Hewitt as trustee wrote to the plaintiff the following letter:

"Mr. Abram Hoeffcker, 15 Beacon street, Boston, will hereafter have charge of the property, 75-77 Broad street, Boston, and you are hereby authorized to pay your future rents to him or to his order. [Signed] Fred L. Hewitt, Trustee of the Briggs Trust."

The following letters were in evidence:

One dated March 10, 1915, signed by the Briggs trust and addressed to Hoeffcker in which the writer states as follows:

"We are inclosing you herewith demand note for \$476.43 to take up note which comes due to-day at the Puritan Trust Co."

"It is impossible for us to pay anything on this note at this time as we have ascertained at the city hall that the Broad street taxes will not be advertised for a tax sale until the 31st of this month, and are therefore making arrangements to take care of the taxes by that time. [Signed] Briggs Trust, by J. W. Robbins."

Another dated July 21, 1915, addressed to Abram Hoeffcker as follows:

"I inclose you herewith letters to the three tenants at the property 75-77 Broad street, Boston in order that you may be able to collect the rents there. [Signed] Fred L. Hewitt, Trustee of the Briggs Trust."

Another dated August 3, 1915, addressed to Abram Hoeffcker as follows:

"Inclosed please find note for \$100 and check for \$25.65 in payment of note for \$125.63 due August 10th plus two cents for stamps. Please return the old note to us at your earliest convenience, and oblige. [Signed] Briggs Trust, by M. S."

"P. S.—This is the best that I can do at the present time, but feel satisfied that another renewal will not be necessary."

Another dated August 16, 1915, addressed to Abram Hoeffcker as follows:

"As you have taken possession of the property at 75-77 Broad street, Boston and accepted a surrender of the lease, we are advising you

of the contents of a letter which we received from the elevator inspector, etc. We would suggest your looking into the same at your earliest convenience. [Signed] Briggs Trust, by J. W. Robbins."

Another dated August 24, 1915, addressed to Abram Hoeffcker as follows:

"We are inclosing you herewith check for \$10.20, being \$10 interest on note due August 26 and 20 cents for stamps, also a renewal note for \$1,000 due October 28, 1915 in payment of note due August 26th. [Signed] Briggs Trust, by M. S."

Another dated August 27, 1915, addressed to Abram Hoeffcker as follows:

"In accordance with our arrangement with you, we inclose you herewith lease of the Stork Company properly assigned. [Signed] Briggs Trust, by Fred L. Hewitt, M. S."

Another dated October 16, 1915, addressed to Abram Hoeffcker as follows:

"We are inclosing you herewith check for \$50 on account. This is the best we can do at the present time. [Signed] Briggs Trust, by M. S."

These letters were admitted subject to the exception of the defendant, which exception was taken to their admission when offered together, and was not to individual letters, except as to the letter of August 16, 1915, to the admission of which specific exception was taken.

The plaintiff also introduced in evidence nine receipts, purporting to run from Abram Hoeffcker, agent, to Fred L. Hewitt, for rent of the building 75 and 77 Broad street, said receipts being dated June 1, July 1, August 1, September 1, October 1, October 31, December 1, December 31, 1914, and February 1, 1915, for the rental of said building for the time between May 1, 1914, and January 31, 1915. Said receipts did not describe Hewitt as trustee.

He further introduced in evidence, subject to the exception of the defendant, three promissory notes. These notes were all signed as follows: "Briggs Trust, by Fred L. Hewitt, Trustee"—and were all payable to Abram Hoeffcker individually. The first of these, dated June 26, 1915, was for \$1,000, and when introduced in evidence bore the following canceled indorsements: "Waiving demand and notice. Abram Hoeffcker. Eliza B. MacQuarrie." The second of these, dated July 10, 1915, was for \$125 and bore the following canceled indorsement: "Waiving demand and notice. Abram Hoeffcker." The third of these, dated February 15, 1915, was for \$476.43, and bore the same canceled indorsement as the second note.

Mr. Arthur W. Blakemore, a lawyer, called by the plaintiff, produced the above-mentioned copies of letters, receipts and notes from the files of the Briggs trust of which he testified he was the duly appointed receiver in bankruptcy. No assignment in writing of the MacQuarrie-Hewitt lease by Fred L. Hewitt to Fred L. Hewitt, trustee of the Briggs trust, was found among the papers of the Briggs trust.

The plaintiff testified as follows subject to the defendant's exceptions as to the conversations between the plaintiff and Hoeffcker in the defendant's absence:

"The lease of May 25, 1914, was duly executed between Hewitt trustee and myself, and thereafter I regularly paid to the lessor the rental of \$50 a month until July, 1915. In

that month I received a letter from Hewitt trustee telling me that some one else would have charge of the property and authorizing me to pay the rents to him. I cannot read English. Eight or ten days afterwards Mr. Hoeffcker came to my store. My wife was present at the time. He said that Mr. Hewitt had nothing more to do with the property, that the property now belongs to his niece, and that he, Hoeffcker, would collect the rents for her. He said that he, Hoeffcker, and his niece had taken over the building and the leases, that she had given the property over to him and he would handle the building for her."

"I showed him my lease and asked whether it was all right. He said the lease was all right as long as I paid the rent, that I got the lease for two years and eight months, and it is O. K. He said the rent under that lease after that should be paid to him, that Mr. Hewitt had nothing more to do with the lease. I told him again, 'So long as my lease is all right I would pay you the rent,' and I paid him \$50 for the month and he gave me a receipt and he went out. I looked for the receipt and could not find it. I lost my receipts for rent in moving. After that I paid the rent to Hoeffcker for several months."

"In the fall of 1915, Mr. Hoeffcker was in my store and I asked him to put a new window front in my store on the Batterymarch street side. My wife was present at the time. I told him it would help my business. He said 'You have two years and a few months' more lease and you are getting the rent pretty cheap. When you think it will pay you, you go ahead and fix it yourself.' I said, 'Go ahead and fix the place myself! I would like to find out again about the lease.' He said, 'Mr. Podren, when I say once to you that the lease is good, it is good, you don't need to ask me again.' I said, 'Then, I will go and fix up the window myself.' I then hired a carpenter and an electrician and had the alteration made at an expense of \$75. After that I continued to pay rent to Hoeffcker. A few weeks before January 12, 1916, Hoeffcker, the defendant, a lawyer and a real estate man from the lunch room called at my store together. Hoeffcker said that they had leased the whole building to the Waldorf Lunch and that he had nothing to do with this place, nothing to do with this office any more. He said that my lease was no good because I got it from Mr. Hewitt who had failed and his lease with the owner was broken. I reminded him that when he started collecting rent from me he had told me that the lease was all right as long as I paid the rent. He said: 'That is business. I have a chance to let the building for fifteen years to the Waldorf Lunch for \$5,000 a year.' I said: 'I am not here very long. I just started with a little money. You see that little store. It is all I have but my name, and in fact half of that merchandise is not paid for. It belongs to the wholesalers, and you will make me move and the wholesalers will find that I have moved and they will foreclose and what shall I do?' He said: 'I can't help you.' I said: 'Do you think it is right that you act in this way? You are using me just as you like, just as if I was a rag.' She said: 'Mr. Hoeffcker is my uncle and my agent. He is attending to all matters connected with the building and has handled the building for me

since I owned it. I do not know anything of business matters and leave everything to Mr. Hoeffcker."

"Q. Did anybody say they were evicting you or putting you out, did you hear your name mentioned? A. Yes, sir.

"Q. You are sure of that? A. Well, he came in and introduced—

"Court. The question is, are you sure of that?

"A. Then they said, 'Here is Mr. Podren.'

"Q. Are you sure he mentioned your name?

"Court. That is the question that is asked you.

"A. I heard the mention of my name, but I did not know what it was about.

"Q. And you did not hear your name after that? A. They said, 'Good-bye, Mr. Podren; I will leave the real estate man to you.'

"The lawyer and Hoeffcker took the defendant by her arm and led her out of the store. I never saw the defendant again or had any talk with her after that. On January 12, 1916, a notice was handed to me by an ejectment company requiring me to vacate in 48 hours. I have not the notice which was handed to me. I posted mine in the window to show the people how the people were using me. My neighbor gave me his, which was as follows:

"Notice to Quit from Lessee Under a Written Lease.

"Commonwealth of Massachusetts, Suffolk—ss.:
"January 12, 1916.

"To Thompson & Company

"You will please take notice that the Kelsey Company, the owner of the premises now occupied by you, namely, the store on first floor and basement in building on Broad street in the city of Boston and numbered 75 on said street, together with all the appurtenances thereto belonging, has executed and delivered to me a written lease of the said premises for the term of one year from and including said date. As I desire to take possession of the premises you will please vacate them without delay.

"[Signed] Thomas H. King. [Seal.]

"By decision of the Supreme Court 48 hours is sufficient notice for parties to vacate.

"Dawes Ejectment Company.
(With a rubber stamp)

On the back with a rubber stamp:

"Dawes Ejectment Company,

"81 Roxbury Street, Roxbury.

"Opposite Roxbury Municipal Court House."

"After I got the notice, the sheriff came to see me. He told me that if I did not get out he would put me out. Then I got out because I got to get out. I took that notice to Mr. Hoeffcker at his office at 15 Beacon street, Boston.

"Q. Did you go to see Hoeffcker after you got the notice? A. I went to see him up to his office on Beacon street.

"Q. What did he say to you? A. He said, 'I could not help you, because I leased the whole building for 15 years to the Kelsey Company.'

"Q. Whether or not at that time he said anything to you about getting out? A. Yes.

"Q. What did he say? A. You have to go out because the building is turned over to the Kelsey Company.

"I did not go to see the defendant and never tried to find out from her anything about my lease. I also went to see Mr. Hewitt. I took the Kelsey Company notice to my lawyer, Mr. Rubenstein. I did not go near the Dawes Ejectment Company. The sheriff came to see me between the time when I got the Kelsey Company notice and before I moved. He told me that if I did not get out he would put me out. We stayed at the Broad street store until we got a place to move the stock to, some two or three weeks. We paid a mover to come and take the stock out and that was about two or three weeks after January 12th. Nobody came and threw us out. A little later I hired a store at 56 Broad street at \$65 a month where I am now doing business. I did not get into the new store for six weeks after I left the 75 Broad street store."

Mrs. Podren, the plaintiff's wife, testified in behalf of the plaintiff and stated that she was present in the plaintiff's store in July, 1915, and several months later when Mr. Hoeffcker called and talked with her husband. She corroborated the plaintiff's testimony above set forth with relation to the conversations between the plaintiff and Hoeffcker, when he first called in July, 1915, and later when they discussed the alteration of the show window on the Batterymarch street side of the store.

Testimony was introduced tending to show that Fred L. Hewitt had no Boston residence or place of business; that he was then in Washington and had been in Florida during the winter.

Charles C. Barton, called by the defendant, testified as follows:

"On December 30, 1915, the defendant, a Mr. Farley, Mr. Hoeffcker and I called at the plaintiff's store at 75 Broad street, Boston. I told the plaintiff that the defendant was on the premises to take possession as lessor under a lease to Mr. Hewitt. I had prepared a written statement which she read, as follows:

"I, Eliza B. Macquarrie, the owner of the premises numbered 75-77 Broad street, Boston, Mass., and the lessor in a written lease to Fred L. Hewitt, dated February 21, 1913, covering said premises, do hereby, on December 30, 1915, in accordance with the power reserved to me in and by the terms of said lease, enter into and upon the said premises and repossess the same as of my former estate, for breach of the covenants therein contained to be performed on the part of said Fred L. Hewitt, and more particularly for the nonpayment of rent due under and by the terms of said lease."

"The plaintiff claimed that he had a lease, and I said that the defendant could not recognize it. He complained that he had gone to the expense of putting in a show window, and I said that it was unfortunate, that the defendant had nothing to do with it, and that the plaintiff must take the consequences of the breach of Hewitt's lease. The plaintiff said he had been paying rent to Mr. Hoeffcker, and I said that Hoeffcker had been collecting rent applying it on account of the rent due from Hewitt. I told the plaintiff that repairs would have to be made on the premises for the Kelsey Company, the new tenant to whom we had given the lease, and that he might stay until the repairs were begun. I have no recollection of hearing the statements which the plaintiff testi-

fied that the defendant made. I do not recollect any conversation about throwing him out. He expressed concern about the action we were taking.

"Q. You did tell him that he had to get out?
A. These words were not used.

"Q. But that is the substance as you have testified in substance, is it not so? A. Undoubtedly he was told that the result of the action which we were taking would be that he had to get out in substance.

"On December 31, 1915, I talked with Hewitt. He said that Hoffecker was collecting the rents applying them to the amounts that Hewitt owed under the lease. On December 31, 1915, a notice dated December 30, 1915, was served on Hewitt in which the defendant notified him that as owner of the premises 75 and 77 Broad street and as lessor of the lease dated February 21, 1913, she had this day entered into and upon the premises and repossessed the same as of her former estate for breach of the covenants contained in said lease. A few days later Podren called upon me and asked if something could not be done. I told him that nothing could be done as his rights depended upon the lease to Hewitt. We could not recognize him in the matter. I had a conversation with Mr. Hewitt in which he told me that Mr. Hoffecker was collecting the rent of the Broad street building and applying it to the amount which he, Mr. Hewitt, owed under the lease, that the amount which he then owed amounted to several thousands of dollars, and that he had a business matter on hand which, if successful, would put him in a position to pay all which he owed under the lease. Mr. Hoffecker is deceased. He died not over a fortnight before the trial. Before this suit commenced, about the time the defendant took possession of the building, I talked with Hoffecker and he said he had been collecting rentals on the building and applying them to the amount due the defendant from Hewitt."

It appeared that subsequent to said entry made on December 30, 1915, the defendant made a lease dated December 30, 1915, of the entire building to the Kelsey Company, the term of which lease was to begin on May 1, 1916, and to run for fifteen years.

The above constitutes all the evidence in the case material to the issue except that relating to the question of damages which is not in issue. The defendant duly moved that a verdict be ordered for her and excepted to the refusal of the court to so order. The case was submitted to the jury with the stipulation between the parties that if the jury found for the plaintiff the judge would set aside the verdict and report the case to the Supreme Judicial Court. If there was evidence properly admitted which warranted submission of the case to the jury, judgment should be entered for the plaintiff in the amount found by the jury, otherwise judgment should be entered for the defendant. The jury returned a verdict for the plaintiff in the sum of \$1,200. In accordance with the stipulation, the verdict has been set aside and the case is herewith reported upon the terms set forth in the stipulation.

Philip Rubenstein, of Boston, for plaintiff.
James W. Spring, of Boston, for defendant.

CARROLL, J. The defendant made a written lease of the entire buildings numbered 75 and 77 Broad street, Boston, to Fred L. Hewitt, for the term of five years beginning March 1, 1913. The lease provided that it was not to be assigned without the written consent of the lessor and the right was reserved to enter for breach of the covenants, and repossess the estate "as of the lessor's former estate and expel the lessee and those claiming under the lessee." Hewitt became trustee of the Briggs trust, so called, under a written declaration of trust, and "as trustee, but not individually," executed a lease, under seal to the plaintiff, of one of the stores in the building, for the term of three years and eight months beginning June 1, 1914. There was evidence that Abram Hoffecker, the defendant's agent, attended "to all matters connected with the building"; that on July 21, 1915, Hewitt as trustee wrote the plaintiff directing him to pay the future rent to Hoffecker; and that thereafter for several months the plaintiff paid Hoffecker the rent.

Hewitt did not pay the rent for the building due under the terms of the lease, and on the 30th day of December, 1915, the defendant made an entry on the premises for breach of the covenants; and on the same day she made a lease of the entire building for the period of fifteen years from May 1, 1916, to the Kelsey Company. On January 12, 1916, a notice to quit, signed by James H. King, who purported to have a written lease of the plaintiff's premises for the term of one year from January 1, 1916, from the Kelsey Company, was served on the plaintiff. After the receipt of the notice, a deputy sheriff saw the plaintiff and told him that if he did not quit the premises he would evict him. The plaintiff testified that in July, 1915, he showed his lease to Hoffecker and asked him "whether it was all right," and he said it was "as long as I paid the rent"; and relying on this statement the plaintiff made repairs on the store. There was no evidence that Hewitt, the lessee, assigned the lease to the Briggs trust, or to himself as trustee, and there was no written assent of the defendant to an assignment of the lease to anyone.

[1] The plaintiff's declaration is in contract, and alleges that the defendant, regardless of her agreement, unlawfully evicted the plaintiff from the premises, to his great damage. The plaintiff bases his right to recover on the fact that he was in possession of the premises under a written lease from Hewitt as trustee of the Briggs trust. The defendant leased the premises to Hewitt. There was no written assignment of the lease from Hewitt to the trust, and the defendant made no agreement with any lessee other than Hewitt; she never consented to the Briggs trust occupying the premises as the assignee

of the lease, and so far as the plaintiff's rights against the defendant are concerned, he is merely a tenant at will unless Hewitt as trustee of the Briggs trust derived his title from the defendant. The plaintiff has not shown this: He has not proved that the title ever passed from Hewitt, or that there was any right or title in his lessor to execute a written lease of the premises. Under the statute of frauds (Rev. Laws, c. 127, § 3), an estate or interest in land created without an instrument in writing has the force and effect of an estate at will only; and no estate or interest in land can be assigned, granted or surrendered except by an instrument in writing or by operation of law. Having no title under his lease from the trust, even if the other elements necessary to establish his case were shown, the plaintiff cannot recover against the defendant. See in this connection *Emery v. Boston Terminal Co.*, 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473; *Mathews v. Carlton*, 189 Mass. 285, 75 N. E. 637; *Scotti v. Bullock*, 225 Mass. 510, 114 N. E. 674.

[2] Assuming that the letters and the promissory notes payable to Hoffecker signed "Briggs Trust, by Fred L. Hewitt, Trustee," and the evidence of other transactions were properly admitted, they are insufficient to show an assignment in writing from Hewitt to the trust, or to himself as trustee.

[3] The plaintiff contends that the defendant is estopped to deny the validity of his title under the written lease, because her agent Hoffecker, assured the plaintiff that the lease from the trust was "all right" and that the plaintiff thereafter paid the rent and made repairs. The defendant made no written contract with the plaintiff. The plaintiff's lessor had no title, and the oral assurance of the defendant's agent did not make the lease a valid instrument. The statute of frauds prevents the plaintiff from recovering. The defendant is not estopped to rely on her rights and can refuse to be bound by the oral assurance of her agent that the lease was valid, even assuming that he had authority to bind her by such a statement. See *Graves v. Goldthwait*, 153 Mass. 268, 26 N. E. 860, 10 L. R. A. 763; *Sarkisian v. Teele*, 201 Mass. 596, 608, 88 N. E. 333; *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622, 45 L. R. A. (N. S.) 962, Ann. Cas. 1914A, 431. In *Nelson Theater Co. v. Nelson*, 216 Mass. 30, 102 N. E. 926, relied on by the plaintiff, it was not questioned that the lease had been assigned.

[4, 5] Even if the plaintiff's lease was executed by one who held a title to the entire building, the lease to Hewitt was broken by his failure to pay the rent according to its terms, and the defendant had the right to enter for breach of this covenant. See *Liggett Co. v. Wilson*, 224 Mass. 456, 113 N. E. 184,

L. R. A. 1917A, 205. In answer to this the plaintiff contends that there was a legal surrender of the Hewitt lease to the defendant. Without intimating that there was evidence to support this contention (see Rev. Laws, c. 127, § 3; *Smith v. Abbott*, 221 Mass. 326, 109 N. E. 190), it is sufficient to say that, as the plaintiff has not shown that he was possessed of an estate greater than a tenancy at will, he cannot prevail. It also is unnecessary to consider whether there was any evidence of an eviction by the defendant. See *Aguglia v. Cavicchia*, 229 Mass. 263, 118 N. E. 283, L. R. A. 1918C, 59.

As there was no evidence to warrant the submission of the case to the jury, judgment is to be entered for the defendant.

So ordered.

(233 Mass. 85)

MANUFACTURERS' NAT. BANK v. SIMON MFG. CO. et al. GOLDSTEIN v. SAME. MASSACHUSETTS TRUST CO. v. SAME.

(Supreme Judicial Court of Massachusetts. Suffolk. May 21, 1919.)

1. APPEAL AND ERROR §266(1)—QUESTIONS REVIEWABLE — LACK OF EXCEPTIONS TO MASTER'S REPORT.

Where objections were severally filed by defendants in equity suits to the master's report, but no exceptions to the report were filed, the only question for the Supreme Judicial Court is whether the final decrees were warranted on the pleadings and findings of the master.

2. APPEAL AND ERROR §694(1)—REVIEW—ABSENCE OF EVIDENCE FROM REPORT.

Where the evidence is not reported, the facts found by the master must be taken as true for the purposes of appeals.

3. FRAUDULENT CONVEYANCES §301(2) — TRANSFER BY CORPORATION — SUFFICIENCY OF EVIDENCE.

In suit by creditors of manufacturing company to reach property and assets transferred to a coat company, facts found by master, including noncompliance with St. 1903, c. 415, held to warrant finding transfer of property was a positive actual fraud on creditors of manufacturing company, in which coat company participated, having been effected by the holder of 499 of the 500 shares of the manufacturing company's stock when he was in financial difficulties.

4. FRAUDULENT CONVEYANCES §183(1) — SUIT TO SET ASIDE—CREDIT FOR AMOUNTS PAID.

Where the acts of a coat company, in taking over the property and assets of a manufacturing company when its chief stockholder was in financial difficulties, were not merely a constructive fraud on creditors of the manufacturing company, but amounted to a positive actual fraud, in suit to reach the assets transferred, the coat company cannot deduct from the assets received by it amounts paid to mer-

chandise creditors of the manufacturing company.

5. BILLS AND NOTES ¶522—NOTICE OF DIVERSION OF PROCEEDS—SUFFICIENCY OF EVIDENCE.

In suit to reach property and assets of manufacturing company transferred to a coat company when chief stockholder of the manufacturing company was in financial difficulties, and to recover against coat company on notes executed by manufacturing company, evidence held to warrant master's conclusion that a trust company which discounted notes had no reason to believe proceeds were not to be used for benefit of manufacturing company, but were to be diverted to individual business of chief stockholder.

6. BILLS AND NOTES ¶380—DISCOUNT IN GOOD FAITH—DIVERSION OF PROCEEDS.

Where a trust company, which discounted notes of a company, was not chargeable with notice that the proceeds were not to be used for the benefit of the company, but were to be diverted to the business of its chief stockholder, the rights of the trust company were not affected by any such fraudulent diversion or appropriation of the proceeds.

Appeal from Superior Court, Suffolk County; William Cushing Wait, Judge.

Suits by the Manufacturers' National Bank, by Benjamin Goldstein, and by the Massachusetts Trust Company against the Simon Manufacturing Company and others. From decrees for plaintiffs, defendants appeal. Decree in each case ordered affirmed.

The findings of the master in relation to the notes discounted by plaintiff Massachusetts Trust Company were as follows:

As in the case of the Manufacturers' National Bank, the dealings of the Simon Manufacturing Company with the Massachusetts Trust Company were all conducted by Simon, and related solely to the discount of notes as hereinafter set forth. He was well known to the officers of the trust company, having a personal account there (although the Simon Manufacturing Company did not), being a frequent caller, and discussing with them the business of the Simon Manufacturing Company, which he represented as highly successful, and from which they understood he was getting large returns.

In July, 1914, the trust company had discounted for him personally two notes for \$7,500 each, in the usual course of business, and with reason to suppose that the proceeds were to be used by him in certain real estate operations of his own. These notes were paid by Simon at maturity. They were both made by Simon and his wife, Estelle, jointly, to the order of the trust company, and bore the indorsement of the Simon Manufacturing Company by Simon as its treasurer, and by Simon individually.

In addition to these two notes the trust company had during the year discounted other notes for Simon, payable to the trust company, and bearing the signature of the Simon Manufacturing Company. On some of these notes Simon

alone was the maker and the Simon Manufacturing Company the indorser, while on others the situation was reversed; the trust company regarding Simon and the Simon Manufacturing Company as practically identical in view of his complete ownership and control of the capital stock and business of the corporation. As to whether or not the proceeds of such discounts were used for the benefit of the Simon Manufacturing Company, as distinguished from Simon, the trust company had no knowledge.

At the request of counsel for the Simon Manufacturing Company I find (if material) that on November 6, 1914, the trust company discounted for the C. D. Wright Company three notes of that date for \$1,000 each, made by the Wright Company to the order of the trust company on two, three, and four months respectively, and all bearing Simon's individual indorsement and that of the Simon Manufacturing Company by him as its treasurer. The same not being paid at maturity, the trust company thereupon applied \$3,000 from Simon's personal account to the payment of these three notes.

On or about December 28, 1914, the trust company laid down the rule that thereafter on all notes offered for discount where a corporation was involved it must appear as maker, and notified Simon to that effect. This policy was adopted to avoid all question as to the liability of a corporation appearing merely as an indorser on a note payable to a third person, and the possibility of such indorsement being held to be ultra vires on its part. Accordingly, on the 28th of December, 1914, Simon being at the time the treasurer of the Simon Manufacturing Company, offered for discount a note of that date for \$5,000 on three months to the order of the trust company, signed in the name of the Simon Manufacturing Company by Simon as its treasurer, and indorsed by him individually. The trust company discounted this note, and credited the proceeds to Simon's personal account, but as they supposed for the use of the company, in view of Simon's statements that the company was driven day and night manufacturing sheepskin coats for the troops under contracts with the English government, and to meet large home demands in the West.

On January 25, 1915, Simon, being at the time the treasurer of the Simon Manufacturing Company, offered for discount the two notes for \$2,500 each of that date, payable to the order of the trust company, signed in the name of the Simon Manufacturing Company by Simon as its treasurer, and indorsed by him individually, copies of which are annexed to said bill of complaint marked "A" and "B." Neither of these notes bore interest. When offering them Simon stated that the proceeds of these two notes were to be used to take up options which he had with large dealers in sheep skins for the purchase of material to be used in filling the contracts aforesaid, and that if he failed to get the skins he would suffer a large loss. The trust company thereupon got from Simon a written statement of the financial condition of the Simon Manufacturing Company as of January 1, 1915, signed in the name of the company by Simon as its treasurer, from which it appeared that the assets of the company, consisting of

merchandise, fixtures, accounts and notes receivable, cash, etc., aggregated on that date \$69,264.18, while its liabilities, outside of its capital stock, were \$19,264.18. In addition to this statement the trust company made an independent investigation of the standing of the company, and, finding everything favorable, discounted the two notes, crediting the proceeds to Simon's personal account, but as they supposed for the use of the Simon Manufacturing Company.

March 29, 1915, when the \$5,000 note of December 28, 1914, came due, Simon wanted it renewed, and offered to give in place of it a new note for \$5,000 on demand, secured by collateral. To this the trust company assented, retained the old note, and took from Simon either in substitution thereof or as security therefor a new note for \$5,000 of that date, payable to the trust company on demand with interest, signed in the name of the Simon Manufacturing Company by Simon as its treasurer, indorsed by him individually, waiving demand, notice, and protest, and secured by assignments of a real estate mortgage and of certain choses in action. This is the note a copy of which, marked "C," is annexed to the bill of complaint of the Massachusetts Trust Company. The officers of the trust company understood at the time that the above collateral was Simon's individual property, supposed he was investing in real estate, but did not know, and had no reason to suspect, that the proceeds of the discount of any of the three notes referred to in their bill of complaint were being used by him in real estate or building operations on his own account (if such was the fact). So far as appears no actual demand for the payment of this \$5,000 note was ever made.

I find that in discounting the three notes aforesaid the trust company relied on the financial responsibility of the Simon Manufacturing company, believing it to be in sound financial condition, which was the fact, its assets being largely in excess of its liabilities. Neither of the above notes "A" and "B" being paid at maturity the same were duly protested, and notice thereof given to the indorsers. No payments have been made on any of these three notes, the trust company has realized nothing from the collateral given to secure the \$5,000 note, of March 29, 1915, the same proving worthless, and so far as appears there are no offsets to the liability (\$10,000 and interest) of the Simon Manufacturing Company on said three notes, nor any defense other than the general claim set up by the company (which was wholly owned and controlled by Simon and his wife, the respondent Estelle Simon, as hereinbefore noted) that it is not liable thereon, owing to the fact (if it be a fact) that the proceeds of said discounts were applied by Simon, not to the uses of the corporation, but to his individual business; that as treasurer he had no right to use the name of the corporation on negotiable paper for any such purpose; and that in doing so he exceeded the authority conferred upon him by the by-laws and votes of the corporation hereinbefore referred to, wherefore the corporation is not bound by his said act. If under the circumstances of this case this defense is open to this respondent, I find that the Massachusetts Trust Company had no knowledge of any of the facts on which such

defense is based. I further find that these notes (and the originals of which they were renewals) were all ordinary commercial paper, with nothing in their appearance or in the circumstances surrounding their execution and negotiation to put the trust company officials on inquiry, or cause them to believe or suspect that the Simon Manufacturing Company appeared thereon as an accommodation maker (as claimed); that the proceeds of these notes were being diverted from the corporation by Simon (if such was the fact); that he intended so to use them; or that his use of the name of the corporation in connection therewith as above was unauthorized.

Samuel Sigilman, of Boston, for appellants.

Wm. Hirsh, of Boston, for appellees Manufacturers' Nat. Bank and Massachusetts Trust Co.

Lewis Marks, of Boston, for appellee Goldstein.

CROSBY, J. [1] These are suits in equity by which the plaintiffs seek to reach and apply property alleged to have been conveyed by the Simon Manufacturing Company to the Simon Coat Company, in fraud of the creditors of the former. The first and third cases were referred to a master. The second case was heard by a judge of the superior court, who found that the Simon Manufacturing Company owed the plaintiff \$4,961.67; it was agreed by the parties in that suit that the question of the fraudulent transfer to the Simon Coat Company should be governed by the decision of a similar issue in the first and third suits. While objections were severally filed by the defendants in the first and third suits to the master's report, no exceptions to the report were filed, so that the only question is, are the final decrees warranted on the pleadings and findings of the master. *Whitworth v. Lowell*, 178 Mass. 43, 59 N. E. 790; *Huntress v. Allen*, 195 Mass. 226, 80 N. E. 949, 122 Am. St. Rep. 243; *Lipsky v. Heller*, 199 Mass. 310, 85 N. E. 453.

[2] The evidence not being reported the facts found by the master must be taken as true for the purposes of these cases. *East Tennessee Land Co. v. Leeson*, 183 Mass. 37, 66 N. E. 427.

The master found that the Simon Manufacturing Company was organized in 1909, and thereafter engaged in the business of making sheepskin and leather-lined coats; that one Isaac Simon was the president, treasurer, a director, and principal stockholder of the company; that the capital stock of \$50,000 was divided into 500 shares, of which Simon originally held 449, and afterward acquired 50 more, thereby owning all the stock except 1 share; that under the by-laws the treasurer was empowered to make notes, drafts, checks and other instruments on behalf of the company for any legitimate purpose to aid and prosecute the interests

of the corporation; that by vote of the directors passed in 1911 the treasurer was empowered to purchase merchandise, to deposit the money, checks and securities of the company in some bank or trust company by him to be chosen, to borrow money on behalf of the corporation, and to sign checks, notes and drafts; that a similar vote was passed each year thereafter up to and including 1914.

He also found that in the spring of 1915 Simon (owing to certain real estate transactions) found himself in financial difficulties, by reason of which his individual property and that of the corporation were attached; that "in an attempt to relieve the situation, * * * and at the same time put the property of the Simon Manufacturing Company out of the reach of the plaintiff banks in case it should turn out that their claims against the Simon Manufacturing Company on the several notes * * * referred to in the bills of complaint were valid, Simon organized the respondent Simon Coat Company on October 4, 1915, * * * to succeed to the business of the Simon Manufacturing Company"; that "the new company simply took possession of the assets and plant of the old, and continued in the same business, in the same place, and with the same machinery, fixtures, and merchandise, as before; for these assets the Simon Coat Company paid nothing; that according to an inventory prepared by Simon at the time the Simon Coat Company was formed they represented a total value of \$18,095.54"; that there was no compliance with St. 1903, c. 415, and the effect of the above transaction was to leave the Simon Manufacturing Company with no property which could be attached or taken on execution in an action at law; that the company refused to produce its books at the hearing, although duly demanded, and their absence was not satisfactorily accounted for; and that the coat company in order to maintain its credit paid all the creditors of the manufacturing company out of the accounts and notes receivable of the latter.

The master found as a conclusion from the evidence before him, that "the Simon Coat Company is nothing but the Simon Manufacturing Company operating under another name, and the conveyance to and the taking over by the Simon Coat Company of the assets of the Simon Manufacturing Company in the manner and under the circumstances hereinbefore described was a fraud on the creditors of the Simon Manufacturing Company"; and that, "if material, there is no property now in the possession of the Simon Coat Company which can be positively identified as formerly belonging to the Simon Manufacturing Company."

A judge of the superior court, upon a hearing for the entry of final decrees in the cases, found, upon the facts found by the

master, that the transfer to the Simon Coat Company amounted to a fraud upon the creditors of the manufacturing company, and that the coat company was liable to the plaintiffs; and that because of active and intentional fraud on the part of the coat company it was not entitled as against the plaintiffs to an allowance for amounts paid by it to the merchandise creditors of the manufacturing company.

[3] We are of opinion that upon the facts found by the master a finding was well warranted that the transfer of the property and assets to the coat company was a fraud upon the creditors of the manufacturing company, and that the former is liable to these plaintiffs.

[4] We are also of opinion that the facts found by the master warranted the further finding by the court that the acts of the coat company were not merely a constructive fraud upon the creditors of the manufacturing company, but that they amounted to a positive, actual fraud in which the coat company participated. Under these circumstances the latter is not entitled to be allowed to deduct from the assets received by it the amounts paid to the merchandise creditors. The coat company having entered into an unlawful scheme to delay and defraud the creditors of the manufacturing company in the collection of their debts, a court of equity will not relieve it from the consequences of its fraudulent conduct. *Wall v. Provident Institution for Savings*, 3 Allen, 96; *Lawton v. Estes*, 187 Mass. 181, 45 N. E. 90, 57 Am. St. Rep. 450; *Fiske v. Fiske*, 173 Mass. 413, 53 N. E. 916; *Adams v. Young*, 200 Mass. 588, 592, 86 N. E. 942. Manifestly the amounts so paid to the merchandise creditors were so paid in pursuance of a dishonest purpose to defraud the other creditors of the Simon Manufacturing Company and to maintain the credit of the coat company; and as the coat company actively participated in the fraud, it cannot be allowed for such payments. *Lynde v. McGregor*, 13 Allen, 172, 181; *Lamb v. McIntire*, 183 Mass. 367, 370, 67 N. E. 320; *Bolster v. Graves*, 189 Mass. 301, 307, 75 N. E. 714; *Kennedy v. Welch*, 196 Mass. 592, 595, 83 N. E. 11; *Rubenstein v. Lottow*, 220 Mass. 156, 169, 107 N. E. 718; *Lobstein v. Lehn*, 120 Ill. 549, 12 N. E. 68; *Biggins v. Lambert*, 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238; *Musselman v. Kent*, 33 Ind. 452; *Blair v. Smith*, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; *Thompson v. Bickford*, 19 Minn. 17 (Gil. 1); *Allen v. Berry*, 50 Mo. 90; *Loos v. Wilkinson*, 113 N. Y. 485, 21 N. E. 392, 4 L. R. A. 353, 10 Am. St. Rep. 495; *Jackson v. Ludeling*, 99 U. S. 513, 25 L. Ed. 460; *Pritchett v. Jones*, 87 Ala. 317, 6 South. 75; *McCaskey v. Graff*, 23 Pa. 321, 62 Am. Dec. 336; *Sullivan v. Tinker*, 140 Pa. 35, 21 Atl. 247; *Gilbert v. Hoffman*, 2 Watts (Pa.)

66, 26 Am. Dec. 103; *Henderson v. Hunton*, 26 Grat. (Va.) 926; *Stovall v. Farmers' & Merchants' Bank of Memphis*, 8 Smedes & M. (Miss.) 306, 47 Am. Dec. 85.

[5, 6] It is the contention of the Simon Coat Company that it is not liable on the three notes discounted by the Massachusetts Trust Company, because the proceeds of those notes were applied by Isaac Simon to his individual business. We are unable to agree with this contention. In the first place it is not found by the master that the proceeds of the notes were so applied; although if that fact had appeared, and if it be assumed that that defense is open to this defendant, the plaintiff still would be entitled to recover in view of the finding of the master that "these notes * * * were all ordinary commercial paper, with nothing in their appearance or circumstances surrounding their execution and negotiation to put the trust company officials on inquiry, or cause them to believe or suspect that the Simon Manufacturing Company appeared thereon as an accommodation maker (as claimed); that the proceeds of these notes were being diverted from the corporation by Simon (if such was the fact); that he intended so to use them; or that his use of the name of the corporation in connection therewith as above was unauthorized."

The notes were discounted by the bank in good faith in the usual course of business at the request of Simon, acting on behalf of the company as its treasurer and in accordance with its by-laws. The circumstance that the proceeds of the notes were credited to the individual account of Simon, and the other findings, fall far short of requiring a finding that this plaintiff is to be charged with knowledge that the proceeds were applied to Simon's individual business. In view of the findings of the master and of the other findings recited in the report, the master was warranted in the conclusion that the trust company had no reason to believe that the proceeds were not to be used for the benefit of the manufacturing company. Under these circumstances the rights of this plaintiff would not be affected if Simon, after receiving the proceeds of the notes, fraudulently appropriated them to his own use. *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 333, 1 N. E. 282, 52 Am. Rep. 710; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698; *Indian Head National Bank v. Clarke*, 166 Mass. 27, 43 N. E. 912; *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45; *Broadway National Bank of Chelsea v. Heffernan*, 220 Mass. 247, 107 N. E. 921.

The decree for the plaintiff in each case must be affirmed with costs.

So ordered.

(233 Mass. 50)

WINCHESTER ROCK & BRICK CO. v. MURDOUGH.

(Supreme Judicial Court of Massachusetts. Suffolk. May 21, 1919.)

1. APPEAL AND ERROR \Leftrightarrow 987(3), 1009(1) — REVIEW—APPEAL IN EQUITY.

On an appeal in equity, it is the duty of the Supreme Judicial Court to examine the evidence and decide the case according to its judgment, giving due weight to the findings made; but the finding of the trial court will not be reversed, unless plainly wrong.

2. LIENS \Leftrightarrow 19—MORTGAGES \Leftrightarrow 360—PLEDGES \Leftrightarrow 56(5)—SALE OF SECURITY.

A mortgagee, lienor, or holder of collateral, in making sale of security under a power, is bound to exercise good faith and reasonable diligence in an effort to secure a fair price for the property, and thus not only to assure his own rights, but also to protect the interests of subsidiary or junior claims.

3. PLEDGES \Leftrightarrow 56(5)—PLEDGE OF BONDS—SALE—WANT OF GOOD FAITH.

The facts that bonds pledged as collateral were sold at the pledgee's office, instead of through stockbrokers, and that there was no newspaper advertisement of the sale, the pledgor having been given due notice, and that there was only one person present other than the pledgee and the auctioneer, in connection with other circumstances, held not sufficient to require a finding of want of good faith or reasonable prudence in conducting the sale.

4. PLEDGES \Leftrightarrow 56(5)—FORECLOSURE SALE—INADEQUACY OF PRICE.

Mere inadequacy of price is not enough to set aside a sale to foreclose a pledge of bonds as collateral for a note.

Exceptions from Superior Court, Suffolk County; William Cushing Wait, Judge.

Suit in equity by the Winchester Rock & Brick Company against Albert B. Murdough. From decree dismissing the bill, plaintiff appealed, and, the justice of the superior court having refused to grant defendant's motion for dismissal of the appeal, defendant excepts. Decree affirmed; defendant's exceptions being waived.

Arthur Berenson, of Boston, for plaintiff.
Curtin, Poole & Allen and Asa S. Allen, all of Boston, for defendant.

RUGG, C. J. This is a suit in equity whereby the plaintiff seeks to set aside the sale of certain bonds formerly held by the defendant as collateral security for a note of the plaintiff and to redeem the bonds. The defendant owned a note of the plaintiff for \$1,500, which fell due on or about June 25, 1915. He held as collateral security for the note bonds of the plaintiff of the face value of \$1,500, which were secured by a mortgage

indenture upon real estate. According to the terms of the note, the defendant was authorized to sell the bonds "either at public or private sale, or otherwise," at his option on the nonpayment of the note, and to purchase at any such sale.

On or about April 10, 1915, more than two months before the maturity of the defendants' note, the plaintiff having failed to pay coupons upon its bonds, the trustees under the indenture took possession of the real estate and other property of the plaintiff and conducted its business until January 5, 1918, and on October 6, 1915, the defendant brought suit on his note, and the defendant therein, the plaintiff here, although entering an appearance made no contest as to its liability and the defendant recovered judgment accordingly. The bonds held as collateral were sold by the defendant at public auction on July 31, 1916, and bought by him for \$15. The plaintiff contends that this sale ought to be set aside because it alleges that it was a mere device and pretense and not conducted in good faith and hence not valid.

The case was heard by a judge of the superior court, who found that the sale was made in good faith without intent to take advantage, after careful and ample notice to the plaintiff of the time and place of sale, with due solemnity by a licensed auctioneer, and in the exercise of reasonable care. A decree was entered dismissing the bill.

[1,2] The familiar rule is that upon an appeal in equity it is the duty of this court to examine the evidence and decide the case according to their judgment, giving due weight to the findings made, but that, since the trial court has had the advantage of seeing the witnesses and weighing their testimony in the light of their appearance, his finding will not be reversed unless plainly wrong. *Lindsey v. Bird*, 193 Mass. 200, 79 N. E. 263. A mortgagee, lienor or holder of collateral in making sale of security under a power is bound to exercise good faith and reasonable diligence in an effort to secure a fair price for the property and thus not only to assure his own rights but also to protect the interests of those whose claims are subsidiary or junior to his own. *Bon v. Graves*, 216 Mass. 440, 446, 103 N. E. 1023.

[3,4] There was evidence tending to show that demand was made for the payment of the note before its maturity and the defendant was advised by the plaintiff that it would be unable to take care of the note by reason

of the foreclosure by the trustees under the mortgage. There was some correspondence between the parties at about the time of the action and judgment on the note. The collateral was not sold until more than a year after the maturity of the note. On June 1, 1916, written notice was given to the plaintiff of the time and place of the sale which was not to take place until July 31, following, substantially two months later. No reply was made to this notice and no effort was made by the plaintiff to protect its interests. The defendant endeavored prior to the sale, through two brokers engaged partly at least in dealing in such securities, to get an offer or quotation on the bonds, but without success. He gave notice of the sale to several people who he thought might be interested, including one of the trustees in possession of the plaintiff's property. Whatever may have been the ultimate value of the property secured by the bonds, there is nothing to show that there was any general market for the bonds. The property was in the hands of trustees under a mortgage indenture. The value of the property and its prospects of future success in the nature of things were extremely uncertain. The facts that the bonds were sold at the defendant's office in a town near Boston instead of through stockbrokers, and that there was no newspaper advertisement of the sale, and that there was only one person present other than the defendant and the auctioneer, in connection with all the other circumstances, are not enough to require a finding of want of good faith or of reasonable prudence in conducting the sale. Mere inadequacy of price is not enough to set aside a foreclosure sale. The place of sale was not specified in the agreement and that it was not in Boston cannot be said of itself to be conclusive of bad faith or want of prudence. The evidence need not be recited in further detail. The findings of the judge are supported by the testimony and are not plainly wrong. The case is governed in principle by *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214; *Guinzburg v. Downs Co.*, 165 Mass. 467, 43 N. E. 195, 52 Am. St. Rep. 525; *Farmers' National Bank v. Venner*, 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690.

In view of the conclusion here reached, the defendant does not insist upon his exceptions, but waives them.

Decree affirmed with costs of appeal.

Defendant's exceptions waived.

(233 Mass. 74)

NATIONAL SURETY CO. v. NAZZARO.

NAZZARO v. NATIONAL SURETY CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 21, 1919.)1. BAIL \Leftrightarrow 55—RECOGNIZANCES \Leftrightarrow 1—"BAIL BOND."

In criminal cases, a "bail bond" is a contract under seal, executed by accused, and from its nature requiring sureties or bail, to whose custody he is committed, while a "recognizance" is an obligation of record, entered into before some court or magistrate authorized to take it, with condition to do some particular act, and a prisoner is often allowed so to obligate himself to answer to the charge.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bail Bond; Recognizance.]

2. INDEMNITY \Leftrightarrow 15(9)—OBLIGATION TO EXECUTE BAIL BOND—FURNISHING RECOGNIZANCE

By providing a recognizance to release one accused of an offense, a surety company did not as a matter of law comply with its express obligation, under its contract of indemnity with defendant, to execute a "bail bond," thereby entitling it to recover on defendant's contract of indemnity; accused having defaulted, and surety company having discharged liability of person who had recognized for him.

3. PRINCIPAL AND AGENT \Leftrightarrow 124(1)—SCOPE OF AUTHORITY—QUESTION FOR JURY.

Where there was conflicting evidence, it was for the jury to say whether a third person was the agent of defendant, authorized to bind him in relation to plaintiff surety company by substituting a recognizance for a bail bond, as required by defendant's contract to indemnify the surety company for becoming surety on a bail bond in behalf of one accused of crime, and by substituting another surety, the recognizer, for the surety company.

Exceptions from Superior Court, Suffolk County; John D. McLaughlin, Judge.

Actions by the National Surety Company against Michael B. Nazzaro, and by Michael B. Nazzaro against the National Surety Company. Verdicts were directed for the Surety Company in each case, and Nazzaro excepts. Exceptions sustained.

J. E. McConnell, of Boston, for National Surety Co.

John E. Crowley, of Boston, for Nazzaro.

DE COUROY, J. These actions, based on an indemnity contract, arose out of the following transaction: Nazzaro applied at its Boston agency to have the surety company become surety on a bail bond to the state of Connecticut, in behalf of one Frank McKenna, who was under arrest in that state. He paid the premium, executed a contract of in-

demnity to protect the surety company against loss, and deposited with it as collateral security the sum of \$600. The agent gave to Nazzaro a letter introducing one Blume to Fitch D. Crandall, the company's agent at New London; the letter stating that Blume was to arrange "details with you [Crandall] in connection with the execution of a bail bond in behalf of Frank McKenna."

The New York office of the surety company forwarded to Crandall a bail bond for \$1,000, on which the company was surety. With Blume and an attorney employed by Blume as counsel for McKenna, Crandall went to the courthouse and presented the bail bond. The clerk of the court refused to accept it, but said he would accept the personal recognizance of Crandall. After some telephone communication with the company's New York office, Crandall recognized for the prisoner's appearance at court, and later the company executed a bond to indemnify him. McKenna was afterwards defaulted, and Crandall's liability on the recognizance was discharged by the check of the surety company for \$1,000 paid to the prosecuting attorney.

The action of the National Surety Company was brought to recover the difference between the \$600 deposited by Nazzaro and the \$1,000 it paid in discharge of Crandall's liability, together with its counsel fees. Nazzaro seeks by his action to get back the \$600 deposited by him as collateral security. The instrument on which the surety company seeks to prevail is a comprehensive, carefully framed indemnity contract under seal, presumably prepared by the company. It plainly contemplates the signing of a "bail bond" by the company, as surety. It recites, "Whereas, the company signed and executed said bond as such surety upon condition of the execution and delivery hereof. * * * " Nazzaro's obligation is expressly confined to indemnifying and saving harmless the company from its liability "upon said instrument," or in connection therewith. As matter of fact the bail bond which the company signed was not accepted, and never became operative. The release of McKenna was not obtained on a bail bond, but on a recognizance. And the surety on the recognizance was not the surety company but Fitch D. Crandall.

[1] The words "recognizance" and "bail" when used in statutes are often construed as interchangeable; and speaking generally like rules of law are applicable to both these kinds of obligation. See *Com. v. Gove*, 151 Mass. 392, 24 N. E. 211; *Lovejoy v. Isbell*, 70 Conn. 557, 40 Atl. 531; *In re Brown*, 35 Minn. 307, 29 N. W. 181; *Swan v. United States*, 3 Wyo. 151, 9 Pac. 931. Nevertheless a bail bond and a recognizance are intrinsically different. In criminal cases a bail bond is a contract under seal, executed

by the accused, and from its nature requiring sureties or bail to whose custody he is committed. A recognizance is an obligation of record, entered into before some court or magistrate authorized to take it, with condition to do some particular act; and the prisoner is often allowed to obligate himself to answer to the charge. 6 C. J. 821, and notes; *Crane v. Keating*, 13 Pick. 339; *Com. v. McNeill*, 19 Pick. 127; *Com. v. Canada*, 13 Pick. 86; *Warner v. Howard*, 121 Mass. 82; R. L. c. 217, §§ 65, 66, 77; St. 1912, c. 330; *People v. Kane*, 4 Denio (N. Y.) 530; *State v. Door*, 59 W. Va. 188, 53 S. E. 120, 5 L. R. A. (N. S.) 402, 115 Am. St. Rep. 915, 8 Ann. Cas. 1016; *State v. Wilson*, 265 Mo. 1, 175 S. W. 603. The rights and liabilities of the sureties in a bail bond and of sureties in a recognizance may be different. See *Merrill v. Prince*, 7 Mass. 396; *Johnson v. Randall*, 7 Mass. 340.

[2, 3] Without going further, we are of opinion that it could not be ruled as matter of law that by providing a recognizance to release McKenna the surety company had complied with its express obligation to execute a "bail bond," thereby entitling it to recover on Nazzaro's contract of indemnity. While apparently it is the practice in Massachusetts to use a recognizance, the law of Connecticut, where bail was to be given, was not introduced in evidence at the trial. See *Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N. E. 947, 128 Am. St. Rep. 434. And as there was conflicting evidence as to Blume's powers, it was for the jury to say whether he was the agent of Nazzaro, and was authorized to bind him by substituting a recognizance for a bail bond, and another surety for the surety company. In *Blard v. Washburn*, 10 Pick. 223, on which the surety company relies, the obscure agreement was construed as intended to indemnify both or either of the plaintiffs, according to the contingent event that both or either should become bail.

It follows that Nazzaro's exception in each case to the direction of a verdict for the surety company must be sustained; and it is
So ordered.

(233 Mass. 65)

JEWETT v. MAYOR, BOARD OF ALDERMEN, AND CLERK OF CITY OF MEDFORD.

(Supreme Judicial Court of Massachusetts. Middlesex. May 21, 1919.)

1. MUNICIPAL CORPORATIONS — 454 — STREETS — ASSESSMENT OF BETTERMENTS — LIMITATIONS.

Under St. 1917, c. 344, pt. 3, § 1, providing that betterments must be assessed against abutting property within two years after the pas-

age of an order laying out a street, the two-year limitation began to run when the order of layout was approved by the mayor.

2. MUNICIPAL CORPORATIONS — 451 — STREETS — BOARD OF ALDERMEN AS ASSESSING BODY — MAYOR'S VETO.

In view of prior legislation and the veto power of the mayor of a city, under Rev. Laws, c. 26, § 9, since power to lay out streets in the city of Medford under its charter (St. 1903, c. 345, § 21, as amended by Sp. St. 1915, c. 160), is in the board of aldermen, subject to the veto power of the mayor, the body of city officers charged with assessment of betterments from laying out of a street under the provision of the Betterment Act, is likewise the board of aldermen, subject to the mayor's veto.

Report from Supreme Judicial Court, Middlesex County.

Petition for certiorari by Elbridge K. Jewett against the Mayor, Board of Aldermen, and Clerk of the City of Medford. Writ ordered.

Frederick Manley Ives, of Boston, for petitioner.

A. Chesley York, City Sol., of Boston, for respondent City of Medford.

DE COURCY, J. [1] The petitioner is the owner of certain lots of land on Second street in Medford. On August 17, 1915, the board of aldermen passed an order laying out Second street under the Betterment Act, the order was approved by the mayor on August 19, 1915, and the street was accordingly laid out. On August 7, 1917, an order was passed by the board of aldermen adjudging that the abutting estates had received benefit and advantage from the laying out, and that said estates, among them the petitioner's lots, should be assessed certain amounts for the benefit. This order was presented to the Mayor for his approval on August 10, 1917, but he did not approve it and did not return it with his objections thereto within ten days thereafter. Under the provisions of St. 1917, c. 344, pt. 3, § 1, betterments must be assessed within two years after the passage of the order of layout, in order to be valid. *Hitchcock v. Aldermen of Springfield*, 121 Mass. 382. In the present case the two-year limitation began to run August 19, 1915, when the order of layout was approved by the mayor. *Quinn v. City of Cambridge*, 187 Mass. 507, 73 N. E. 661. If the order assessing betterments became fully effective on its passage by the board of aldermen (August 7, 1917), it came within the two years. But if the order was subject to the mayor's veto, it did not take effect until ten days after it was presented to him for approval (see *Doty v. Lyman*, 166 Mass. 318, 322, 44 N. E. 337), or on August 20, 1917, which is one day too late. Accordingly

the case turns upon whether the order assessing the betterment was subject to the veto of the mayor. If it was not, the assessment is valid. If it was, the assessment is invalid, and the petitioner is entitled to a writ of certiorari. *Hitchcock v. Springfield*, supra.

[2] Under the Betterment Act the board of city officers which is authorized to lay out ways therein is the body which is to determine whether any land receives a special benefit therefrom, and the value of such benefit, and to assess upon the same a proportional share of the cost of the laying out. The charter of the city of Medford vests the government "in a single officer, to be called the mayor, and in a legislative body, to be called the board of aldermen," and in a school committee. St. 1903, c. 345, § 2. Section 21 of that charter, as amended by Spec. St. 1915, c. 160, provides that—

"The board of aldermen, with the approval of the mayor, shall have authority to order the laying out, altering, relocating, discontinuing and making specific repairs in all streets, ways and highways in the said city, and to assess all damages therefor."

The words "with the approval of the mayor," were construed as meaning subject to the veto power of the mayor, when this court was considering a similar provision in the charter of the city of Waltham. *Doty v. Lyman*, 166 Mass. 318, 44 N. E. 337. It would seem to follow that as the power to lay out ways in Medford is in the board of aldermen subject to the veto power of the mayor, the body charged with the assessment of betterments under the provision of the Betterment Act above mentioned is likewise the board of aldermen, subject to the mayor's veto.

It is contended by the respondents that the words "with the approval of the mayor" were inserted in said section 21 in order to make the charter conform to R. L. c. 26, § 9, which provides that every order of a city council which involves the expenditure of money, or where concurrence of the board of aldermen and common council may be necessary, shall be presented to the mayor for approval. But the charter expressly provides for that in section 52:

"The general laws relating to the municipal indebtedness of cities, the general laws requiring the approval of the mayor to the doings of a city council or of either branch thereof, and relative to the exercise of the veto power by the mayor of a city, * * * shall have full force, application and effect in said city."

This interpretation of the Medford charter, giving to the mayor the right to veto a betterment assessment, is confirmed by the history of the Betterment Act, and is in harmony with the trend of recent legislation increasing the powers of the mayor. See *Galli-*

gan v. Leonard, 204 Mass. 202, 90 N. E. 583. Putting to one side the statutes specially applicable to the city of Boston, the first Betterment Act applying to cities which accepted it was St. 1868, c. 75. At that time the power to lay out streets in most cities was in a city council of two branches, the "mayor and aldermen" and the "common council"; and to that city council was given the power to assess betterments. The mayor then was the presiding officer over the board of aldermen, with a casting vote but no veto. See *Day v. Springfield*, 102 Mass. 310. When the betterment laws were consolidated in 1871 (St. 1871, c. 382) and the mayor and aldermen were constituted the board to assess betterments, the mayor still had a vote in the board, but no veto power. It was in 1876 that a general law was passed conferring a veto power on the mayor and depriving him of the right to vote with the aldermen. St. 1876, c. 193, now R. L. c. 26, §§ 10, 11. And the anomaly of calling the aldermen "mayor and aldermen," when the mayor's right to vote as an alderman had been taken away from him, was ended by St. 1882, c. 164, providing that in all laws relating to cities the words "mayor and aldermen" should be construed to mean board of aldermen. But there was no indication that the veto power was to be taken from the mayor.

In some of the later charters the extent of the veto is defined and extensive. See charter of Cambridge, St. 1891, c. 364, § 11. In the more recent ones providing for a single board, the "aldermen" are generally given power to lay out streets, assess damages, and except as otherwise provided, to act in matters relating to such layout subject to the approval of the mayor. This express power of veto seems to cover orders for betterment assessments. See, for examples, St. 1893, c. 361 (Waltham); St. 1897, c. 172 (Woburn); St. 1898, c. 302, §§ 15, 17 (Gloucester); St. 1899, c. 162 (Melrose); Id. c. 240, §§ 16, 17 (Somerville); St. 1900, c. 323, §§ 15, 17 (Gloucester); Id. c. 427 (Northampton); St. 1914, c. 609 (Westfield); Id. c. 680 (Attleboro); Id. c. 687 (Revere). And in the general act for the revision of city charters, St. 1915, c. 267, plans A and B, which provide for a city government by a mayor and single legislative body, make every order of the council subject to the veto of the mayor. Part 2, § 10; Part 3, § 8. In the light of this history, and of the veto power given to him specifically under section 21 of the Medford charter, and generally under R. L. c. 26, § 9, we do not think that the Legislature intended in the Betterment Act to exclude the mayor's veto.

The result is that the writ of certiorari must issue; and it is

So, ordered.

(233 Mass. 95)

McALLER v. GILLETTE et al.

(Supreme Judicial Court of Massachusetts.
Hampden. May 21, 1919.)1. MASTER AND SERVANT ¶278(3)—INJURY
TO SERVANT—NEGLIGENCE—SUFFICIENCY
OF EVIDENCE.

In an action for conscious suffering of plaintiff's intestate, injured while working on a pile driver in the employ of defendants' testator, evidence held insufficient to warrant finding that the accident was due to any negligence on the part of defendant's testator.

2. MASTER AND SERVANT ¶265(5)—INJURY
TO SERVANT—NEGLIGENCE—RES IPSA
LOQUITUR.

Where a servant, working about a pile driver, was injured when it started to pull up a "follower," so called, used to drive the pile deeper than the hammer would reach, and it came up suddenly and struck a crosspiece, and knocked the plank from under the servant's feet, so that he fell and struck his head on the pile, the accident was not one referable to the negligence of the employer, under the doctrine of *res ipsa loquitur*, which had no application to the facts.

Report from Superior Court, Hampden County; Christopher T. Callahan, Judge.

Action of tort by Christine McAller, administratrix, against Edgar L. Gillett and others, executors, for conscious suffering of plaintiff's intestate from personal injuries while in the employ of defendants' testator. Verdict was ordered for defendants, and the case was reported to the Supreme Judicial Court. Verdict ordered to stand.

Raymond A. Bidwell, of Springfield, for plaintiff.

Green & Bennett, of Holyoke, for defendants.

DE COURCY, J. The plaintiff's intestate, Archibald McAller, was injured while working on a pile driver. The only evidence introduced at the trial was that of declarations made by McAller to his family and attorney, between the time of his injury in May, 1912, and his death the following September. The description of the apparatus and the story of the accident are meager and incomplete. In its most favorable aspect the testimony tends to show the following facts:

[1] A pile driver had been set up over a pond of water ten or twelve feet deep, in order to drive piles for the foundation of a railroad bridge. There were two pieces of timber, one each side of, and at right angles with the face of, the pile driver; and on these, "across the face," was laid a plank on

which the intestate was set to work by Mr. Gillett, the defendants' testate. When a pile was driven as far as the hammer could drive it, a "follower" was used. This was a piece of timber about six feet long, on the bottom of which was a pintle or bolt, an inch in diameter and about five inches long. This bolt was dropped into a hole in the top of the pile, in order to keep the follower in its place while it was being used to drive with. When the pile was driven to the required depth a rope was attached to the follower, and it was pulled up.

It was the duty of McAller to guide the follower so that the bolt would feed into the hole in the top of the pile, and also to steady it there until the hammer drove the pile down so that "the earth or whatever came around the follower would keep it steady itself." It does not appear who fastened on the rope, or what McAller's duties were while the follower was being hoisted.

The intestate had been at work some hours when the accident happened. Presumably the pile driver was shifted after each pile was driven; and at the same time some one must have moved the plank on which he stood when at work. According to McAller's statement, as testified to by his attorney, a pile had been driven; then "they started to pull up the follower and it came up suddenly without any warning to him with a jerk, and that it jumped up on the upper end and struck a crosspiece that was across the front part of the pile driver frame. When it struck that, the foot of it bounded outward and struck the plank on which McAller was standing, knocking it out from under his feet and knocking him over in a somersault shape, so that he fell head first, and came in contact with the pile striking the right side of his head."

Assuming that there was evidence for the jury that the plaintiff's intestate used due care, and did not assume the risk, this meager record discloses no negligence on the part of the defendants' testator. It does not appear that the follower ever before came up "with a jerk," which might operate as a notice to the employer. No explanation was offered as to why it jumped out at this time. There was no evidence that the construction or arrangement of the derrick was such that the employer should apprehend such a complicated occurrence, beginning with the traveler striking "the crosspiece," tipping, and knocking the plank from under the intestate. In short the plaintiff failed to produce evidence which would warrant a jury in finding that the accident was due to either of the causes of action alleged in her declaration. *Ragolsky v. Nuremberg*, 211 Mass. 575, 98 N. E. 594.

[2] In the absence of any proof that the

movement of the follower was due to any defect or latent danger in the derrick or its appliances, the plaintiff invokes the doctrine of *res ipsa loquitur*. But we cannot say that the accident was one which in the ordinary experience of mankind would not have happened unless from negligence on the part of the employer, or that of others for whose negligence he was responsible. On the contrary, if we consider the inferences that properly might be drawn from the facts disclosed, the accident well may have been due to a careless starting of the engine, by applying the power suddenly and with too great force; or it is equally inferable that the rope was adjusted too far from the top of the follower, which would give it a tendency to tip outward when separated from the pile. These, and some other explanations that might be conjectured, would indicate that the accident was due to negligence on the part of a fellow-servant of McAller, for which the employer would not be liable. In any event it is plain that the doctrine of *res ipsa* is not applicable to the facts disclosed. *Trim v. Fore River Ship Building Co.*, 211 Mass. 593, 98 N. E. 591; *Cullalucca v. Plymouth Rubber Co.*, 217 Mass. 392, 104 N. E. 956.

The verdict for the defendants was ordered rightly; and in accordance with the report the entry must be:

Verdict to stand.

(233 Mass. 77)

DOOLEY v. McDONOUGH et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 21, 1919.)

1. APPEAL AND ERROR §83(4)—REVIEW—ASSUMPTION AS TO FINDING.

In vendor's action for installment of price, in view of general finding for seller, and his rulings in giving buyers' requests that, if their conduct in signing the agreement be construed as an offer to be conveyed to the seller, such offer was subject to withdrawal until accepted, etc., the Supreme Judicial Court must assume the court found the agreement was an offer proposed by the buyers, and that they selected the person who negotiated it as their agent to take offer to seller and receive his written acceptance.

2. VENDOR AND PURCHASER §44—ACCEPTANCE OF OFFER—EVIDENCE.

In seller's action to recover initial payment on purchase of realty, evidence held to warrant conclusion apparently reached by trial court that, when buyers attempted to revoke offer to buy, made by signing, at solicitation of a broker, a formal written agreement, such offer had been accepted by the seller and a binding contract completed.

3. VENDOR AND PURCHASER §80—TIME FOR PAYMENT OF INSTALLMENT.

In seller's action to recover initial payment on purchase of realty, evidence held to warrant finding that such payment, on installment, of \$100, was payable when seller executed formal written contract which had been signed by buyers, and delivered it to a broker acting as the agent of buyers for that purpose.

Report from Municipal Court of Boston, Appellate Division.

Action by James B. Dooley against Michael F. McDonough and wife to recover the initial payment under an alleged contract for the purchase of real estate. There was finding for plaintiff, and the case was reported to the appellate division of the municipal court of the city of Boston, which dismissed the report, and defendants appeal. Order dismissing report affirmed.

Defendants' second and third requests for rulings given by the trial court were as follows:

(2) If the conduct of the defendants in signing the alleged agreement be construed as an offer to be conveyed to the plaintiff, such offer was subject to withdrawal until accepted by the plaintiff.

(3) If the conduct of the defendants is construed as an offer to be conveyed to the plaintiff through the agent of the plaintiff, in whose hands the property in question had been placed for sale, a withdrawal of the defendants' offer is effectual if communicated to such agent's office, before acceptance by the plaintiff, and received by one properly in charge of such office.

The defendants had been shown the plaintiff's house twice by a real estate broker, the plaintiff's agent, one Fernandez. The next day, after he had last shown the house, said broker, with his wife, called at the defendants' house in the evening. The defendant Mrs. McDonough was at home when Mr. Fernandez called about 8:30 o'clock p. m. The defendant Mr. McDonough was absent, but returned about 11 o'clock. The agreement was prepared in duplicate in the defendants' home, and presented to the defendants for their signatures, after Mr. McDonough returned. Both Mr. and Mrs. McDonough signed the agreement in duplicate, said agreement being under seal, and left both copies in the hands of the said Fernandez. At that time, it did not bear the signature of the plaintiff, and there was evidence that the broker, Fernandez, did not have authority to sell the house for the specified price, namely, \$3,700, but did have authority to get a customer for a price of \$4,000, and if he could get an offer in writing for \$3,700, that would be considered by the plaintiff. There was evidence further tending to show that the agreements were signed and delivered to Fernandez for the purpose of bringing the same to Dooley

in accordance with Dooley's statement to Fernandez that if he could get an offer for \$3,700, he, Dooley, would consider it.

Fernandez drove to the defendants' house in his automobile and was accompanied by his wife on the evening in question, and she was present during the negotiations above described.

The next morning, the defendant, Mr. McDonough, telephoned to the broker's office. Mr. Fernandez was not in. His wife answered the telephone and Mr. McDonough delivered the following message, in substance, that he did not wish to go any farther with the transaction. Mr. Fernandez did not receive this message until after he had procured the plaintiff's signature to the agreement, which he procured in Boston between 9 and 10 o'clock the next morning at the plaintiff's office, where he left with the plaintiff one of the signed agreements and took the other to deliver to the defendants and get the \$100 deposit payment. Mr. Fernandez received from his wife the message of the defendants early in the afternoon, before delivering the agreement to McDonough. Witness Fernandez further testified as follows: "I saw Mr. and Mrs. McDonough sign these [agreements] and I witnessed them. I read it over. I had my copy and he had his. They were made in duplicate original. I went and had Mr. Dooley sign them in duplicate. The next day I was to go and get \$100 as per agreement. The next morning Mr. McDonough called me up and he wanted to put the thing off for a time and I told him I expected him to live up to his agreement."

When Mr. Fernandez left the defendants' house on the evening on which the latter signed the agreement, he was told to come in the evening of the next day for the deposit as Mr. McDonough would not be home until then, although his previous proposition was to return with the agreements in the event the plaintiff signed the same, on the next forenoon.

After the plaintiff signed the agreement, and after Mr. Fernandez had received Mr. McDonough's message, that he did not wish to proceed with the transaction, Mr. Fernandez delivered in person to the defendants the following letter from the attorneys of the plaintiff, dated March 29, 1918:

"Dear Sir and Madam: In behalf of Mr. James B. Dooley, with whom you have entered into an agreement to purchase his property No. 15 Shafter street, Dorchester, under agreement signed March 25th, we hereby make demand upon you for immediate payment of \$100.00 as called for under said agreement, upon receipt of which Mr. Dooley stands ready to deliver the duplicate original of said agreement.

"We are advised by Mr. Fernandez, the agent in the transaction, that when he sought to deliver this agreement to you, you put him off on one pretext and another and have delayed in making the deposit payment of \$100.00 called

for under the agreement. We also beg to now notify you that Mr. Dooley will hold you to the agreement and expect you on May 1st to carry through the balance of the provisions of same.

"This letter is brought to you by Mr. Fernandez himself, who has the duplicate original agreement signed by Mr. Dooley and who will again tender same to you, and he is authorized by Mr. Dooley to receive the deposit of \$100.00.

"[Signed] Swain, Carpenter & Nay."

The defendants refused to pay the \$100 or take the agreement tendered to them and this suit was brought to recover \$100, the amount alleged to be due as the first payment under the alleged agreement.

Swain, Carpenter & Nay, of Boston, for plaintiff.

John D. Graham, of Boston, for defendants.

DE COURCY, J. The defendants had been shown the plaintiff's house by one Fernandez, a real estate broker, who had been authorized by the plaintiff to sell it for \$4,000. On a subsequent Monday evening the broker called on the defendants and they made an offer of \$3,700 for the property, and signed in duplicate a formal written agreement to purchase at that price. The papers were delivered to Fernandez, and he was to receive the initial payment of \$100 on Tuesday evening if he could get the plaintiff to sign them.

Fernandez obtained the signature of the plaintiff to the agreements between 9 and 10 o'clock Tuesday forenoon, left one copy with him and took the other to deliver to the defendants. At some time that forenoon Mr. McDonough telephoned to the broker's office that he did not wish to go any further in the transaction; but Fernandez did not receive the message until the afternoon, some hours after he had procured the plaintiff's signature. The defendants later refused to take the agreement tendered to them, and this action was brought to recover the first payment of \$100. The judge of the municipal court found for the plaintiff, and his finding was sustained by the appellate division.

[1-3] In view of the judge's general finding and his rulings on request numbered 2 and 3, we must assume that he found, in effect, that the agreement was an offer proposed by the defendants, and that they selected Fernandez as their agent to take the offer to the plaintiff and receive his written acceptance. The facts stated in the report warrant the conclusion which the judge apparently reached, that when the defendants attempted to revoke their offer, it had been accepted, and that a binding contract had been completed in the manner intended by the parties. Nickerson v. Bridges, 216 Mass. 416, 420, 103 N. E. 939; Brauer v. Shaw, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387; Boston & Maine R. R. v. Bartlett, 3 Cush. 224. See Codman v. Deland, 231 Mass. 344, 121

N. E. 14. There was also warrant for the finding that the installment of \$100 was payable when the plaintiff executed the contract and delivered it to Fernandez, acting as the agent of the defendants for that purpose. It is not found that the payment was a condition precedent to the completion of the contract. *Mass. Biographical Society v. Russell*, 229 Mass. 524, 118 N. E. 662.

No error appearing on the record the entry must be:

Order dismissing report affirmed.

(233 Mass. 126)

SCHEMA v. BACIGALALUPO.

(Supreme Judicial Court of Massachusetts. Essex. May 23, 1919.)

LANDLORD AND TENANT §169(6)—INJURIES TO TENANT—RESPONSIBILITY OF LESSOR — SUFFICIENCY OF EVIDENCE.

In action against lessor for injuries to tenant in common passageway, evidence *held* insufficient to show that lessor owed tenant any duty; there being nothing from which it could be inferred lessor was negligent or responsible for condition of passageway, and it not appearing from whom the tenant hired his tenement, whether from the lessor or a sublessor.

Exceptions from Superior Court, Essex County; Charles U. Bell, Judge.

Action for personal injuries by Michael Schena against Madelina Bacigalalupo, wherein Domenica A. Schena, administrator was substituted as plaintiff. There was finding for plaintiff, and defendant excepts. Exceptions sustained.

William J. McDonald, of Haverhill, for plaintiff.

David H. Fulton, of Boston, for defendant.

CARROLL, J. The plaintiff in this action seeks to recover damages for personal injuries to his intestate, Michael Schena, who, he contends, was injured by reason of a defect in a common passageway on the defendant's premises. The jury found for the plaintiff.

There was evidence that the defendant was the owner of a building in which Michael Schena was a tenant; that the floor of the passageway between the tenant's room and the room of one Bocuco was defective; and that by reason of this defect the plaintiff's intestate was injured. There also was testimony showing that adjoining premises were being repaired and some material for this work was taken from the defendant's building; but the record does not show how long the defect complained of existed, nor who caused it; and there is nothing in the evidence from which it could be inferred that the defendant was negligent, or responsible for the condition of the passageway. It does not appear from whom the plaintiff's intestate hired his tenement—he may have been the tenant of the defendant or of Bocuco; nor whether Bocuco hired the whole or only a part of the building; nor what the terms of the lease were, Bocuco may have been the lessee under a written lease, and the passageway may have been a part of the leased premises; at least there is nothing in the evidence to contradict this assumption. On the evidence before us, there is nothing to show that the defendant owed the plaintiff any duty. The defendant's motion for a directed verdict should have been granted.

Exceptions sustained.

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(188 Ind. 621)

ETNA TRUST & SAVINGS CO. v. NACK-
ENHORST et al. (No. 23083.)*

(Supreme Court of Indiana. May 27, 1919.)

Appeal from Superior Court, Marion County;
W. W. Thornton, Judge.

Separate Opinion.

For majority opinion, see 122 N. E. 421.

W. H. Watson and Holtzman & Coleman,
all of Indianapolis, for appellant.Walker & Hollett and Major A. Downing,
all of Indianapolis, for appellees.

HARVEY, J. I agree with the prevailing opinion wherein it holds that the superior court erred in requiring that out of the assessment roll should be paid two claims for materials purchased by the contractor for use in the construction of the sewer in question.

It has been expressly held in the decisions cited that claims for materials and labor are not liens upon or chargeable against the fund raised by the assessment. Such claimants must seek payment from the contractor or his surety.

The superior court was doubly wrong in allowing payment out of the assessments to the surety of an amount the surety had paid out in a pretended purchase of one of these material accounts, because: First, such account was not chargeable against the assessment roll; and, second, the surety was liable therefor directly, and had no right as against others having equities in the fund to buy this claim and assert a prior equity securing its payment.

I cannot agree, however, that the prevailing opinion is correct in allowing as prior to the claim of appellant for money advanced on faith and security of the assessment roll the amount the receiver borrowed for use in completing the contractor's work, or in allowing priority to the costs and expenses of the receivership.

While it is a fact that the receiver borrowed from appellant the sum needed and used in completing the work, and the superior court ordered that the sum so borrowed be repaid to appellant as a prior claim, it may seem on first impression to matter little, in dollars and cents, to appellant that this sum is deducted from the assessment, as it is paid to appellant after such deduction; but appellant loaned the total amount of the assessment roll, and in addition thereto loaned the amount needed to complete, and is entitled to recover both sums, and its equities as to both should be considered.

If the contractor had purchased the amount of material and labor necessary to complete his contract, and had not paid therefor, there can be no doubt that his sure-

ty would have been directly liable therefor, and the assessment roll would not have been chargeable therewith.

What equity protects the surety at the expense of one having an existing and valid lien on the assessment roll, where the only difference is that the receiver who is attending to the affairs of the contractor purchases the material and labor? Existing liens on property coming into the hands of a receiver are not so easily displaced or destroyed.

This is a proceeding in equity, and the result sought is a marshaling of priorities and the application of a certain fund in accord with equity. As shown by the prevailing opinion the amount derived by assessment for sewer construction primarily constitutes the fund. The relations of the parties to this fund were originally such that the contractor would be entitled thereto under his contract. To mature his said right thereto he must perform his contract, including payment of all expenses of labor and material. Thus far his rights and obligations are rights at law. He abandoned the work. Out of this failure no equities grow in his favor. He filed bond securing such performance. The surety on this bond then became bound at law in some manner to make good the default.

Such a surety is not a favorite at law or in equity. It received compensation it deemed sufficient to protect it in the event of liability on the bond.

In this case the surety refused on demand of the city to do anything. This did not add to its equities. It was expressly obligated to pay material and labor claims. This it refused to do. In an effort to save itself from one such claim it purchased the same, and asserted that it thereby was entitled, as against all others interested, to an allowance of this claim. No equity arises in its favor out of this attempted evasion of its legal obligation. If it had performed its obligation, this litigation and receivership would have been avoided. No allowance for services of the receiver or his attorney could have been asked or made. No equity arises in its favor out of its conduct indirectly causing this expense. Therefore, as the surety was obligated to so act to avoid such expense, the receiver should have called upon the surety for funds to complete the contract and pay the expenses of the receivership. Equity to others demanded this, and a court of equity, having jurisdiction of all parties, should have required that the receiver collect from the surety this expense, because of its default, and the default of its principal, the contractor. In all this there is not the slightest suggestion of an equity in favor of the surety. So much for the equities of the contractor and its surety.

The city is a party to this proceeding. It is not involved at this stage, except as a stakeholder, ready to pay the right party,

or to pay to the court of equity, that the court may distribute to the right party. The material claimants are parties, but they have legal remedies against the surety, and have no claims, legal or equitable, to the fund. The only other party is the Aetna Trust Company. It was induced to loan money to the contractor by the fact that a legal contract had been made between the city and the contractor, the performance of which was secured by a bond. The payment of all material and labor claims necessary to completion was secured by the bond. This was assurance that the sewer would be completed, and that the city would resort to the bond in event of default by the contractor, or that the city would complete the sewer, or cause it to be completed, at the expense of the contractor or his surety.

Thus an assessment roll and the collection thereof was assured, and the statute in force when this contract was made created a lien upon the property affected at the date of the contract. Acts 1905, § 108. See section 8711, Burns 1914.

If, by reason of defaults and refusals of the contractor and his surety, a court of equity took jurisdiction, the exercise of its powers would bring completion at the expense of those obligated for the expense thereof. If the cost of completion exceed the contract price, the contractor or his surety must furnish the excess.

Induced by all these provisions, the Aetna Trust Company agreed to and did take an assignment of the prospective assessment roll as security. The Aetna Company advanced all it agreed to and more. It defaulted in nothing. It did not become an assignee of the contract, or assume any obligations thereunder, and neither law nor equity imposes any such obligation. It took the beneficial results of performance which others were obligated to complete. It might have resisted, as might others, the appointment of a receiver, because an ample legal remedy existed in the city to cause completion at the expense of the surety. There may have been need, however, for a receiver, because neither the city, nor the contractor, nor his surety would move or act toward completion. The assignee of the roll waived nothing by allowing a court of equity to undertake working out the duties, obligations, and equities of all parties. It had a right to anticipate that a court of equity would so do at the expense of those obligated therefor, and that the court would use its powers to bring

in from such obligated parties the expense of so doing.

When all this is considered, where does equity range the rights and priorities of the surety and the Aetna Trust Company? That is the only question here. The defaulting surety cannot stand on the same plane, as to any part of the Aetna Company's advancement, with the Aetna Company, which company has defaulted in nothing.

The prevailing opinion holds that in any event the surety could only be held for that part of the expense of completion which the assessment did not pay; hence the assessments must be first applied to completion, though this damages the Aetna Company's security. This might well be true if the contractor and the surety were the only parties interested in the application of the assessments; but it cannot be true where another has in good faith, and for a consideration which moved to the use and benefit of the contractor and his surety, taken as security the assessment roll.

The prevailing opinion admits that the assignee of an anticipated assessment roll takes an equitable interest, but states that this amounts to nothing except as ripened by performance of the contract. Such an equitable interest included a right to the protection of performance by those obligated thereto. The surety became responsible for the completion, and thus for the ripening of the equitable rights of the assignee, and cannot take advantage of its own wrong in failing to cause completion, and assert, that, its own default having prevented the assignee's rights from ripening, the assignee must suffer and the surety benefit.

Therefore I am of opinion that the trial court also erred in protecting the surety by requiring that the amount borrowed by the receiver be paid out of the assignee's assessments, and in requiring that the costs of the receivership be paid out of the assessments.

The reversal of the decree is approved, but the mandate should be that the total amount of the assessments be paid over to appellant, less the inspection charges, and including that to be released by the city at the end of the guaranty period, and, further, that the receiver be directed to proceed against the surety for the amount expended in completion and the costs of the receivership, and, when collected, the amount advanced by appellant to the receiver should be repaid.

MYERS, J., concurs herein.

(70 Ind. App. 206)

FEICHTER v. KORN et al. (No. 10372.)

(Appellate Court of Indiana, Division No. 2.
May 15, 1919.)1. FRAUDS, STATUTE OF §118(2)—CONTRACT
FOR SALE OF LAND—MEMORANDA.

Under the statute of frauds which requires that all contracts for the sale of land shall be in writing, several writings cannot be construed together as constituting a contract, where there is no reference in either of them to the others and extrinsic evidence would be necessary to show this relation.

2. PLEADING §312—EXHIBITS—VARIANCE.

If there is a variance between a pleading and exhibits, the latter must prevail and control.

3. VENDOR AND PURCHASER §16(1)—OFFER
AND ACCEPTANCE.

A writing concerning a sale of land, reciting that, "if this deal is made, it must be not later than October 1, 1916," held to constitute no more than an offer to sell, and not a final agreement the specific performance of which could be enforced, without a showing of acceptance.

Appeal from Circuit Court, Allen County;
J. W. Eggeman, Judge.

Suit for specific performance by Jacob H. Feichter against John Korn and Elizabeth Korn. Decree for defendants, and plaintiff appeals. Affirmed.

John H. Aiken, of Ft. Wayne, for appellant.
Breen & Morris, of Ft. Wayne, for appellees.

NICHOLS, J. Appellant filed his complaint against appellees, in the Allen circuit court, for the specific performance of an alleged contract; so much of such complaint as is necessary for this decision being as follows:

The above-named plaintiff complains of the above-named defendants and says: That on the 28th day of September, 1916, this plaintiff was the owner of lot 52, and the east 2 feet of lot 51, in Thompson's Second addition to the city of Ft. Wayne, Allen county, Ind., and also the west 48 feet of block 4, and the west 48 feet of the north ½ of block 3, all in Evans' place, in the city of Ft. Wayne, Allen county, Ind., the last-described property being known as No. 1129 Maple avenue, in said city of Ft. Wayne. That at said time said defendants were the owners in fee simple of lot 1 in Ninde's Second addition to the city of Ft. Wayne, Allen county, Ind., excepting therefrom such portion as was taken off for the widening and straightening of Taylor street, in said city. That on the 28th day of September, 1916, this plaintiff and said defendants entered into a certain written agreement, portions of which agreement bear date of September 26th, whereby, in consideration of mutual covenants and agreements, said defendants promised and agreed that they would convey to this plaintiff in fee, by warranty

deed, said lot No. 1 in Ninde's Second addition to the city of Ft. Wayne, Allen county, Ind., in consideration whereof this plaintiff promised and agreed to convey to said defendants in fee simple, by warranty deed, the said real estate first herein described as belonging to said plaintiff. That on said 28th day of September, 1916, after said defendants had had possession of said portions of said written contract bearing date of September 26th, and which provided that the deal was to be closed before October 1, 1916, and on signing such portions of said agreement and as a consideration for the closing of said contract, this plaintiff executed and delivered to said defendants that portion of said contract contained on the third page of said contract, by which plaintiff agreed to do certain repairs to the buildings on the property which he was exchanging to said defendants. A copy of said written contract is filed herewith, made a part of this complaint, and marked Exhibits A1, A2, and A3. Plaintiff further alleges: That he duly performed all the conditions of said contract and agreement to be by him performed. That he did fix the roof and put in the bath fixtures and light wires and performed all other requirements of said contract on his part to be performed, * * * and thereupon plaintiff executed his warranty deeds, plaintiff's wife joining therein, conveying plaintiff's said real estate to said defendants in accordance with the terms of said contract, and then and there demanded of said defendants a deed for their said above-described real estate so to be conveyed to this plaintiff. That plaintiff's said warranty deeds were properly acknowledged, and this plaintiff tendered to said defendants said warranty deeds, and said defendants refused to accept said deeds so tendered, and refused to execute a deed for their real estate or to deliver the same to this plaintiff, and still refuse to do so, but, on the contrary, refuse to be bound by their said contract. * * * Wherefore, plaintiff demands judgment that said defendants be decreed to specifically perform said agreement. * * *

Exhibit A1.

Fort Wayne, Ind., September 26, 1916.

I, the undersigned, agree to sell, trade and convey by warranty deed and good title, lot No. 1 in Ninde's Second addition in this city of Fort Wayne, Ind., and will take in trade lot No. 52 Thompson's Second Add. lot 38 and 170, and one house and lot 1129 Maple Ave. lot 48-150 both in the city of Fort Wayne, Ind., and will assume or agree to pay a mortgage of \$2,300 on Scott Ave. home and \$1,100 on Maple Ave. home. Will also pay interest on \$5,600 mortgage up to date of transfers and pay this fall tax on lot No. 1 and will give and take possession in 30 days from date of transfers. If this deal is made it must not be later than October 1, 1916. P. S. The street pavement is to be assumed by me in Scott Ave. and Maple Ave.
John Korn.
Elizabeth Korn.

Exhibit A2.

Fort Wayne, Ind., September 26, 1916.

I, the undersigned, agree to sell, trade and convey by warranty deed and good title lot No.

52 in Thompson's Second addition in the city of Fort Wayne, Ind., and house and lot on Maple Ave. No. 1129, in Ft. Wayne, and will pay the interest on said loans up to date of transfers, and pay this fall tax on same. Mortgages on Scott Ave. of \$2,300.00, Maple Ave. \$1,100, and will take in trade lot No. 1 in Ninde's Second Add. in the city of Fort Wayne, Ind., and will assume or agree to pay the mortgage of \$5,600 on same, and will give and take possession in 30 days from transfers. If this deal made is closed, it must not be later than October 1, 1916. P. S. I am to assume the Taylor St. pavement, of equal amount:

J. R. Feichter.

Exhibit A3.

Fort Wayne, Ind., Sept. 28, 1916.

Scott Ave. House.

I, the undersigned, agree to fix the roof so it will not leak. Put in new stool. Fix water pipes and wires, in fact have house cleaned out from cellar to garret and have same put in good condition.

J. R. Feichter.

Appellees filed their demurrer to this complaint, with memorandum, which was sustained by the court, and appellant refusing to plead further, and electing to stand on his complaint, judgment was rendered for appellees and that appellant take nothing by his suit.

The court's ruling on the demurrer to the complaint is the only error assigned in this court.

[1] Appellant insists that the exhibits to the complaint taken together constitute the contract, the specific performance of which he seeks in this action. There is no reference whatever in any one of these instruments to either of the others, and without such reference, under the statute of frauds which requires that all contracts for the sale of real estate shall be in writing, they cannot be construed together as constituting the contract, for extrinsic evidence cannot be heard to show their relation each to the others. The evidence of the relation must be within the instruments themselves. Many authorities sustain this principle, among which we cite *Graham v. Henderson Elevator Co.*, 60 Ind. App. 697, 111 N. E. 335, which contains a full discussion of the question and cites numerous authorities.

[2, 3] Appellant says that appellant and appellee entered into "a certain written agreement," of which the exhibits are a copy; but these exhibits, whether taken together or separately, do not constitute a written agreement, and, if there is a variance between the pleading and the exhibits, the latter must prevail and control. *Watson Coal & Mining Co. v. Casteel*, 73 Ind. 296; *Berry v. Reed*, 73 Ind. 235. Taken separately and independently, for this is the only way we can consider them under the above rule, there being no internal reference from any one to the others, if the appellees are to be

charged, it must be by Exhibit A-1, for it is the only one signed by them. This exhibit provides that "if this deal is made, it must be not later than October 1, 1916." Certainly this is not the language of a final agreement the specific performance of which can be enforced. The most that can be said of the instrument with such a provision is that it was an offer that must be accepted not later than October 1, 1916. There is no averment in the complaint of any act that can be said to have been an acceptance of such offer within the time given; hence there was no contract of sale.

Other questions are ably discussed by counsel, but we deem it unnecessary to consider them.

There was no error in sustaining the demurrer. The judgment is affirmed.

(70 Ind. App. 233)

BALTES et al. v. ARMOUR LEATHER CO.
(No. 9824.)

(Appellate Court of Indiana, Division No. 1.
May 27, 1919.)

1. APPEAL AND ERROR ¶757(2) — ASSIGNMENTS REVIEWABLE.

Assignment that court erred in overruling demurrer to complaint presents no question to the court on appeal, where neither demurrer nor memorandum accompanying it are set out in appellant's brief.

2. CORPORATIONS ¶363 — INDEBTEDNESS OF INSOLVENT CORPORATION — LIABILITY OF DIRECTORS — EVIDENCE.

In action under Burns' Ann. St. 1914, § 5104, based on assent of defendants as directors to failure of company to collect subscriptions resulting in insolvency of the company, which after insolvency became indebted to plaintiff, held that the court did not err in its conclusion of defendants' liability under the facts found.

Appeal from Circuit Court, De Kalb County; Dan M. Link, Judge.

Action by the Armour Leather Company against Michael Baltes and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Vesey & Vesey, of Ft. Wayne, for appellants.

Albert E. Thomas and Howard L. Townsend, both of Ft. Wayne, for appellees.

ENLOE, J. This was an action by appellee to recover of and from the appellants the amount of a certain indebtedness then owing, and theretofore contracted by the Cushion Heel Shoe Company, a corporation organized under the laws of the state of Indiana, with the appellee herein. The appellants had been directors of said corporation

at the time the grievances complained of were committed.

The complaint was brought under the provisions of section 5104, Burns 1914, and, among other things, alleged the due organization of said corporation; that its capital stock was \$200,000; that at the time of the organization of said corporation more than \$100,000 of its stock had been subscribed; that the defendants were the directors of said corporation; that said directors and said company wholly failed to collect the amount of said subscriptions, or the amount of the capital stock as fixed by said company, and put the same in the treasury thereof; that said defendants as directors assented to such failure to collect said subscriptions; that by reason of such failure said corporation became insolvent; that thereafter, and while so insolvent, it became indebted to the plaintiff, etc. A demurrer to the complaint was overruled.

The cause was tried by the court, which, upon request, made a special finding of the facts and stated its conclusions of law thereon, favorable to the appellee, and rendered judgment accordingly.

[1, 2] The errors assigned are: (1) That the court erred in overruling the demurrer to complaint; and (2) that the court erred in its conclusions of law upon the facts found.

As neither the demurrer nor the memorandum accompanying same are set out in appellant's brief, no question is presented to us on this ruling.

Section 5089, Burns R. S. 1914, provides:

"The capital stock, as fixed by such company, shall be paid into the treasury thereof, within eighteen months from the incorporation of the same, in such installments as the by-laws of the company assess and direct."

Section 5104, Burns R. S. 1914, provides:

"If any company organized and established under the authority of this act, and of the act to which this is supplementary, shall violate any of the provisions thereof, and shall thereby become insolvent, the directors ordering or assenting to such violation shall jointly and severally be liable, in an action founded on said acts, for all debts contracted after such violation as aforesaid."

The trial court found, among other things, that on the 14th day of February, 1910, the board of directors of said Cushion Heel Shoe Company, by a resolution of said board, unanimously adopted, declared that, because of noncompliance of the terms and conditions of the obtaining subscriptions to

the capital stock of said company, all subscriptions *are now declared null, void, and canceled.* (Our italics.)

The court further found that the said corporation was, at the time the indebtedness herein sued for was contracted, insolvent, and that such insolvency was brought about by the failure of its board of directors to collect in the subscriptions for said capital stock. The court further found:

"That from the 5th day of March, 1912, and thereafter until said corporation went into bankruptcy, it was wholly insolvent, and that upon the 5th day of March, and from then until the 3d day of June, 1912, said corporation, with the knowledge and assent of its board of directors and of the defendants, Owen N. Heaton, Michael Baltes, Dr. W. H. Johnson, August Freese, Henry Brauning, John Schweiters, and John H. Wort, members of its board of directors, purchased from the plaintiff herein merchandise for which it became indebted to plaintiff in the sum of \$1,484.25, upon which the sum of \$296.85 has been paid," etc.

In the case of Patterson v. Minnesota Manufacturing Co., 41 Minn. 84, 90, 42 N. W. 926, 928, 4 L. R. A. 745, 749, the court, speaking of a statute similar to the statute of this state in question, said:

"The object is twofold: First, to enforce diligence and fidelity on the part of corporate officers; and, second, to furnish a prompt and efficient remedy to those creditors who were, or might have been, injuriously affected by the acts of misfeasance or nonfeasance."

In the same opinion it is said concerning the "assent" of such directors (41 Minn. 94, 42 N. W. 929, 4 L. R. A. 751):

"This assent, however, need not be express. If a director knew that a violation of law was being, or about to be, committed, and made no objection when duty required him to object, and when he had the opportunity of doing so, this would amount to 'assent.'"

While it is true that the court found that some of the persons who had subscribed for the stock of defendant corporation were insolvent, and therefore the amount of their subscriptions were not collectable, yet, so far as is shown upon this record, a large part of the stock subscriptions were collectable, and for some reason the corporation through its board of directors failed to collect the money upon them and pay it into the treasury of said company.

The conclusions of law are well sustained by the findings. Brown v. Clow, 158 Ind. 403, 62 N. E. 1006; Bachman v. Cooper, 20 Ind. App. 173, 50 N. E. 394.

The judgment is therefore affirmed.

(70 Ind. App. 304)

CATHCART v. BREWER. (No. 9844.)(Appellate Court of Indiana, Division No. 2.
May 29, 1919.)**1. APPEAL AND ERROR ¶1078(6)—SPECIFICATIONS OF ERROR—WAIVER.**

Questions presented in motion for new trial are waived where appellant fails to state any proposition or authorities to sustain them.

2. APPEAL AND ERROR ¶302(5)—SPECIFICATIONS IN MOTION FOR NEW TRIAL—SUFFICIENCY.

Specification in motion for new trial that "the verdict of the jury is contrary to law and the evidence" does not present any question.

3. TRIAL ¶281—EXCEPTIONS IN GROSS—AVAILABILITY.

Exception to instructions, that court erred in giving instructions 1 to 25, is in gross as to all of the instructions, and not available; it not being claimed that all are bad.

4. APPEAL AND ERROR ¶758(2)—PRESENTATION OF ERRORS.

Contention that court erred in permitting a witness to testify cannot be sustained, where appellant in his brief has failed to show that any objection was made to the witness testifying, that the court made any ruling in relation thereto, or that any exception was taken in view of rule 22 (55 N. E. v) as to appellant's brief containing concise statement of so much of record as fully presents error relied on.

5. APPEAL AND ERROR ¶616(3)—RECORD—AUTHENTICATION.

Where instructions tendered by appellant are not signed, dated, or filed by the judge as required by law, they have no legitimate place in the record, and are not presented for consideration by the court on appeal.

Appeal from Circuit Court, Washington County; Bayless Harvey, Special Judge.

Action by Jonas E. Brewer, guardian of Mary C. Hagaman, against John M. Cathcart. Verdict and judgment against defendant, motion for new trial overruled, and he appeals. Affirmed.

Arthur McCart, of Paoli, and Elliott & Houston, of Salem, for appellant.

James M. Tippen, of Salem, Buskirk & Buskirk, of Paoli, and Wilbur W. Hottel, of Salem, for appellee.

McMAHAN, J. This was an action by the appellee, as guardian of Mary C. Hagaman, a person of unsound mind, against appellant, for defrauding and cheating appellee's ward in the sale and exchange of certain real estate and personal property. There was a trial by jury, which resulted in a verdict and judgment against appellant. The appellant filed a motion for a new trial, which

was overruled, and he appeals, assigning the overruling of said motion as error.

[1] All questions presented in the motion for a new trial are waived except specifications 4, 7, 8, and 9, by reason of the failure of appellant to state any proposition or any authorities to sustain them.

[2] The fourth specification in the motion for a new trial is that "the verdict of the jury is contrary to law and the evidence." This specification for a new trial is not known to the statute, and therefore does not present any question. *Jennings v. Ingle*, 35 Ind. App. 153, 78 N. E. 945.

[3] The seventh specification is that the court erred in giving to the jury, at the request of appellee, instructions Nos. 1 to 25, and that the court erred in giving each of these instructions.

Appellant in his brief contends that the court erred in giving each of said instructions Nos. 2, 7, 8, 17, and 18. No objection is made to the other 20 instructions so given by the court. Appellee has called our attention to the fact that the exception taken to the giving of the instructions was a joint exception. The record relative to appellant's exception reads as follows:

"Of said instructions so tendered the court gave instructions numbered from 1 to 25, both inclusive, and to the giving of said instructions the defendant excepts."

This exception was in gross as to all of said instructions 1 to 25, and to be available all must be bad. It not being claimed that all of them are bad, appellant's exception is not available. *Inland Steel Co. v. Smith*, 168 Ind. 245, 80 N. E. 588; *Kelly, etc., Co. v. Munson*, 53 Ind. App. 619, 101 N. E. 510.

[4] The appellant next contends that the court erred in permitting the witness Mary C. Hagaman to testify. The appellant in his brief has failed to show that any objection was made to her testifying or that the court made any ruling in relation thereto or that any exception was taken. If any objection was made to this testimony which was overruled, and an exception saved, rule 22 (55 N. E. v) requires that appellant's brief shall contain a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript. As said by the Supreme Court in *Inland Steel Co. v. Smith*, supra:

"It has been uniformly held by this court that, whenever appellant fails to specify the page and line where the ruling excluding or admitting evidence may be found, the court will not search the record to find it, but will disregard any such question."

[5] It is also contended that the court erred in refusing to give instruction No. 4 tendered by appellant. Appellee insists that

no exception was reserved to such refusal, for the reason that the appellant has failed to make the instructions tendered by him a part of the record. The instructions tendered by appellant are not authenticated in any manner as required by the statute. They are not signed, dated, or filed by the judge as required by law; hence they have no legitimate place in the record, and are not presented for our consideration. *Muncie, etc., Co. v. Black*, 173 Ind. 142, 89 N. E. 845; *Indianapolis, etc., Co. v. Walsh*, 45 Ind. App. 42, 90 N. E. 188.

There being no error shown, the judgment will be affirmed.

Judgment affirmed.

(73 Ind. App. 604)

BOREN et al. v. REEVES. (No. 9821.)*

(Appellate Court of Indiana, Division No. 1.
May 27, 1919.)

1. WILLS §601(2)—ESTATE DEVISED—INDEFEASIBLE FEE.

Will bequeathing to a daughter all testator's property, with a provision that, if she should die without issue alive, then whatever remained at her death should be divided between the children of testator's brother, held to give to her an indefeasible fee-simple title, and not an estate contingent upon her death without issue.

2. WILLS §440—CONSTRUCTION—INTENTION OF TESTATOR.

Testator's intention must be gathered from the language found in the will itself.

3. WILLS §455—CONSTRUCTION—KNOWLEDGE OF TESTATOR.

The law presumes that a testator knows that uncertain language used by him may be subjected to the well-recognized rules of construction.

4. WILLS §601(1)—LIMITATION OF ESTATE BY SUBSEQUENT CLAUSE.

Where estate in fee is devised in one clause of a will in clear and decisive terms, it cannot be taken away or cut down by subsequent provisions unless the intention to do so is manifest from words as clear and definite as those which created the fee.

5. WILLS §545(3)—DEVISE COUPLED WITH DEVISE OVER.

Where real estate is devised in terms denoting an intention that primary devisee shall take a fee on the death of the testator coupled with a devise over in event of death of primary devisee without issue, the words refer to death without issue during the life of the testator.

Appeal from Circuit Court, Henry County; Fred C. Gause, Judge.

Suit by Charles T. Boren and others against Arthur Reeves. Judgment for defendant, and plaintiffs appeal. Affirmed.

Newby & Newby, of Knightstown, and Bundy & Jones, of New Castle, for appellants. Forkner & Forkner, of New Castle, and J. L. Shelton, of Knightstown, for appellee.

REMY, J. Austin Boren died in February, 1888. His last will, omitting signature and formal parts, which was written about a month before his death, is as follows:

"Item I. I will and bequeath to my daughter, Cora Boren, all my property, both real and personal of whatever nature including all claims and everything pertaining to the farm.

"Item II. If my said daughter shall die, without issue alive, then at her death, I hereby direct and will that whatever remains shall be equally divided between the children of my deceased brother Albert Boren, to wit, Charles T. Boren, Addie Holland, Frank M. Boren, Oliver M. Boren, Harry Boren, Laura Woods and W. A. Boren.

"Item III. I hereby request and nominate E. N. Wilkinson of Knightstown, Indiana, to be the guardian of said daughter Cora Boren."

The will was probated in March, 1888, at which time, and in accordance with the provisions of the will, Cora Boren took possession of the real estate referred to, and continued in possession thereof until January, 1916, at which time she died intestate, without issue, and leaving as her only heir at law her husband, Arthur Reeves, appellee herein. In 1914 W. A. Boren, who is named in item 2 of the will, died intestate, leaving as his only heirs the appellants, who are the survivors of the persons named in said item 2. Shortly after the death of Cora Boren Reeves, appellants commenced this suit against appellee for the partition of, and to quiet title to, said real estate. Appellee's demurrer to the complaint was sustained, and appellants, refusing to plead further, elected to stand on the demurrer. Judgment was rendered in favor of appellee, from which this appeal was taken. The action of the court in sustaining the demurrer is the only error assigned.

[1] The controversy involves the construction of the above will. It is appellants' contention that by the terms of the will Cora Boren was given a conditional fee in the real estate, which was to become indefeasible upon her having issue alive at her death, and that, since she died without issue, the fee-simple title vested in appellants. It is also contended by appellants that the physical condition of testator and the age of Cora Boren, together with other circumstances surrounding the testator at the time of the execution of the will, all of which are set forth in the complaint, should be considered in arriving at testator's intention. On the other hand, appellee asserts that the will must be construed as vesting in Cora Boren an unconditional fee-simple title which at her death passed to him as her sole heir.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Transfer denied.

[2] It is conceded by appellants that item 1 of the will devised to Cora Boren an estate in fee. Was this estate limited by item 2 of the will, and thereby made contingent upon the devisee's death without issue? In construing the provisions of the will, we must be guided by the testator's intention, and what his intention was must be gathered from the language found in the will itself.

"However clearly an intention not expressed in the will may be proved by extrinsic evidence, the rule of law requiring wills to be in writing stands as an insuperable barrier against carrying the intention thus proved into execution." *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847.

As was said by the court in *Lee v. Lee*, 45 Ind. App. 645, 91 N. E. 507:

"The intention to be carried into effect by a judicial interpretation or construction of a will is not that which existed in the mind of the testator when it was executed, but that which is embodied in the language of the will itself."

[3, 4] And the law presumes that a testator knows, when executing his will, that uncertain language used by him may be subjected to the well-recognized rules of construction. *Aldred v. Sylvester*, 184 Ind. 542, 111 N. E. 914. It is a settled rule in the construction of wills that, where an estate in fee is devised in one clause of a will in clear and decisive terms, it cannot be taken away or cut down by subsequent provisions of the will, unless the intention to do so is manifest from words as clear and definite as those which created the fee. *Myers v. Carney*, 171 Ind. 379, 86 N. E. 400, and cases cited.

[5] Another rule equally well established is that, where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over in event of the death of the primary devisee without issue, the words refer to a death without issue during the life of the testator. *Fowler v. Duhme*, 143 Ind. 243, 42 N. E. 623, and cases cited.

The will under consideration, by the clear and certain language of item 1, devises the fee of the real estate in controversy to Cora Boren. By the second item said real estate is devised to others upon the death of Cora Boren without issue alive. It is not contended by appellants that the will by express language devised to Cora Boren an estate in fee defeasible upon the contingency of her death without issue. The most that could be claimed is that such an estate might be inferred from the whole will. If appellants are right in their contention, then it must be presumed, without definite language in the will to support such presumption, that the testator intended that, although his daughter should live 50 years, and have born to her

many children, she would have no right to sell or incur the fee of the real estate, since it was to go to his nephews and nieces, in the event all of his daughter's children should die prior to her death.

Governed by the rules of interpretation we have stated, and by the further rule that the law favors the vesting of estates, we are constrained to hold that the will under consideration gave to Cora Boren an indefeasible fee-simple title to the real estate referred to in item 1 of the will, and for which partition is sought. The court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

(71 Ind. App. 323)

HAMMOND, W. & E. C. RY. CO. v. KASPER.
(No. 9787.)*

(Appellate Court of Indiana. May 28, 1919.)

1. APPEAL AND ERROR ⇨ 762—BRIEFS—OMISSIONS.

A reply brief filed more than 60 days after the submission of the case cannot perform the office of a supplemental brief or supply omissions in the original brief.

2. APPEAL AND ERROR ⇨ 928(4, 5)—REVIEW—PRESUMPTION.

Where it did not appear from appellant's brief that all of the instructions tendered were refused or that the instructions given by the court on its own motion were the only ones given, the Appellate Court will presume that there were others which cured any inaccuracies in the instructions given, and that the instructions tendered were fully covered.

Appeal from Circuit Court, Lake County; Will C. McMahan, Judge.

Action by Fred Kasper against the Hammond, Whiting & East Chicago Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Peter Crumpacker and F. C. Crumpacker, both of Hammond, for appellant.

Wm. J. Whinery, of Hammond, for appellee.

NICHOLS, P. J. This action was by the appellee against the appellant, in the Lake circuit court, to recover damages for personal injuries alleged to have been sustained by appellee as a result of a collision between an automobile truck which he was driving on a public street in the city of Hammond, Lake county, Ind., and one of appellant's street cars running upon said street. The case was tried by a jury in said court, and resulted in a verdict for appellee in the sum of \$500. The only error assigned for reversal, and which is discussed,

is the overruling of appellant's motion for a new trial. Under this assignment, appellant complains of certain instructions given by the court on his own motion, and his refusal to give certain instructions, tendered by the appellant.

[1] It appears by appellant's brief that we assume to be a correct statement of the record, which we do not search, that appellant tendered its written instructions numbered 1 to 15, and requested the court to give the same to the jury, and that each and all of said instructions were refused, to which refusal as to each appellant excepted, and that the court of its own motion gave certain instructions to the jury, numbered 1 to 23, inclusive, to the giving of which the appellant at the time separately excepted. It does not appear by the appellant's brief whether other instructions were tendered, or whether other instructions were given. We are informed by appellee's brief that certain instructions were tendered by appellee, but whether they were given or refused appellee does not inform us. Appellant, after having its attention called to this omission, by the appellee, does not amend its original brief, but undertakes to make the correction in its reply brief. The reply brief was filed more than 60 days after the submission of the case and cannot, therefore, perform the office of a supplemental brief, or supply omissions in the original brief. *Albaugh Bros., etc., v. Lynas*, 47 Ind. App. 30, 93 N. E. 678; *Gates v. Baltimore, etc., R. R. Co.*, 154 Ind. 338, 341, 56 N. E. 722.

[2] It is the duty of this court to indulge all reasonable presumptions in favor of the trial court, and, it not appearing that the above-mentioned instructions were all of the instructions tendered or given, we must presume that there were others. So presuming, we must further presume that such instructions corrected any deficiencies or inaccuracies in the instructions given, or that the court thereby withdrew such erroneous instructions as could not be corrected; and that they covered such instructions as were refused, and upon which appellant predicates error. *State v. Winstandley*, 151 Ind. 496, 51 N. E. 1054; *Board of Com'rs v. Gibson*, 158 Ind. 471, 63 N. E. 982; *Frankel v. Michigan Mutual Life Ins. Co.*, 158 Ind. 304, 72 N. E. 703; *Board of Com'rs v. Nichols*, 139 Ind. 611, 619, 38 N. E. 526; *L. E. & W. R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; *C. I. & E. R. Co. v. Wysor Land Co.*, 163 Ind. 288, 69 N. E. 546; *Indpls. T. & T. Co. v. Gillaspay*, 56 Ind. App. 332, 105 N. E. 242; *Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860; *Barton v. State*, 154 Ind. 670, 57 N. E. 515.

There is no available error.

The judgment is affirmed.

McMAHAN, J., not participating.

(70 Ind. App. 289)

CITY OF NEW ALBANY v. KIEFER.
(No. 9816.)

(Appellate Court of Indiana, Division No. 2.
May 29, 1919.)

1. MUNICIPAL CORPORATIONS ⇐764(3) —
STREETS AND SIDEWALKS—REPAIR—WIDTH.

It is the duty of a city to keep its streets and sidewalks in reasonable repair and free from dangerous defects to the full width thereof.

2. MUNICIPAL CORPORATIONS ⇐755(1)—SIDE-
WALKS—INJURIES TO PEDESTRIANS.

While a city does not insure a pedestrian on a sidewalk against injury, it is required to keep the walk in a reasonably safe condition for traveling, and, failing so to do, is liable to a pedestrian, exercising reasonable care, who was injured because of the defects.

3. APPEAL AND ERROR ⇐757(1) — MATTERS
REVIEWABLE—BRIEF.

Where appellant in his brief fails to set out, either the motion for a new trial or its substance, any errors that may have been committed by the trial court in overruling it are waived.

Appeal from Circuit Court, Clark County;
James W. Fortune, Judge.

Action by Lena Kiefer against the City of New Albany. Judgment for plaintiff, and defendant appeals. Affirmed.

Jewett Bulkelt & Jewett, of New Albany, for appellant.

Evan B. Stotsenburg and John H. Weathers, both of New Albany, and George C. Kopp, of Jeffersonville, for appellee.

NICHOLS, P. J. The appellee, while traveling on one of the public sidewalks in the city of New Albany, sustained injuries by reason of the defective condition of the said sidewalk, and this action is for damages for the injury received. The complaint was in one paragraph, to which the appellant filed its demurrer with memoranda, which demurrer was overruled by the court, to which ruling the appellant excepted. The case was put at issue on a general denial and submitted to a jury for trial which returned a verdict for \$1,100 in favor of the appellee, \$300 of which verdict was remitted by the appellee. Appellant filed its motion for a new trial, which was overruled, and it now prosecutes this appeal.

The errors relied upon for reversal are: (1) Overruling of appellant's demurrer to the complaint; (2) overruling of appellant's motion for a new trial, as the verdict of the jury was not sustained by sufficient evidence; (3) the damages assessed by the jury were excessive, and the court erred in overruling appellant's motion for a new trial for that cause.

The complaint avers: That the injury occurred upon Spring street in said city, which

was a public street with sidewalks about 10 feet wide upon either side for the use of foot passengers. That at the place of the accident involved the sidewalk was made of brick. On the 13th day of August, 1914, the appellant carelessly and negligently suffered and permitted the sidewalk on the north side of said street to be defective and out of repair. That the bricks constituting the pavement were out of place and loose and liable to and would turn under the foot if stepped upon, and that such bricks were a dangerous obstruction to pedestrians using said sidewalk, and that they were liable to be thrown thereby. Appellee says that appellant negligently and carelessly maintained the said sidewalk in an unsafe and dangerous condition, by maintaining and permitting the bricks thereof to be out of place and loose where the public used the same to travel upon, without maintaining or keeping any guard or signal of the existence of the same to notify or warn the public of the location. That such unsafe condition had existed for more than six months prior to the date of the injury, and that appellant, its officers and agents, well knew of the existence of such dangerous and unsafe conditions as aforesaid long before the injury to appellee, or by the exercise of ordinary care said appellant, its officers or agents, could have known of the same in time to have repaired it or to have notified appellee of its unsafe condition; but appellee says that she had no knowledge whatever of said dangerous and unsafe condition of said sidewalk. Appellee says that she was on August 13, 1914, lawfully using said sidewalk, and while using due care she stepped upon one of said loose bricks where others were out of place, and, by reason of the carelessness and negligence of the appellant in maintaining such sidewalk with bricks out of place and loose, her foot turned, and she was thrown down upon the hard sidewalk, thereby spraining, injuring, straining, and lacerating the tendons, muscles, and ligaments of the right foot, right leg and ankle, whereby she was caused to suffer and still suffers and will continue to suffer great bodily pain and mental anguish, and has been permanently injured and crippled, all to her damage in the sum of \$3,500.

[1, 2] In discussing its demurrer, appellant

says that the complaint failed to show that the appellee was required to use that part of the sidewalk over which she was walking when injured, and that it does not appear that a safe way had not been provided by the appellant on said sidewalk over which the appellee might have traveled at the time of the alleged injury. We do not understand it to be the law that, unless the appellee was required to use the public way, she would be precluded from a recovery for the injuries suffered by reason of such use. It is the duty of the city to keep its streets and sidewalks in reasonable repair and free from dangerous defects to the full width thereof. *City of Decatur v. Stoops*, 21 Ind. App. 397, 52 N. E. 623; *Town of Odon v. Dobbs*, 25 Ind. App. 522, 58 N. E. 562. It is true, as contended by appellant, that the city of New Albany did not insure the appellee against injury, but, while it is true that such city is not an insurer of the safety of its streets and sidewalks, yet it was required to keep them in a reasonably safe condition for traveling, and, failing so to do, it was liable to a pedestrian passing over them if, while such pedestrian was exercising reasonable care, he was injured because of the defects therein. *Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 164; *Higert v. City of Greencastle*, 43 Ind. 574. We hold that the complaint was sufficient against demurrer, and that the demurrer was properly overruled.

[3] The appellant in its brief fails to set out either the motion for a new trial or its substance, and, failing so to do, it has waived any errors that may have been committed by the trial court in overruling it. *Tongret et al. v. Carlin*, 165 Ind. 489, 75 N. E. 887; *Scott v. State*, 176 Ind. 382, 96 N. E. 125; *Lee v. State*, 177 Ind. 232, 97 N. E. 785; *Harrold v. Whistler*, 60 Ind. App. 504, 111 N. E. 79. Even if the second and third assignments of error presented any question as to the ruling of the court upon the motion for a new trial, we have examined the evidence in this case, and hold that it was sufficient to sustain a verdict (*City of Valparaiso v. Schwerdt*, 40 Ind. App. 608, 82 N. E. 923), and that the damages assessed by the jury, deducting the remittitur, were not excessive.

Judgment is affirmed.

(70 Ind. App. 264)

WARNER GEAR CO. v. DE PEUGH
(No. 9828.)

(Appellate Court of Indiana. May 28, 1919.)

1. APPEAL AND ERROR ⇨1064(2) — ERRONEOUS INSTRUCTION—REVERSIBLE ERROR.

In action under Employers' Liability Act for injuries sustained by plaintiff while employed in the enameling department of defendant's factory, instructing that plaintiff's expression, "It was all my fault," made shortly after the accident, was only a conclusion not amounting to an admission of negligence, held to require reversal.

2. EVIDENCE ⇨222(2), 272 — ADMISSION — DECLARATIONS AGAINST INTEREST—ADMISSIBILITY.

In an action under the Employers' Liability Act for injuries sustained by plaintiff while employed in the enameling department of defendant's factory, plaintiff's expression, "It was all my fault," made shortly after the accident, was an admission or declaration against interest and admissible.

3. EVIDENCE ⇨265(1)—ADMISSIONS—EFFECT—QUESTIONS FOR JURY.

Admissions when proved to have been made are to be considered and weighed precisely as other evidence, and the effect of the circumstances under which made is to be determined by the jury.

Appeal from Circuit Court, Randolph County; Theo. Shockney, Judge.

Action by George De Peugh against the Warner Gear Company. Verdict for plaintiff, motion for new trial overruled and defendant appeals. Reversed, with instructions.

Taylor, Carter & Wright, of Indianapolis, and D. P. Williams, of Pittsburgh, Pa., for appellant.

Edward R. Templer and Wilbur Ryman, both of Muncie, for appellee.

REMY, J. On August 20, 1915, while appellee was in the employ of appellant company in the enameling department of its factory, he received certain personal injuries, and later commenced this action for damages charging that his injuries were the result of appellant's negligence. The action is brought under the Employers' Liability Act of 1911 (Laws 1911, c. 88). Upon the issues presented by appellee's second paragraph of complaint and appellant's answer in denial thereof, the cause was submitted to the court and jury, resulting in a verdict for appellee. The

overruling of the motion for a new trial is the only error assigned.

[1] The motion for a new trial contains numerous specifications, but in our view of the case it is only necessary to consider that relating to the action of the court in giving to the jury on its motion instruction No. 22, which is as follows:

"Some evidence has been introduced before you of alleged admissions of the plaintiff wherein it is claimed that the plaintiff, speaking of his alleged injuries, and as to how the injury occurred, said, among other things, that it was all his fault. The court instructs you that, if you believe from the evidence that the plaintiff made use of some expression that 'it was all my fault,' such expression was only a conclusion of the plaintiff, and not the statement of a fact, and would not amount to an admission of negligence."

[2, 3] Some witnesses had testified that shortly after the accident which resulted in the injuries complained of appellee stated, "It was all my fault." This admission or declaration, being against interest, and being related to a matter material to the issue, was admissible in evidence. *Peterson v. Pittsburg, etc., Mining Co.*, 37 Nev. 117, 140 Pac. 519, and cases cited. Admissions, when proved to have been made, are to be considered and weighed precisely as other evidence. The weight of such evidence depends upon its character and the circumstances under which the admissions were made, and the effect of such circumstances is to be determined by the jury. 17 Cyc. 814. See, also, *Finch v. Bergins*, 89 Ind. 360; *Newman v. Hazelrigg*, 96 Ind. 73; *Kauffman v. Mäler*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124. By the instruction complained of the jury were told that the statement, if made by appellee, would not under any circumstances amount to an admission of negligence. This was clearly an invasion of the province of the jury; and in view of the fact that, as shown by the record, there were irregularities in the trial of the cause which may have prejudiced the rights of appellant, and since there was a sharp conflict in the evidence, we cannot say that the correct result was reached, and that the error in the giving of the instruction was harmless.

Appellant has presented other questions for our consideration; but, inasmuch as they involve matters not likely to arise in another trial of the cause, we do not deem it necessary to consider them in this opinion.

Judgment reversed, with instructions to grant a new trial.

NICHOLS, J., not participating.

(226 N. Y. 213)

CLANCY v. NEW YORK, N. H. & H. R. CO.

(Court of Appeals of New York. April 15, 1919.)

NEW TRIAL ~~§~~ 165—JUDGMENTS—MOTIONS—HEARING.

It was error to set aside an order setting aside a verdict and reinstating it 18 months after trial.

Crane, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Elizabeth Clancy, as administratrix, etc., of Patrick Clancy, deceased, against the New York, New Haven & Hartford Railroad Company. From a judgment of the Supreme Court, Second Appellate Division (177 App. Div. 900, 163 N. Y. Supp. 1112), affirming a judgment and order of the trial court in favor of plaintiff, defendant appeals. Reversed, and new trial granted.

The notice of appeal brings up for review certain orders unnecessary to enumerate here further than as appears in the opinion below.

Edward J. A. Rook, of New York City, for appellant.

Michael J. Tierney, of New Rochelle, for respondent.

HOGAN, J. The present action was brought under the Employers' Liability Act (Consol. Laws, c. 31, §§ 200-204) to recover damages for the alleged negligence of the defendant which resulted in the death of plaintiff's intestate.

A question of practice is presented upon this appeal which must be disposed of, irrespective of the merits of the case, and which arose in the following manner:

Upon the trial under review, which was had on January 13 and 14, 1914, counsel for defendant moved to dismiss the complaint particularly upon the ground that section 841b of the Code of Civil Procedure was inapplicable to the case at bar, and defendant was not required to sustain the burden of proof as to contributory negligence, the statute not being retroactive, and upon the further ground that, assuming the burden of proof rested on defendant, upon the evidence defendant had sustained the burden. The trial justice denied the motion, holding that under section 841b of the Code of Civil Procedure the burden of proof as to contributory negligence was on defendant. Exceptions were duly taken to the rulings of the trial justice, and counsel for defendant then moved that a verdict for defendant be directed by the trial justice. Counsel for plaintiff thereupon moved that a verdict be directed for plaintiff. The justice directed the jury to find a verdict in favor of plaintiff for a substantial amount, and the jury reported a

verdict as directed. Counsel for defendant thereupon moved to set aside the verdict and for a new trial upon the ground that the verdict was contrary to the evidence, contrary to law, against the weight of evidence, and especially on account of the error of the justice in imposing upon defendant the burden of proof of contributory negligence. The justice reserved decision of the motion, and on January 15, 1914, the trial justice made an order that the verdict be set aside and new trial granted. Upon a resettlement of the order the same was amended so as to read:

"That the said verdict be, and the same hereby is, set aside and a new trial be, and the same hereby is granted, solely upon the ground and for the reason that section 841b of the Code of Civil Procedure is not applicable and does not affect the trial of this action, for the reason that it was enacted after the commencement of this action, and the said motion in all other respects is hereby denied."

The latter order was entered in the office of the clerk of Westchester county January 31, 1914. On February 24, 1914, plaintiff served a notice of appeal from the order, but the appeal was never perfected.

June 23, 1914, upon the application of counsel for plaintiff, the justice who presided at the trial granted an order requiring defendant to show cause at a Special Term for trials at Poughkeepsie on June 28, 1914, why an order should not be made vacating and setting aside the order entered January 31st setting aside the verdict and granting a new trial and defendant's motion to set aside the verdict should not be reconsidered, reargued, and the motion be denied. The sole reason for the granting of the order as appears from an affidavit on which it was based is that on May 14th the Supreme Court in Brooklyn, in the case of Nicholson v. City of New York, 165 App. Div. 921, 150 N. Y. Supp. 1099, had held section 841b of the Code was applicable to actions commenced before the enactment of the same.

The determination of the motion for a reargument was held in abeyance pending the decision of the Appellate Division in the Nicholson Case, and argument thereon was subsequently adjourned by consent of the parties. A number of motions were made from time to time which are unnecessary to detail here. Reargument of the motion made at the close of the trial was granted and heard at Special Term on September 11, 1915, some 18 months subsequent to the trial and presumably long after the term at which the trial was had terminated. Afterwards said motion was decided, and an order duly made and entered which provided:

"Ordered upon the reargument thereof that the defendant's said motion upon the minutes to set aside the plaintiff's said verdict upon the trial herein and grant a new trial herein be, and the same hereby is, in all respects denied."

The order was entered in Westchester county clerk's office December 27, 1915, and upon the same day judgment was entered in favor of plaintiff. Upon appeal from the judgment and order by defendant the same were affirmed, one justice not voting. Defendant appeals to this court, and challenges the jurisdiction of the court below to set aside the order made denying a new trial of the action. Counsel for the respondent claims that the power of the court to make the order is inherent, and not controlled or limited by the Code.

The motion made by defendant to set aside the verdict and for a new trial was entertained by the trial justice under section 999 of the Code of Civil Procedure, and was based substantially upon exceptions or because the verdict was contrary to law or contrary to the evidence. Under that provision of the Code the motion was required to be made at the same term at which the trial was had, and the appeal from the order made upon a determination thereon must be heard upon a case prepared and settled in the usual manner.

The motion to set aside the verdict and for a new trial was granted at the same term at which the trial was had and the order to that effect entered January 31st, which discloses that the trial justice granted the order solely for the reason that after consideration he was convinced he was in error as matter of law in the construction and application of section 841b of the Code of Civil Procedure in the action at bar. The result of that order as affecting the substantial rights of the parties is apparent. The defendant against which a verdict for a substantial sum of money was directed was relieved therefrom. The plaintiff was deprived of her verdict and denied the right to enter judgment thereon, and a retrial of the action was imposed upon her. The order granted by the trial justice was as effective as would have been a judgment so far as the rights of the parties were concerned.

The status of the parties thus remained until the order entered December 27, 1915, which granted a reargument of the motion made at the close of the trial and denied the motion to set aside the verdict and for a new trial. The granting of the last order referred to resulted in the entry of a judgment in favor of the plaintiff against defendant and the substantial rights of the parties were as clearly affected as were the rights of the plaintiff when the verdict in her favor was set aside and a retrial ordered. We think the weight of authority is contrary to the practice adopted in this case. *Herpe v. Herpe*, 225 N. Y. 323, 122 N. E. 204; *Bohlen v. Metr. E. R. Co.*, 121 N. Y. 546, 24 N. E. 932; *Heath v. N. Y. B. L. B. Co.*, 146 N. Y. 260, 40 N. E. 770; *Heinitz v. Darmstadt*, 140 App. Div. 252, 125 N. Y. Supp. 109; *Ellis v. Hearn*, 132 App. Div. 207, 200, 116 N. Y. Supp. 977.

For this reason, the judgment and order herein must be reversed, and a new trial granted, with costs to abide the event.

CHASE, COLLIN, CUDEBACK, and McLAUGHLIN, JJ., concur with HOGAN, J.

CRANE, J., reads dissenting memorandum, as follows:

Even if the practice of setting aside an order setting aside a verdict and reinstating it were irregular, the Appellate Division subsequently, in passing upon the entire case, law, and facts, has affirmed the judgment entered upon the verdict and decided that the trial judge was right in his final conclusion. We also agree that he should not have set aside the verdict for the reasons stated. While such practice may not be proper, I do not see what is to be gained by granting a new trial in this case, for what must now be a harmless step in practice.

HISCOCK, C. J., not sitting.

Judgment reversed, etc.

(226 N. Y. 260)

In re PARKER'S ESTATE.

(Court of Appeals of New York. April 22, 1919.)

1. TAXATION \Leftrightarrow 898—TRANSFER TAX—VALUATION—REMAINDERS.

Under Tax Law, § 230, a remainder is to be taxed at the highest rate that would be possible on the happening of any of the contingencies and conditions, however remote, which the transfer may involve.

2. TAXATION \Leftrightarrow 898—TRANSFER TAX—VALUATION OF CONTINGENT REMAINDER.

Where testator created trust for life of beneficiaries, with remainder over to their heirs at law or appointees by will, the assessed value of the remainder should be added and combined with the residue for the purpose of determining their value and measuring the tax, and, under Tax Law, § 230, the trustee must pay the amount which the residuary legatee would have to pay should there be no heirs.

3. TAXATION \Leftrightarrow 898—TRANSFER TAX—REMAINDERS.

Under Tax Law, § 230, remainders are to be appraised at their present value and no distinction is to be drawn between the classes of remainders, whether vested or contingent, the gift being classed as absolute for the purpose of taxation.

4. CONSTITUTIONAL LAW \Leftrightarrow 70(3)—FUNCTION OF JUDICIARY—ENFORCEMENT OF LAWS.

It is the duty of the courts to enforce the law imposing a transfer tax on remainders as it is written, without considering whether the burden is justified.

Appeal from Supreme Court, Appellate Division, First Department.

In the matter of the transfer tax on the estate of James V. Parker, deceased. From an order of the Appellate Division (185 App. Div. 300, 173 N. Y. Supp. 12), affirming a decree of the surrogate, the comptroller appeals. Reversed and remitted to the surrogate for further proceedings.

Schuyler C. Carlton, of New York City, for appellant.

Perry D. Trafford, of New York City, for respondent.

CARDOZO, J. By the will of James V. Parker, who died in January, 1917, property there described as "now in the hands and management of Robert H. Gardiner," is made the subject of a trust. The trustee is to apply the income to the use of Edith Stackpole Parker, wife of John Harleston Parker, during her life. On her death he is to divide the principal into as many shares as there are children of hers then living, and children then deceased leaving issue then surviving; the issue of deceased children are to receive their shares absolutely per stirpes; the

children who survive are to receive theirs in trust during their respective lives, with remainder to such persons as they may appoint by their respective wills, and, in default of such appointment, to their heirs at law. All the rest, residue, and remainder of the testator's property, including any legacy or devise which may for any reason lapse or fail, is given to John Harleston Parker, a nephew. There is thus a possible contingency that may make the principal of the trust a part of the residuary estate. That result will come to pass if no children or issue of the life tenant shall be living at her death. The property subject to the trust will then swell the estate of the residuary legatee. The value of the life interest in the trust has been appraised at \$351,475; the value of the future estate or remainder at \$143,890; and the value of the residuary estate (exclusive of the remainder) at \$455,941.66. The question to be determined is the rate at which the remainder is to be taxed.

[1] The command of the statute is that it shall be taxed at the highest rate that would be possible on the happening of any of the contingencies or conditions which the transfer may involve. Tax Law, § 230; Consol. Laws, c. 60; Matter of Zborowski, 213 N. Y. 109, 107 N. E. 44. A possible contingency will add the remainder to the residuary estate. In that contingency, the rate of tax that must be paid will be higher than if the remainder shall pass to legatees who are given nothing else. The rate does not depend upon relationship alone. It depends also upon value. Transfers to father, mother, husband, wife, or child are taxed at rates which vary from 1 per cent. to 4 per cent. according to the value of the gift. Transfers to brother, sister, and some other classes are taxed at rates varying from 2 per cent. to 5 per cent. Transfers to all other persons are taxed at rates varying from 5 per cent. to 8 per cent. Tax Law (Consol. Laws, c. 60), § 221a, as amended by Laws 1916, c. 548. The rate is 5 per cent. on the first \$25,000; 6 per cent. on the next \$75,000; 7 per cent. on the next \$100,000; and 8 per cent. on the balance. If the gift of a remainder valued at \$143,890 is considered by itself, the tax will be \$8,222, at which amount it was assessed by the surrogate. If the gift is added to the value of the residuary estate, the rate will be 8 per cent., and the tax will be \$11,411.20.

[2] We think the two gifts must be combined in determining their value and measuring the tax. A possible contingency will bring them together in the ownership of the same legatee. The remainder will then be taxable at the rate of 8 per cent. That is therefore the rate at which the tax must be collected now. The respondent draws some distinction between rates and grades of rates. The argument is that there are only three rates; 1 per cent. for legatees of one

class; 2 per cent. for those of another; 5 per cent. for those of another; and that progressive variations are not rates, but grades. No such distinction appears in the statute. The section (section 221a) is headed "rates of tax." In its body, the same terminology is maintained. A different "rate" is prescribed for the different increments of value. The argument in favor of the supposed distinction does violence, therefore, to the letter of the law. But, what is more important, it does violence to the spirit. The purpose of the statute is not obscure. The purpose is to put at once into the treasury of the state the largest sum which in any contingency the remaindermen may have to pay. The remaindermen do not suffer, for when the estate takes effect in possession, there will be a refund of any excess. Tax Law, § 230. The life tenant does not suffer, or, at all events, not seriously, for interest is paid by the comptroller upon the difference between the tax at the highest rate and the tax that would be due if the contingencies or conditions had happened at the date of the appraisal. Tax Law, § 241. If the trustees prefer, they may deposit securities of approved value, and receive the accruing income. Section 241. To guard against shrinkage of values, the statute bids them pay the balance, if the deposit turns out to be too small. Everywhere the scheme disclosed is absolute safety for the state, with a minimum of hardship for the life tenant. Tax this remainder at the rate of 8 per cent., and the state is protected against any possible contingency. Tax it at less, and an uncollected balance will be owing to the state if the remainder shall pass to the residuary legatee. That is the very evil against which the statute seeks to guard. Collection is imperilled when the state must keep track of the estate through all the changes and chances of an indefinite future. The path of safety is followed when collection is made at once.

[3] We leave, therefore, a needless hiatus in the framework of the statute when we yield to the respondent's argument. He admits that in a possible contingency, the rate of tax on the remainder will be based on the aggregate value of remainder and residue. He denies that it is the duty of the trustee to take heed of that contingency to-day. But to say that is to ignore the statute. The trustee is to take heed of all contingencies that may affect the tax on a remainder dependent on the trust. He is not to pick and choose, allowing for some contingencies, and ignoring others. He is to heed them all, or all that the will reveals. Much is made of the point that the contingent remaindermen are not personally liable for the payment of

the tax. We cannot see that this affects the duty of the trustee. He is to pay the tax out of the property of the trust, but he is to pay with due regard for the possibilities of the future. Remainders are to be appraised at their present value. *Matter of Zborowski*, supra; 213 N. Y. at page 113, 107 N. E. 44. They are gifts, like present interests. In fixing their value, no distinction is to be drawn between the classes of remainders, whether vested or contingent. For the purpose of taxation, the contingency is eliminated, and the gift is classed as absolute. *Matter of Terry*, 218 N. Y. 218, 112 N. E. 931. The value of other gifts to the same legatee must be reckoned in computing the tax when the remainder is vested. The method of computation is not different when the remainder is contingent. It is argued that in providing against contingencies, we should limit ourselves to those that the testator may be supposed to have foreseen. We need not stop to inquire whether that is so. There is nothing to show that this contingency was not foreseen by the testator, and covered by his will. He might have said, in so many words, that the nephew should receive the remainder in default of issue of the life tenant. He said the same thing in effect when he provided that his nephew should be the residuary legatee. Gifts have the same value whether they are stated separately or collectively. The rate of taxation does not vary with the paragraphs of scribes.

[4] This construction of the statute maintains the consistency of the law and its singleness of purpose. The state has secured itself against all contingencies, remote as well as probable. That is the dominant scheme, which it is our duty to preserve. In the case before us, the contingency is in all likelihood remote, and so the mind rebels a little against the tying up of money. But in other cases it may be less remote, and the need of protection greater. Whether in improbable contingencies the risk justifies the burden it is not for us to say. That is a question for the Legislature. Our duty is done when we enforce the law as it is written. *Matter of Zborowski*, supra, 213 N. Y. at page 116, 107 N. E. 44.

The order should be reversed, with costs in the Appellate Division and in this court, and the matter remitted to the surrogate for further proceedings in conformity with this opinion.

HISCOCK, C. J., and CHASE, HOGAN, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order reversed, etc.

(226 N. Y. 633)

**FIRST NAT. BANK OF WATERLOO v.
EXCHANGE NAT. BANK OF SENECA
FALLS et al.**(Court of Appeals of New York. April 29,
1919.)**BANKS AND BANKING @—180—SALE OF STOCK
PLEGGED—RIGHTS TO DIVIDENDS.**

Where a bank declared dividends on stock pledged to it, it was its right and duty to collect dividends and apply them to reduction of indebtedness for which stock was held as security, and purchasers of stock at sale directed to be made were not entitled to all dividends, but only to those which had not become payable.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the First National Bank of Waterloo against the Exchange National Bank of Seneca Falls and another, as trustee in bankruptcy of Francis Bacon. From a judgment of the Appellate Division (179 App. Div. 22, 164 N. Y. Supp. 1092), unanimously affirming a judgment at Special Term for plaintiff (179 App. Div. 22, 153 N. Y. Supp. 818), defendants appeal. Judgment modified, and as modified affirmed.

George E. Zartman, of Waterloo, pro se.

H. A. Carmer, of Seneca Falls, for appellant Exchange Nat. Bank of Seneca Falls.

W. Smith O'Brien, of Geneva, for respondent.

PER CURIAM. Several of the questions sought to be raised by the appellants are conclusively settled by the unanimous affirmation by the Appellate Division of the judgment of the Special Term. A careful consideration of the other questions argued fails to disclose any substantial error which would justify the reversal of the judgment. There is, however, one error in the form of the judgment which necessitates a modification of it.

It appears that from October 1, 1908, to April 1, 1915, the First National Bank of Waterloo has declared on the stock pledged to it 14 dividends of 2½ per cent. each, making a total of \$4,427.50, and in the thirteenth

subdivision of the judgment it is provided that the purchaser or purchasers of such stock upon the sale directed to be made shall be entitled to all the dividends which have been declared upon said stocks or any of them and which remain unpaid, together with any dividends which may be declared and remain unpaid prior to such sale. This is contrary to the general rule. It is well settled that, under circumstances similar to those here established, it is the right and duty of the pledgee of stock to collect the dividends declared thereon and apply them towards reduction of the indebtedness for which the stock is held as security. This rule was reiterated recently by this court. See *Brightson v. Claffin*, 225 N. Y. 469, 122 N. E. 458, and authorities there cited. The dividends declared upon the stock of the plaintiff remain in its possession and are not subject of a sale, but should be applied, prior to the sale, in reduction of the indebtedness found due. If at the time of the sale a dividend has been declared on the stock which has not become payable, then as to that dividend the purchaser of the stock would take it.

The judgment should therefore be modified by striking out the thirteenth subdivision and inserting in place thereof the following: That the plaintiff, prior to the sale of the stocks ordered to be sold, apply on the amount found due to all dividends which have been declared on said stocks or any of them and which are due and remain unpaid at the date of sale, together with the interest on such dividends from the entry of judgment on the remittitur of this court to said sale, and the purchaser of the certificates of stock issued by the First National Bank of Waterloo is required to surrender said certificates to the plaintiff and have issued in the place thereof certificates representing 126½ shares of the present capital stock of the plaintiff; and the judgment, as thus modified, should be affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

Judgment accordingly.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(126 N. Y. 297)

IROQUOIS RUBBER CO. v. GRIFFIN et al.*

(Court of Appeals of New York. April 29, 1919.)

1. PARTNERSHIP \Leftrightarrow 218(3)—LIABILITY—SCOPE OF AGENCY—PURCHASE OF GOODS.

It cannot be assumed as a matter of law that a partnership in the auto sales business carried on repair work or had need for automobile accessories.

2. PARTNERSHIP \Leftrightarrow 218(3) — LIABILITY OF PARTNER—PURCHASE OF GOODS—QUESTION FOR JURY.

Where one of two partners in the auto sales business ordered automobile accessories consisting of gas burners, tank washers, magneto cable, engine paint, etc., whether the purchases were within the scope of his partnership agency, actually or apparently, *held* for the jury.

3. PARTNERSHIP \Leftrightarrow 141—LIABILITY OF PARTNER—PURCHASE OF GOODS.

A man who enters into a partnership for only one purpose is not liable for the purchases of the other partner, unless used in that business, or the articles are of the kind usually and customarily bought for such an undertaking, existing or as represented to exist.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Iroquois Rubber Company against A. Ray Griffin and Stanley Mathes. From a judgment of the Appellate Division of the Fourth Department (175 App. Div. 968, 162 N. Y. Supp. 1125), affirming a judgment in favor of plaintiff, defendant Mathes appeals. Reversed, and new trial granted.

Sanford T. Church, of Albion, for appellants.

J. Sawyer Fitch, of Rochester, for respondent.

CRANE, J. The Iroquois Rubber Company of Buffalo, N. Y., sold to Mathes & Griffin of Albion, N. Y., in 1913, auto supplies consisting of gas burners, tank washers, magneto cable, engine paint, etc., amounting to \$513.67 on which has been paid \$148.06, leaving a balance due of \$365.61. A. Ray Griffin, one of the defendants, was in the garage business under the name of Oakland Garage of Albion. Stanley Mathes was not in the garage business or connected with the Oakland Garage. He and Griffin constituted the firm of Mathes & Griffin, agents of the Oakland automobile to sell Oakland automobiles. They also sold secondhand cars.

The plaintiff brought this action against the firm to recover for the automobile supplies furnished, and the defendant Mathes, while admitting that he and Griffin were co-agents, or partners, for the sale of automobiles, denied that they were partners for any other purpose or that the supplies were fur-

nished to the partnership. The denial also raised the issue as to whether the special partnership or business was such as to impliedly authorize Mathes to purchase automobile supplies.

The plaintiff has recovered in the courts below, and the appeal is brought here by the defendant Mathes upon exceptions to the judge's charge.

The testimony showed that a purchase of \$139.22 was made by Griffin in March of 1913 at the plaintiff's store, and that the balance of the bill, \$227.79, was purchased in the following May by a written order on the letter head of the defendants. Witnesses for the plaintiff said that Mathes was with Griffin in the store at the time of the March purchase and was introduced as Griffin's partner. This was denied by the defendant.

There was no evidence as to the May order except as it appeared in the letter sent. A copy of this letter is not in the record, and the circumstances of the purchase are not given. The defendant did not sign the letter and knew nothing about these transactions, according to his testimony. He says further that none of the articles thus purchased were ever received by him or by his firm, and, if this testimony be true, the fair inference is that they went to Griffin for his personal use in the Oakland Garage.

[1, 2] The plaintiff says that as agents for the Oakland car the firm had no office, but had sold a few cars, both new and secondhand. The case is lacking of any evidence that the firm, as selling agents, repaired cars, had a place of business, or used automobile accessories. In the absence of any evidence as to the nature of the business, it cannot be assumed as a matter of law that a selling agent carries on repair work or has need for automobile accessories. Especially would this be so where it appears that one of the partners in the selling agency conducts a separate and distinct business of an automobile garage, and that the other partner never ordered or received the goods and, by his testimony, had no occasion for them.

These brief statements make it clear, therefore, that an issue of fact was presented for the jury as to whether they believed the testimony of Mathes, and, if they did, whether the partnership with Griffin was such as authorized him to purchase the bill of goods from the plaintiff.

Mathes would be liable if Griffin's purchases were within the scope of his partnership agency, actual or as represented by Mathes, and not otherwise. This was a question for the jury and not for the court.

In its charge, the learned court said:

"But the only actual partnership which the plaintiff proved to exist between Mathes and Griffin was one for the handling of the Oakland automobiles. As far as their actual business

between themselves was concerned it does not appear that their partnership extended any further than that. So there is no proof of a general partnership which would authorize Mr. Griffin to charge Mr. Mathes by reason of the fact that they were in a general partnership."

But the court went further and held, as a matter of law, that as the May order was sent upon a letter head reading, "Mathes & Griffin, dealers in ten different makes of autos; a full line of used cars," Mathes was bound to pay for the goods so ordered.

"I have no doubt," said the judge to the jury, "that I am justified in saying to you that from and after May 6, 1913, Mr. Mathes is chargeable for the goods purchased by Mr. Griffin in the name of Mathes & Griffin from the plaintiff in this action regardless of whether there was any partnership between Mr. Mathes and Mr. Griffin or not. * * * Your duty in this case is to find a verdict for the plaintiff, either for the full amount—\$367.01 if you think that Mr. Mathes was in the store on the 13th of March, 1913, and heard Mr. Griffin say that they were partners in the automobile business, or for \$227.79 if you do not find that he was in the store on March 13, 1913, and heard Mr. Griffin say that he and Mr. Mathes were partners in the automobile business."

The judge, by this charge, directed a verdict for the amount of the May purchase, because it was ordered on the letter head of the defendants, and this representation of the business authorized Griffin's act.

We think that this circumstance was but evidence to be considered by the jury together with the testimony of the defendant Mathes in determining the litigated facts as above stated. The issue litigated and which should have been submitted to the jury was the scope of the partnership business as it actually existed or as represented by Mathes, and the authority of Griffin who made the purchases to bind Mathes by his acts.

Considering the nature of the agency, the letter heads, the business as previously conducted and as explained by this defendant, was the partnership merely to sell automobiles, or did it include their fixing and repair, thus requiring accessories? This was for the jury.

Another request should also have been charged. It was this:

"I ask your honor to charge the jury that in order to hold the defendant Mathes liable on this account set up or claimed in this action, the goods delivered and the credit given must be within the scope of the business in which he was held out to be a partner."

The court ruled:

"I decline to charge otherwise on that subject because I do not think the question is further involved in the case. It is true as an elementary proposition of law, but I do not think it affects this case in any way."

In the light of what we have here stated, the exceptions taken to this refusal and to the direction of a verdict require a reversal of this judgment.

[3] The amount involved is not large as litigation goes; the plaintiff has waited a long time for its money, and the case is very simple, but the law still remains that a man who enters into a partnership for only one purpose is not liable for the purchase of the other partner unless used in that business or the articles are of the kind usually and customarily bought for such an undertaking existing or as represented to exist.

The judgment should be reversed, and a new trial granted; costs to abide the event.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, nad McLAUGHLIN, JJ., concur.

Judgment reversed, etc.

(226 N. Y. 225)

FIDELITY & DEPOSIT CO. OF MARYLAND v. QUEENS COUNTY TRUST CO.*

(Court of Appeals of New York. April 22, 1919.)

1. BANKS AND BANKING §130(1)—DEPOSITS—NOTICE.

A bank, in which trustee in bankruptcy deposited funds belonging to the estate of the bankrupt, held to have notice that the funds deposited by the trustee to his account as such belonged to the estate in bankruptcy.

2. BANKS AND BANKING §130(1)—DEPOSIT—TRUST FUNDS.

If a bank had notice that funds deposited by a trustee to his account as such belonged to an estate in bankruptcy, and knew or ought to have known of the existence of a general order in bankruptcy forbidding the withdrawal of the funds, save on checks countersigned by the clerk of the court, etc., but paid out such funds on the trustee's check uncountersigned, it would be liable.

3. BANKRUPTCY §100(1)—ADJUDICATION—NATURE OF—"JUDGMENT IN REM."

An adjudication in bankruptcy is a "judgment in rem," binding against all the world, in so far as it determines the defendant to be a bankrupt and his property subject to administration in bankruptcy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment in Rem.]

4. BANKS AND BANKING §130(1)—DEPOSITS—LIABILITY.

A bank, in which trustee in bankruptcy deposited funds belonging to the bankrupt estate, held to have knowledge, or to be chargeable with knowledge, of the existence of a general order in bankruptcy forbidding the withdrawal

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Reargument denied 123 N. E. 864.

of the funds, save on checks countersigned by the clerk of the court.

5. SUBROGATION — 7(4)—TRUSTEES—RIGHTS OF.

The surety on the bond of a trustee in bankruptcy, who appropriated to his own use moneys belonging to the estate in bankruptcy has, under the principles of subrogation, the rights of an obligee in the bond against a bank, which allowed the surety to withdraw the funds belonging to the bankrupt estate on checks which were not countersigned by the proper officer.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by the Fidelity & Deposit Company of Maryland against the Queens County Trust Company. From a judgment on an order of the Appellate Division (174 App. Div. 160, 159 N. Y. Supp. 954), reversing a judgment for plaintiff entered upon a directed verdict, and directing a dismissal of the complaint, plaintiff appeals. Judgment of the Appellate Division reversed, and new trial granted.

See, also, 174 App. Div. 929, 160 N. Y. Supp. 1130.

ELI J. Blair, of New York City, for appellant.

Charles H. Street, of Huntington, for respondent.

COLLIN, J. The plaintiff brings the action to recover the amount it was compelled to pay as surety in the bond given by Robert J. Peebles, as trustee in bankruptcy of William Trist Bailey, and which Peebles, as trustee, illegally withdrew from the defendant and appropriated to his personal use. At the trial the court directed a verdict in favor of the plaintiff in the sum of \$8,600 and interest. The Appellate Division reversed the consequent judgment and dismissed the complaint.

We have concluded there was error in dismissing the complaint. The cardinal facts are:

By order duly made in June, 1906, Robert J. Peebles, trustee in bankruptcy of William Trist Bailey, a bankrupt, was directed to furnish a surety company bond in a stated sum and to deposit in the defendant all moneys of the estate immediately upon the receipt of them. The bond of the trustee and of the plaintiff as surety, in the usual form, was responsively furnished. The evidence did not show that a copy of the order or bond was served upon the defendant. Between July 3, 1906, and June 27, 1907, the trustee made in the defendant 12 deposits of funds belonging to the bankrupt estate. The deposit slips stated the deposits were made by Robert J. Peebles, trustee, and the deposits were credited to the account of

"Robert J. Peebles, Trustee." On the same day, July 3, 1906, that such account was opened by the deposit of a check, the individual account of Robert J. Peebles in the defendant was charged with a withdrawal of the amount of the check. Of the 11 checks of third persons deposited in the trustee account a part were payable to "Robert J. Peebles, Trustee," and a part to "Robert J. Peebles." They were apparently indorsed "Robert J. Peebles, Trustee." A check, deposited September 13, 1906, was drawn by John J. O'Grady payable to himself and was indorsed:

"Pay to the order of Robert J. Peebles, Trustee in Bankruptcy for William Trist Bailey, Bankrupt. John J. O'Grady."

"Robert J. Peebles, Trustee in Bankruptcy for William Trist Bailey, Bankrupt, for deposit to the credit of Robert J. Peebles, Trustee."

The withdrawals from the trustee account were made between July 17, 1906, and September 17, 1908, by fifty checks, each signed, "Robert J. Peebles, Trustee." Of the 50 checks, 32, drawn and paid prior to September 17, 1908, were issued upon the order of the United States District Judge for the Eastern District of New York, and each was countersigned across its face, "Percy G. B. Gilkes, Deputy Clerk U. S. District Court Eastern Dist. of New York," or "Richard F. Morle, Clerk U. S. District Court Eastern District of New York," and each of 25 of the 32 had upon its face in writing, "In re Wm. Trist Bailey." Three of those checks were certified by the defendant on the day of their date. Eight checks drawn and paid prior to September 17, 1908, were in the ordinary form; that is, without the countersignature or the statement.

The appropriations of the trust funds by the trustee to his personal use began on September 17, 1907, and were accomplished by 9 checks drawn and paid within the ensuing year. Each check was in the ordinary form and, with the exception of 2, was deposited in the individual account of Peebles in the defendant. During that period, one check was drawn on the account pursuant to the order of the court and was countersigned, "Richard F. Morle, Clerk U. S. District Court Eastern Dist. of New York." There is no evidence that Peebles was indebted to the defendant at any time or that any of the moneys of the bankrupt estate misappropriated by him were received by the defendant in payment of any indebtedness to it.

General Order 29 of the United States Supreme Court General Orders in Bankruptcy (18 Sup. Ct. viii) adopted and promulgated by that court November 28, 1898, pursuant to Bankruptcy Act July 1, 1898, c. 541, § 30, 30 Stat. 554 (U. S. Comp. St. § 9614), is:

"No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks."

There is no evidence that the defendant was furnished a copy of this rule.

Robert J. Peebles died December 31, 1908. A substituted trustee compelled an accounting on the part of his administrator, which revealed the peculations we have stated. Under the order of the court the plaintiff paid (the estate of Robert J. Peebles being insolvent) their amount.

[1, 2] The conclusion that the facts permit and give support to the inference that the defendant knew or ought to have known that the funds deposited in the trustee account were trust funds belonging to Peebles as trustee in bankruptcy of William Trist Bailey, is too manifest and indisputable to require an analytical restatement of or discussion concerning them. The defendant did not, however, by paying moneys of those funds to Peebles or crediting them to his individual account, through the check of "Robert J. Peebles, Trustee," participate in the misappropriation of them by the trustee. A liability of the defendant did not arise from those facts. *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759, L. R. A. 1918F, 1059.

In case a copy of the General Order 29 had been furnished to the defendant, or the defendant had known or ought to have known of its existence, prior to the payment of the checks by which the misappropriation was effected, the payment of the 9 checks would have made it liable for the diversion of the funds effected through them. The checks then would have been as to it, as they in fact were, incomplete and improperly drawn. *American National Bank v. Fidelity & Deposit Co.*, 129 Ga. 126, 58 S. E. 867, 12 Ann. Cas. 666.

[3, 4] We have concluded, with hesitation, however, that the evidence permitted or gave support to a finding that the defendant was chargeable with knowledge of the existence of the general order. It was charged conclusively with notice or knowledge of the adjudication of William Trist Bailey's bankruptcy and with the provisions of the Bank-

ruptcy Act, including those of section 30. The adjudication was a judgment in rem, binding against all the world, so far as it determined Bailey to be bankrupt, and his property subject to administration in bankruptcy. *Manson v. Williams*, 213 U. S. 453, 29 Sup. Ct. 519, 53 L. Ed. 869; *Corbett v. Riddle*, 209 Fed. 811, 126 O. C. A. 535. The evidence permits the finding, as we have stated, that the defendant was chargeable with the knowledge that the moneys in the account of "Robert J. Peebles, Trustee," were trust funds arising from the bankrupt estate. The rule that a bank is not bound to take notice of or give heed to notations or memoranda upon checks, made for his personal convenience or advantage by the drawer, is not applicable to the countersignatures and the statement, "In re William Trist Bailey." The statement, considered with the knowledge of the bank that William Trist Bailey was an adjudicated bankrupt, may be found, in and of itself, to characterize the nature of the funds upon which the checks were drawn. It may indicate that the checks were given in the proceedings in the bankruptcy of Bailey, upon funds arising from the bankrupt's estate. *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. Ed. 1078; *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360; *Miller v. Roach*, 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71. The countersignatures were the formal official acts of a public officer of the bankruptcy court, to which must be imputed a cause and a purpose. The defendant could not assume or presume that they were made in sheer voluntariness or sport and without reason or effect. The acts of public officials do not spring from such causes. The countersignatures manifestly had a relation to the checks themselves. If unnecessary or meaningless, in relation to them, they would not have been there. Good and practical reason for them must in the nature of things exist. It is difficult, if not impossible, to conceive of a reason for them dissociated from the completeness or validity of the checks.

The defendant as a matter of natural necessity and mental operation, was bound to be in a condition of inquiring for the cause and purpose of them. One who has reasonable grounds for suspecting or inquiring ought to suspect, ought to inquire, and the law charges him with the knowledge which the proper inquiry would disclose. Actual notice may be proved by direct evidence or it may be inferred or implied. Actual knowledge is not required. Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstances from which a jury would have been warranted in inferring notice. If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary thoughtfulness and care, to make further accessible inquiries, and he avoids

the inquiry, he is chargeable with the knowledge which by ordinary diligence he would have acquired. Knowledge of facts, which, to the mind of a man of ordinary prudence, beget inquiry, is actual notice, or, in other words, is the knowledge which a reasonable investigation would have revealed. First National Bank of Paterson v. National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139; Baker v. Bliss, 39 N. Y. 70; Williamson v. Brown, 15 N. Y. 354; Anderson v. Blood, 152 N. Y. 285, 46 N. E. 493, 57 Am. St. Rep. 515; Peck v. Bank of America, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826. In the case at bar a simple inquiry, by the bank of the trustee, for the reason of the countersignatures, would have revealed the existence of the general order and of its provisions.

[5] The plaintiff, in virtue of the general principles of subrogation, has the rights of the obligee in the bond against the defendant. Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137, 115 N. E. 465; American National Bank v. Fidelity & Deposit Co., 129 Ga. 126, 58 S. E. 867, 12 Ann. Cas. 666.

The judgment of the Appellate Division should be reversed, and a new trial granted; costs to abide the event.

HISCOCK, C. J., and OUDDEBAK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

Judgment reversed, etc.

(228 N. Y. 205)

HEUMAN v. M. H. POWERS CO.

(Court of Appeals of New York. April 15, 1919.)

1. CARRIERS ⇨77 — COMMON-LAW OBLIGATION.

It is the common-law obligation of a carrier to safely carry and deliver goods intrusted with it.

2. CARRIERS ⇨151 — CONTRACTS LIMITING LIABILITY—SUFFICIENCY.

Where a common carrier desires by special contract to exonerate itself from the effects of its own acts or omissions, or those of its employes, the special contract must openly express that intention, so that it cannot be in the slightest degree misunderstood.

3. CARRIERS ⇨156(2)—CONTRACTS LIMITING LIABILITY—CONSTRUCTION.

A clause in a contract of carriage, "the responsibility of the company is limited to \$50 for any article together with the contents thereof," referred to the carrier's responsibility as a carrier, and did not include misfeasance or nonfeasance of the carrier itself, or its employes, and the carrier was liable for the full face value of articles stolen by employes.

4. CARRIERS ⇨110 — LOSS OF GOODS FROM THEFT—LIABILITY—FAILURE OF SHIPPER TO STATE VALUE OF ARTICLES.

Failure to notify a common carrier that there was a safe in a cabinet containing valuable articles did not relieve carrier from liability where its servants broke into the safe and stole the valuable articles.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Ottilie Heuman against the M. H. Powers Company. From an order of the Supreme Court, Appellate Division, First Department (175 App. Div. 627, 162 N. Y. Supp. 590), reversing a determination of the Appellate Term, which affirmed a judgment of the City Court of New York in her favor, the plaintiff appeals. Order reversed.

See, also, 177 App. Div. 889, 163 N. Y. Supp. 1119.

The action was begun in the City Court against the defendant, a common carrier, to recover the value of certain jewelry which was lost while in possession of the defendant.

The plaintiff employed the defendant to move her household goods from one apartment to another in the city of New York. Included in the furniture to be moved was a cabinet with a small safe inside, containing, among other things, some articles of jewelry.

When the defendant was employed, the plaintiff's husband, with his wife's authority, signed a memorandum showing when and where the moving was to be done, and the defendant's charges therefor, which were \$49, and containing also the following clause:

"The responsibility of the company is limited to \$50 for any article, together with the contents thereof."

The property was to be moved on Saturday, and late in the afternoon a van load of furniture, including the cabinet safe, arrived at the apartment to which the goods were to be taken.

The plaintiff's husband and the defendant's representative arranged that this van load of goods should be taken to the defendant's warehouse, and should be delivered to the plaintiff on the following Monday morning. When the goods were delivered on Monday it was found that the cabinet safe had been broken open, and certain articles of jewelry belonging to the plaintiff had been taken.

It turned out that while the goods were in the custody of the defendant over Sunday, three of the defendant's employes broke open the safe and took the jewelry.

In the City Court the plaintiff recovered a judgment against the defendant of \$1,000 and costs, which was affirmed at the Appellate Term, but was reversed in the Appellate Division.

Bertram L. Kraus, of New York City, for appellant.

John W. Browne, of New York City, for respondent.

CUDDEBACK, J. The action is for a breach by the defendant of the contract of carriage.

It will be observed that the memorandum signed by the plaintiff's husband contains no stipulation as to the value of the property intrusted to the defendant, but simply a clause limiting the responsibility of the defendant for any article or the contents thereof to \$50. Therefore those cases which involve a stipulation between the shipper and the carrier as to the value of the goods carried to measure the extent of the carrier's liability in case of loss do not apply. *D'Utassy v. Barrett*, 219 N. Y. 420, 114 N. E. 786.

[1] Whatever else may be said of the manner in which the defendant performed its contract, it certainly violated the common-law obligation of a carrier to safely carry and deliver the plaintiff's goods. The question is whether the clause quoted from the memorandum signed by the plaintiff's husband is sufficient to limit the responsibility of the defendant for the loss of the jewelry to \$50. The simple and complete answer to that question is that the clause referred to, when read in the light of the decisions construing such clauses, does not even purport to limit the defendant's responsibility for the violation of duty shown in this case.

[2] The rule is that where a common carrier desires by special contract to exonerate itself from the effect of its own acts or omissions, or those of its employees, the special contract must openly and plainly express that intention so that it cannot be in the slightest degree misunderstood. *Mynard v. Syracuse, B. & N. Y. R. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Spinetti v. Atlas S. S. Co.*, 80 N. Y. 71, 36 Am. Rep. 579; *Gardiner v. N. Y. C. & H. R. R. R. Co.*, 201 N. Y. 387, 94 N. E. 876, 84 L. R. A. (N. S.) 826, Ann. Cas. 1912B, 281.

[3] The clause in the memorandum is:

"The responsibility of the company is limited to \$50 for any article, together with the contents thereof."

Plainly this clause refers to the defendant's responsibility as a carrier, and does not include the misfeasance or nonfeasance of the carrier itself or of its employees. The plaintiff had no reason to understand she was releasing them from responsibility for their own depredations. While couched in the words selected by the defendant, the clause does not, under the circumstances of this case, limit the defendant's responsibility at all.

[4] The defendant also contends that it

was relieved from its liability as a common carrier by the failure of the plaintiff to disclose the fact that there was a safe in the cabinet containing valuable articles. The answer to that argument is that the failure to make such disclosure did not relieve the defendant from liability for its own acts or those of its servants, which amounted to a misfeasance. *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442; *Id.*, 70 N. Y. 410, 26 Am. Rep. 608.

I recommend that the order of the Appellate Division be reversed, and that the judgment of the Appellate Term be reinstated, with costs in this court and in the Appellate Division.

HISCOCK, C. J., and COLLIN, HOGAN, and CRANE, JJ., concur.

CHASE, J., not voting.

McLAUGHLIN, J., not sitting.

Order reversed, etc.

(236 N. Y. 352)

PEOPLE ex rel. FINNEGAN v. McBRIDE et al., Civil Service Commission.

(Court of Appeals of New York. April 22, 1919.)

1. MANDAMUS \Leftrightarrow 8(12)—CIVIL SERVICE COMMISSION—NATURE OF DETERMINATION—REMEDY BY CERTIORARI.

Determination by a city civil service commission canceling an eligible list promulgated by it on account of irregularities, although involving the exercise of judgment and discretion, is neither judicial nor quasi judicial, but an administrative act, reviewable by mandamus, and not certiorari; there being no trial or judicial hearing before the commission.

2. MUNICIPAL CORPORATIONS \Leftrightarrow 217(3)—CIVIL SERVICE COMMISSION—LIST OF ELIGIBLES—REVOCATION.

The rule that nonjudicial officers of limited jurisdiction, having power to do a certain act, may not vacate their orders, does not apply to the action of a city civil service commission in correcting errors and irregularities in an eligible list by setting it aside, but the commission cannot act arbitrarily in so doing.

3. MUNICIPAL CORPORATIONS \Leftrightarrow 217(3)—CIVIL SERVICE COMMISSION—ELIGIBLE LIST—REVOCATION.

The civil service commission of New York City cannot vacate an eligible list, which it has once promulgated upon its mere conclusion based upon hearsay and without proof that gross irregularities were permitted to creep into the examination.

Appeal from Supreme Court, Appellate Division, First Department.

Mandamus by the people, on the relation of Mary A. Finnegan, against James E. Mc-

Bride and others, Civil Service Commissioners of the City of New York. From an order of the Appellate Division (185 App. Div. 482, 173 N. Y. Supp. 43) affirming, by a divided court, an order of the Special Term (104 Misc. Rep. 153, 172 N. Y. Supp. 11) granting a peremptory writ of mandamus, defendants appeal. Affirmed.

William P. Burr, Corp. Counsel, of New York City (Terence Farley, of New York City, of counsel), for appellants.

John W. Collopy, Jr., of New York City, for respondent.

Samuel H. Ordway and Henry W. Hardon, both of New York City, for intervener Civil Service Reform Association.

Charles D. Newton, Atty. Gen., on behalf of State Civil Service Commission and as *amicus curiæ*.

POUND, J. The positions of nurse and of supervising nurse in the department of health of the city of New York are classified as competitive positions in the civil service of the city. The nurses in the department of health when appointed are assigned to either one of two bureaus, one called the bureau of child hygiene, and the other the bureau of preventable diseases. Prior to August, 1917, the custom had grown up in the department of health of assigning some of these nurses in both bureaus to act as supervising nurses, with supervisory powers over the other nurses and a larger salary. Apparently such nurses had been assigned to act as supervising nurses without civil service examination, promotion, or otherwise. In August, 1917, the civil service commission announced that it would hold in November, 1917, a competitive examination for promotion to the position of supervising nurse, open to all of the nurses in the department who had served for a year or more.

Subdivision 20 of rule XV of the Municipal Civil Service Rules of the city of New York provides what weights shall be given to the different factors of mental tests and comparative conduct, efficiency, and seniority in examinations for promotion. Prior to the examination for supervising nurse it is alleged that it was announced that the various factors in the examination should have, and that they were given, different weights from those required by said rule, although the rule, which had the force of law, was not amended, but it does not appear as a fact that the rule was thus disregarded.

The examination was held on November 27, 1917, and practically all of the nurses in the department took it. The ratings of the candidates in this examination on the subject of experience were made, in part at least, on records kept by some of the acting supervising nurses who were also candidates in the

same examination, but not in contemplation of such examination. After the examination had been held, but before the eligible list had been established, complaints were made, and defendants made an investigation, but afterwards the eligible list was established on March 4, 1918, divided into two parts, one for the bureau of child hygiene and the other for the bureau of preventable diseases. Thereafter, on April 6, 1918, after further complaints, the defendants made another investigation, in which the facts were gone into more fully, and an alleged conspiracy was discovered by which a nurse who was not among the first three on the list was given an opportunity to be appointed by waivers or withdrawals of those who stood ahead of her on the list. As the result of this investigation defendants found "that gross irregularities were permitted to creep into the matter of this examination," and that "because of said irregularities the results of said examination do not meet the requirements of the Constitution, the civil service law of the state, or of the rules and regulations of the municipal civil service commission of the city of New York adopted in accordance therewith," and thereupon the commission on April 6, 1918, "resolved that the promotion eligible lists of supervising nurses for the bureaus of child hygiene and preventable diseases, department of health promulgated March 4th, be and they are hereby canceled." On May 15, 1918, the defendants ordered a new promotion examination for supervising nurse, and notified the nurses that such examination would be held in June, 1918.

Thereupon the relator, who was No. 14 on the list entitled bureau of child hygiene, and who, if the lists were merged into one list, would be twenty-third on the merged list, commenced this proceeding, in substance asking that a writ of mandamus issue requiring the defendants, as the civil service commission of the city of New York, to reinstate the old eligible lists for promotion to the position of supervising nurse in the department of health which they had theretofore canceled, and to merge the same into one list. Thereafter the Supreme Court, at Special Term, granted the relief asked for on the ground that the commission had no power to set aside the eligible list, and, if it had the power, was not justified on the facts in taking such action.

On appeal by the defendants to the Appellate Division, the final order made below was affirmed by a divided court on the ground that the commission, being a body of limited jurisdiction, was *functus officio* and had no power to revoke a list which it had once promulgated.

[1] That the establishment of an illegal list sanctifies it in the presence of its own creator seems an impotent conclusion. The

determination of the civil service commission was neither judicial nor quasi judicial in its character and the commission was not bound by the rule that functions of inferior judicial tribunals or of quasi judicial officers terminate with the entry of judgment and may not afterwards be altered or varied in any respect by the tribunal itself. For a short period of time it was held that the civil service commission acted quasi judicially (*People ex rel. Sims v. Collier*, 175 N. Y. 196, 67 N. E. 309), but this court candidly retracted the views expressed in the *Sims* Case in *People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785, where it was held that the ordinary determinations of the commission, although involving the exercise of judgment, are neither judicial nor quasi judicial, for the reason that they are not based on a trial or judicial hearing before the commission which may be reviewed by certiorari. In *Matter of Simons v. McGuire*, 204 N. Y. 253, 257, 97 N. E. 526, 527, *Werner, J.*, said:

"The trend of the earlier cases reached its logical culmination in *People ex rel. Sims v. Collier*, 175 N. Y. 196 [67 N. E. 309], where it was held that the duty of classification under the Civil Service Law was quasi judicial in its nature, and was therefore not reviewable by mandamus, but by certiorari, as in other cases involving judicial functions. This was in 1908. Three years of experience under that decision demonstrated that this court had in effect assumed the functions of the civil service commissioners; for every challenged decision of these officers was brought to this court as a question of law. The case of *People ex rel. Schau v. McWilliams*, 185 N. Y. 92 [77 N. E. 785], which came to us in 1906, very pointedly presented the unfortunate tendencies of our decision in the *Sims* Case, and after mature deliberation we decided to retract our earlier views and held that the determination of a civil service commission in classifying positions in the public service, although involving the exercise of judgment and discretion, is more of a legislative or executive character than judicial or quasi judicial."

The commission proceeded with judicial forms to investigate the charges that the examination for supervising nurse was irregular, but there was no trial or judicial hearing before the commission. Its action is sought to be reviewed, not by certiorari, which is appropriate to the review of a judicial act, but by mandamus which is appropriate to the review of administrative acts. The rule which forbids the reopening of a matter once judicially determined by a competent inferior tribunal does not apply. As was said in *People ex rel. Hotchkiss v. Bd. Supervisors Broome Co.*, 65 N. Y. 222, 225:

"There is no substantial reason for hampering such a body, in its power to correct its own errors and to do right, by applying to it the technical rules which pertain to justices' courts, and other inferior judicial tribunals, supposed to pro-

ceed according to the course of the common law, and whose mere errors can only be corrected by a direct proceeding in review."

[2] Neither does the general rule apply that nonjudicial officers of special and limited jurisdiction, having power to do a certain act, may not vacate their own orders. *People ex rel. Hotchkiss v. Bd. Supervisors*, supra, 65 N. Y. 227; *People ex rel. Chase v. Wemple*, 144 N. Y. 478, 482, 39 N. E. 397. The action of the commission, had with due deliberation, upon such a matter as the establishment of an eligible list, should, for obvious reasons, be regarded as a finality, but the commission's authority thereon does not wholly cease. It certifies names therefrom for appointment. Error may be corrected by setting it aside if it was the result of illegality, irregularity in vital matters, or fraud. The commission may not act arbitrarily. Public officers or agents who exercise judgment and discretion in the performance of their duties may not revoke their determinations nor review their own orders once properly and finally made, however much they may have erred in judgment on the facts, even though injustice is the result. A mere change of mind is insufficient. Further action must, where power is not entirely spent, be for cause, with good reasons and proper motives for the correction of improper action. The commission has life and power to vacate a list which has no legal virtue whatsoever.

[3] It is impossible to say that the action of the commission in annulling the eligible list in the case before us was due to anything more serious than a response to criticism of the rating of the contestants and dissatisfaction with an attempted juggling with the list after it had been established, whereby, through waivers obtained from those at the head of the list, candidates were pushed up where they would be certified for appointment in advance of their turn. The dissatisfaction thus expressed does not appear to be due to any illegal action of the commission. Correction of the abuse of waivers—an abuse which may result in the entire thwarting of the merit system through official pressure upon candidates to yield their prior claims to certification to one more favored by the appointing power—must be sought elsewhere. The commission may not decide for itself, for the purpose of vacating an eligible list, that "gross irregularities were permitted to creep into the matter of the examination." Where no such irregularities appear, the declaration of the commission that they exist does not create them. Here we have no proof that ratings were made contrary to the rule which fixed the relative weights of mental tests and experience, but only a hearsay charge to that effect. The incident that some efficiency records were kept by nurses who afterwards en-

tered the examination, while not commendable, was not under the circumstances, a serious irregularity, nor one which resulted in an improper rating of any candidate. The clear legal duty of the commission, having once established the list, was to continue it in existence as a single list for the period fixed by law, or by rule having the force of law.

The order appealed from should therefore be affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, McLAUGHLIN, and ANDREWS, JJ., concur.

Order affirmed.

(228 N. Y. 266)

KURAK v. TRAICHE.

(Court of Appeals of New York. April 22, 1919.)

1. DAMAGES §142 — PLEADING — PERSONAL INJURIES.

Where a person alleges and proves that he has been injured in his person, he may recover such damages as necessarily, usually, and immediately flow therefrom, under a general allegation that damages have been sustained by reason of such injury; but a person seeking to recover damages other than such as necessarily, usually, and immediately flow from the injuries must allege and prove such special damages.

2. DAMAGES §143 — PLEADING — ALLEGING PARTICULAR DAMAGES.

Where a plaintiff attempts by his complaint to specify particular damages which he claims to have suffered from personal injuries, he thereby, at least to some extent, negatives any claim for damages other than those which he has specified.

3. DAMAGES §158(1) — PLEADING — PERSONAL INJURIES — VARIANCE.

In personal injury action, allegations that plaintiff fractured his arm, bruised his knee, broke his ribs, sprained his back, injured his spine, and suffered a nervous shock do not support evidence of paralysis of the face, in absence of proof that such paralysis was a natural or necessary result of such injuries.

4. DAMAGES §158(2) — PLEADING — PERSONAL INJURIES.

In personal injury action, complaint alleging particular injuries, "and that he was otherwise bruised, sprained, and injured in and about various parts of his body" does not permit evidence of an injury not the necessary or natural result of the specified injuries.

5. DAMAGES §158(2) — PLEADING — PERSONAL INJURIES.

Where injuries are specifically stated, parts of the body mentioned, and the injuries to the parts are given, an accompanying clause of general injury to other parts of the body natural-

ly leads to the inference that such are of minor importance, or else connected with and necessarily growing out of the injuries specified, so that such a clause does not permit proof of injuries other than those specified, unless naturally developing out of them.

Hiscock, C. J., and McLaughlin, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Peter Kurak against Peter Traiche. From a judgment of Appellate Division (178 App. Div. 952, 165 N. Y. Supp. 1095), affirming a judgment for plaintiff upon verdict of jury for damages sustained in a collision, and from which judgment of Appellate Division two justices dissent on ground that it was error to admit evidence of paralysis under the allegations of the complaint, defendant appeals. Reversed.

David B. Sugarman, of Syracuse, for appellant.

Edward W. Cregg, of Syracuse, for respondent.

CRANE, J. [1, 2] There is but one serious question in this case. The plaintiff proved as part of his injury for which he sought damage a paralysis of the right side of his face. There was nothing said about it in the complaint. An exception having been taken to the admission of this testimony for this reason, we are presented again with the much-discussed question of how fully a complaint should inform the defendant of the elements of damage. The cases which are numerous upon this point were fully reviewed, and the principle clearly stated by Chase, J., in *Keefe v. Lee*, 197 N. Y. 68, 70, 74, 90 N. E. 344, 345, 346 (27 L. R. A. [N. S.] 837). To the rule there stated, we must adhere as it has been followed repeatedly by the lower courts. "Where a person," reads the opinion, "alleges and proves that he has been injured in his person the law implies that damages result from such injury, and he may recover such damages as necessarily, usually, and immediately flow therefrom, under a general allegation in the complaint that damages have been sustained by him by reason of such injury. * * * If a person seeks to recover damages other than such as necessarily, usually, and immediately flow from the injury, he must allege such special damages and prove them. * * * Where a plaintiff attempts by his complaint to specify particular damages which he claims to have suffered, he thereby, at least to some extent, negatives any claim for damages other than those which he has specified."

The complaint in this case, alleging that the plaintiff while driving his horse and wag-

on in the streets of Syracuse, was run into by the defendant's automobile, states his injuries to be the following:

"That his left arm was bruised, sprained and fractured; that his left knee was bruised, sprained and injured; that several ribs on the left side of his body were fractured; that his back and the muscles and ligaments thereof were bruised, sprained, and injured; that his spine was injured, and that he received a severe internal injury, and that he was otherwise bruised, sprained, and injured in and about various parts of his body; that he suffered a severe nervous shock."

[3] There is no allegation that he suffered a paralysis of the face, and such a misfortune is not a necessary, natural, or ordinary result of the injuries alleged. Although it was no doubt caused by his injuries, there is no proof that it was the necessary or natural result to be expected from the fracture of his arm or his bruised knee or his broken ribs or the sprained back or injured spine or the nervous shock. In the absence of such proof, it must be assumed that this separate and distinct facial difficulty was not in all cases to be anticipated as accompanying such injuries.

[4] The fact, therefore, should have been alleged. It is stated, however, that the rule laid down in the Keefe Case and in *Kleiner v. Third Avenue Railroad Co.*, 162 N. Y. 193, 56 N. E. 497, is not applicable because of the general statement accompanying the above specified injuries contained in the words, "and that he was otherwise bruised, sprained and injured in and about various parts of his body."

[5] If these words were the only allegations of injury, the rule of *Ehrgott v. Mayor, etc.*, of N. Y., 96 N. Y. 264, 48 Am. Rep. 622, would probably apply, permitting the plaintiff to prove any kind of an injury, the defendant's protection resting in his right to demand a bill of particulars. But it was stated in the Keefe Case that the principle

of the Ehrgott Case was to be confined to the language used in the complaint in that case. Mere general allegations of injury necessarily put the defendant on inquiry, as he is not informed what part of the body is injured or what the nature of the injury is. But where the injuries are specifically stated, parts of the body mentioned and the injuries to the parts are given, an accompanying clause of general injury to other parts of the body naturally leads to the inference that such are of minor importance, or else connected with and necessarily growing out of the injuries specified. Such general allegation is hardly a fair notice of a special disorder or disease as important and as serious as those specified. Such a clause, therefore, as that mentioned does not permit the plaintiff to prove injuries other than those specified unless naturally developing out of them. This has been the rule applied by the courts. *Briscoe v. City of Mt. Vernon*, 174 App. Div. 200, 160 N. Y. Supp. 924; *Sealey v. Metropolitan Street R. Co.*, 78 App. Div. 530, 79 N. Y. Supp. 677; *Lockwood v. Troy City Ry. Co.*, 92 App. Div. 112, 87 N. Y. Supp. 311; *Long v. Fulton Contracting Co.*, 133 App. Div. 842, 117 N. Y. Supp. 1118; *Fulford v. Lynch*, 168 App. Div. 70, 153 N. Y. Supp. 753.

We are obliged to hold, therefore, in adherence to this well-established practice that the evidence of paralysis to the face was improperly received under the allegations of the complaint, and that the judgment of the lower courts must be reversed and a new trial granted, with costs to abide the event.

CHASE, COLLIN, and CUDEBACK, JJ., concur.

HOGAN, J., concurs in result.

HISCOCK, C. J., and McLAUGHLIN, J., dissent.

Judgment reversed, etc.

(236 N. Y. 309)

PEOPLE ex rel. SPRENGER v. DEPARTMENT OF HEALTH OF CITY OF NEW YORK.

(Court of Appeals of New York. April 15, 1919.)

1. HOSPITALS §1 — POWER OF BOARD OF HEALTH — REFUSAL OF PERMIT FOR HOSPITAL.

Under the charter of the city of New York, §§ 1167, 1172, the board of health had no power to refuse a permit for a private hospital for the treatment of medical, surgical, and obstetrical cases, as required by its Sanitary Code, § 220, when all other conditions were satisfactory, and no offense to the senses was suggested, for the exclusive reason that considerable damage would accrue to surrounding property.

2. MANDAMUS §81—REFUSAL OF HOSPITAL PERMIT BY BOARD OF HEALTH.

Where the action of the board of health of the city of New York, the head of the department of health, in refusing permit for a private hospital was unauthorized, unreasonable, and arbitrary, the aggrieved person's remedy was mandamus.

Appeal from Supreme Court, Appellate Division, First Department.

Mandamus by the People of the State of New York, on the relation of William A. Sprenger, against the Department of Health of the City of New York. From an order of the Appellate Division (174 N. Y. Supp. 917), affirming an order of the Special Term (104 Misc. Rep. 224, 172 N. Y. Supp. 38), granting a peremptory writ of mandamus commanding defendant to grant relator a permit for a private hospital for the treatment of medical, surgical, and obstetrical cases, defendant appeals. Order affirmed.

William P. Burr, Corp. Counsel, of New York City (Terence Farley, of New York City, of counsel), for appellant.

Ralph K. Jacobs, of Brooklyn, for respondent.

Wood, Cooke & Seltz, of New York City, for interveners.

PER CURIAM. [1] The head of the department of health of the city of New York is the board of health. Charter (Laws 1901, c. 466) § 1167. The sanitary code enacted by the board of health provides (section 220) that no person shall conduct a private hospital without a permit therefor issued by the board of health. The regulations of the de-

partment of health provide that the proposed site and sanitary condition of the hospital building shall be subject to the approval of the department of health. The charter of the city provides (section 1172) that—

"The board of health may embrace in said sanitary code all matters and subjects to which, and so far as, the power and authority of said department of health extends, not limiting their application to the subject of health only."

The board has general jurisdiction over the establishment and maintenance of hospitals, including the licensing of hospitals. On an application for a permit, it should consider and give proper weight to all the ordinary contingencies and circumstances appropriate to the subject which require the exercise of discretion. The element of location may be material. The effect of a proposed location on property values in the neighborhood need not be wholly disregarded, and may even become decisive in a case otherwise doubtful. But the authority now conferred on the board does not include, expressly or by reasonable implication, the power to refuse a permit, as has been done in this case, when all other conditions are satisfactory and no offense to the senses is suggested, for the exclusive reason that "considerable damage would accrue to the surrounding property if the permit were granted." That reason considered alone came not legally within the scope of its discretion. The property rights of one owner may not be subordinated to the property rights of his neighbors, except as an incident to the exercise of authority reasonably conferred for the general welfare.

The question of legislative power wholly to exclude hospitals, such as hospitals for contagious diseases or for the treatment of inebriates or the insane, from particular places, such as thickly populated or fine residential districts, is not before the court.

[2] The action of the board was, as the law now exists, unauthorized, and therefore unreasonable and arbitrary, the relator's remedy is mandamus (People ex rel. Lodes v. Department of Health, N. Y. City, 189 N. Y. 187, 194, 82 N. E. 187, 18 L. R. A. [N. S.] 894), and the order appealed from should be affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order affirmed.

226 N. Y. 241)

**EQUITABLE TRUST CO. OF NEW YORK
v. HAMILTON, County Treasurer.**(Court of Appeals of New York. April 22,
1919.)**COUNTIES — 206(2) — CLAIMS AGAINST —
AUDIT—RECONSIDERATION.**

County board of supervisors, after considering, auditing, and allowing a claim, no appropriation having been made, could rescind its action, though claimant had been given a certificate that claim had been audited at a certain amount and claim had been assigned after audit, but before the board's rescission.

Appeal from Supreme Court, Appellate Division, Second Department.

Mandamus on the relation of the Equitable Trust Company of New York against Walter G. Hamilton, as County Treasurer of the County of Rockland. From an order of the Appellate Division (177 App. Div. 390, 164 N. Y. Supp. 58), affirming an order of the Special Term denying, as a matter of law, and not in the exercise of discretion, the application, relator appeals. Affirmed.

Lloyd P. Stryker, of New York City, for appellant.

E. W. Hofstatter, of Nyack, for respondent.

CARDOZO, J. Charges preferred against the district attorney of Rockland county were followed by the appointment of a commissioner (Public Officers Law, § 34, Laws 1909, c. 51 [Consol. Laws, c. 47]), and a hearing on the merits. The complainant had an attorney, who prosecuted the proceeding. At its close, a claim for services and expenses was submitted to the board of supervisors. The attorney gave credit for \$3,300 received from private subscriptions. He asked the allowance of the unpaid balance. On May 1, 1916, the board of supervisors adopted a resolution that the "unpaid balance of service item be audited and allowed at \$3,000, and that the same be paid from the 1916 county audit appropriation." The clerk of the board delivered to the attorney a certified copy of the bill as audited. County Law, § 50, subd. 5 (Laws 1909, c. 16 [Consol. Laws, c. 11]). At the end of the same month, on May 31, 1916, the board revoked its action. No appropriation had yet been made. The resolution recites that the bill "as audited for future payment" was "apparently in excess of a reasonable charge," and was audited "without full consideration of the facts." The audit and allowance were therefore rescinded, and the matter left open for future consideration. Two days before this resolution, the attorney made an assignment of his claim to the Equitable Trust Company. The

assignee has petitioned for a mandamus directing that the claim as audited be paid. The Special Term refused the writ, and at the Appellate Division the refusal was unanimously affirmed.

We think that the audit and allowance were lawfully rescinded. The appellant concedes that this would be so if the claim were fraudulent or illegal. *Smith v. Hedges*, 223 N. Y. 176, 119 N. E. 396. The argument is, however, that there can be no rescission for mere error. In such circumstances, action once taken it is said, is final, no matter how inconsiderate or hasty. We think that precedent and policy demand another ruling. Undoubtedly the audit, unless fraudulent or illegal, is not subject to revision by some other board of supervisors. *Osterhoudt v. Rigney*, 98 N. Y. 222, 234; *People ex rel. Smith v. Clarke*, 174 N. Y. 259, 66 N. E. 819. Action ceases to be tentative or provisional when there is an end to the official life of those who are authorized to act. *Gulnac v. Board of Freeholders*, 74 N. J. Law, 543, 64 Atl. 998, 122 Am. St. Rep. 405. "Subsequent adverse action by a different body is repeal rather than reconsideration." *Swayze, J.*, in *Gulnac v. Board of Supervisors*, supra. But a different situation is presented when the same board which has considered once elects to consider again. The rule then is that until audit has been followed by payment or appropriation, the whole transaction is in fieri. The board may disallow to-day, and on further consideration allow to-morrow. It may allow to-day, and to-morrow disallow or reduce. That has been the rule since the decision in *People ex rel. Hotchkiss v. Supervisors of Broome County*, 65 N. Y. 222. The appellant argues that the decision in that case might have been put upon the ground that the audit was voidable for fraud. But that is not the ground on which the court did put it. The rule was broadly announced that an audit by a board of supervisors is quasi judicial only "in a very largely qualified sense," and "not in any such sense as render an erroneous or improper audit or allowance incapable of correction by the body committing the error." Even later boards may rescind for illegality or fraud. *Osterhoudt v. Rigney*, supra. Only the same board may rescind for misconception of the merits. *People v. Stocking*, 50 Barb. 573, 583; *People ex rel. Smith v. Board of Town Auditors*, 5 Hun, 647; *Matter of Bell v. Webb*, 4 App. Div. 614, 36 N. Y. Supp. 1132; *People ex rel. Francis v. Cahill*, 5 App. Div. 570, 574, 39 N. Y. Supp. 372, affirmed, on opinion below, 158 N. Y. 708, 53 N. E. 1130; *People ex rel. Caldwell v. Bd. Supervisors, Saratoga County*, 45 App. Div. 42, 48, 60 N. Y. Supp. 1122; *Adams v. Town of Wheatfield*, 46 App. Div. 466, 469, 61 N. Y. Supp. 738; *People ex rel. Laurence v. Bd.*

Supervisors, Delaware County, 48 App. Div. 428, 63 N. Y. Supp. 317; Matter of Weeks, 97 App. Div. 131, 89 N. Y. Supp. 826; *Id.*, 106 App. Div. 45, 94 N. Y. Supp. 468; People ex rel. Chase v. Wemple, 144 N. Y. 478, 482, 39 N. E. 397; State ex rel. Minden E. L. & P. Co. v. City of Minden, 84 Neb. 193, 120 N. W. 913, 21 L. R. A. (N. S.) 289. Nothing to the contrary was held in People ex rel. Myers v. Barnes, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739, and People ex rel. McCabe v. Matthies, 179 N. Y. 242, 72 N. E. 103. In the one case, the board that made the audit had ceased to exist; in the other, it was content with its ruling, and the attempt was made to procure revision by mandamus. The appellant would have us obliterate the distinction between the powers of the same board and the powers of another. If the rule enforcing the distinction is not already settled in this court, we think we should declare it now.

In thus holding, we do not impair the efficacy of the principle that quasi judicial action, when the statute intends it to be final, may not thereafter be revoked. People ex rel. Chase v. Wemple, *supra*. The very question to be determined is when action becomes final. That is in every case a question dependent for its answer upon the scheme of the statute by which power is conferred. We are persuaded that the Legislature, in the enactment of the County Law and like laws that have preceded it, did not mean that audits should be irrevocable as against the better judgment of the auditors. The purpose of an audit is to fix the items that are to enter into the annual appropriation. County Law, § 12, subd. 2; section 51, subd. 1; *Osterhoudt v. Rigney*, *supra*, 98 N. Y. at page 234; People ex rel. Francis v. Cahill, *supra*: Allowance is a means to an end. Finality is not reached, while the life of the board endures, until the end has been attained. This conclusion is consistent with the scheme and purpose of the statute. It is reinforced by a compelling public policy and by long-continued practice. Boards of supervisors must often act hastily and on inadequate information. They ought to have some opportunity to undo and correct an error apparent to themselves. For many years, in the practical interpretation of their powers, they have reserved this opportunity. People v. Stocking, *supra*; People ex rel. Francis v. Cahill, *supra*. The practice is wise and lawful. We will not overturn it.

The order should be affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order affirmed.

(226 N. Y. 623)

In re DOLBEER'S ESTATE.

(Court of Appeals of New York. April 22, 1919.)

1. APPEAL AND ERROR \Leftrightarrow 314—MATTERS REVIEWABLE—CERTIFIED QUESTION.

An appeal from a final order is not an appeal where questions should be certified as provided by Code Civ. Proc. § 190, subd. 3.

2. TAXATION \Leftrightarrow 806—TRANSFER TAX—JOINT BANK ACCOUNTS.

The entire amount of a joint bank account in the name of husband and wife payable to the survivor, created subsequent to the taking effect of Tax Law as amended by Laws 1915, c. 664, is taxable on the death of the husband, where the succession was donative in character.

3. DESCENT AND DISTRIBUTION \Leftrightarrow 6—NATURE OF RIGHT OF SURVIVORSHIP—STATUTES.

The right to take property by survivorship being the creation of law, the state may impose conditions, if no vested or contract rights are thereby violated.

Appeal from Supreme Court, Appellate Division, Second Department.

Proceedings for the appraisal under the Transfer Tax Act of the estate of Frazier M. Dolbeer. Appeal from an order of the Appellate Division, Second Department (173 N. Y. Supp. 905), affirming a decree (104 Misc. Rep. 118, 171 N. Y. Supp. 364) assessing a transfer tax. Reversed.

See, also, 174 N. Y. Supp. 900.

Schuyler C. Carlton, of New York City, for appellant.

Edward S. Clinch, of New York City, for respondent.

PER CURIAM. [1] This appeal presents the question: Is the entire amount of a joint bank account in the name of husband and wife, payable to the survivor, created subsequent to the taking effect of chapter 664 of the Laws of 1915, amending Tax Law (Consol. Laws, c. 60), taxable on the death of the husband? An appeal from a final order is not an appeal where questions should be certified as provided by the Code of Civil Procedure (section 190, subd. 3), and it is unnecessary to answer the question certified.

[2, 3] In Matter of McKelway, 221 N. Y. 15, 116 N. E. 348, L. R. A. 1917E, 1143, it was held that, even when the joint account was created prior to the adoption of the statute, the transfer by survivorship was taxable to the extent of one-half the joint property. When the joint account is created subsequent to the adoption of the statute, the privilege of acquiring the entire property by the right of succession may be subjected to the tax on the method of acquisition. Matter of Vanderbilt, 172 N. Y. 69, 73, 64 N. E.

782; *Matter of Keeney*, 194 N. Y. 281, 87 N. E. 428; *Keeney v. Comptroller of State of New York*, 222 U. S. 525, 32 Sup. Ct. 105, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139. The right to take property by survivorship is the creation of law upon which the state may impose conditions (*Matter of Dows*, 167 N. Y. 227, 60 N. E. 439, 52 L. R. A. 433, 88 Am. St. Rep. 508; *Matter of White*, 208 N. Y. 64, 67, 101 N. E. 793, 46 L. R. A. [N. S.] 714, Ann. Cas. 1914D, 75), if no vested or contract rights are thereby violated.

The record does not disclose who furnished the money which was deposited to the joint credit. Nothing indicates that the succession in this case was not donative in character (*Matter of Orvis*, 223 N. Y. 1, 7, 119 N. E. 88), and we may well reserve consideration of the application of the statute to a case where the survivor had previously acquired his interest for value.

The order of the Appellate Division should be reversed, with costs in this court and in the Appellate Division, and the proceeding remitted to the Surrogate's Court for the purpose of imposing a tax in accordance with this opinion.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order reversed, etc.

(226 N. Y. 302)

STEWART v. KNICKERBOCKER ICE CO.

(Court of Appeals of New York. April 29, 1919.)

ADMIRALTY §20—WORKMEN'S COMPENSATION ACT—VALIDITY.

In view of the amendment to Judicial Code, § 24 (U. S. Comp. St. §§ 991[1] to 991[25]), which saves from the jurisdiction of the federal courts to claimants the rights and remedies under Workmen's Compensation Law of any state, the Workmen's Compensation Law of New York, in so far as it gives a remedy for injuries or death of an employé engaged in work of a maritime nature, is not in violation of the federal Constitution, conferring jurisdiction on the federal courts in admiralty cases.

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the claim of Lillian E. Stewart, for compensation for the death of William M. Stewart under the Workmen's Compensation Law, against the Knickerbocker Ice Company, employer. An award of the State Industrial Commission was affirmed by the Appellate Division (173 N. Y. Supp. 924), and the employer appeals. Affirmed.

Frank R. Savidge, of New York City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

HISCOCK, C. J. This is an appeal from an affirmance of an award made under the Workmen's Compensation Act (Consol. Laws, c. 67) for injuries received by one Stewart, while engaged in helping to unrig a derrick on one of the defendant's barges. It is conceded that the work in which the injured man was engaged was of a maritime nature, and upon that conceded fact the argument is made that our Workmen's Compensation Act is not applicable, because it is in conflict with the Constitution of the United States and with the federal statute passed thereunder. The attempt is made to support this argument almost exclusively by reference to the decision of the United States Supreme Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

The *Jensen* Case was one involving the applicability of our Workmen's Compensation Act to injuries received by a stevedore while engaged in helping to unload a vessel belonging to the Southern Pacific Railroad Company. The two questions which were considered by Judge Miller in his opinion (215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276) were the ones whether our act was unconstitutional, as depriving employers of property without due process of law; and, second, whether it was in conflict with the federal Constitution, because attempting directly to regulate or impose a tax or burden on interstate or foreign commerce—the Southern Pacific Company, owner of the vessel, being concededly engaged in such commerce. He reached the conclusion, concurred in by all members of the court voting, that the act was not vulnerable in either of those respects. When the case reached the Supreme Court, however, a new question was argued, and it was held by a closely divided vote that, inasmuch as the injured man was engaged in maritime work, our Compensation Act was violative of the United States Constitution as embodied in the federal statutes adopted thereunder conferring jurisdiction in such a case upon the federal courts.

In the prevailing opinion it was, amongst other things, in substance, written that the Constitution extended the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" and conferred upon the Congress power "to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer

thereof" (244 U. S. 214, 37 Sup. Ct. 523, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900); that under these provisions of section 9 of the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 77) the District Courts of the United States had been given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it" (244 U. S. 215, 37 Sup. Ct. 529, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900), and that this grant had been continued under Judicial Code, §§ 24 and 256 (Act March 3, 1911, c. 231, 36 Stat. 1091-1094, 1160 [U. S. Comp. St. §§ 991 (1) to 991 (25), 1233]); that the remedy given by our compensation statute was of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and therefore not saved to suitors from the grant of exclusive jurisdiction under the foregoing statute. Proceeding upon these fundamental principles, it was held that our act was in conflict with the Constitution as expressed in these statutes.

It was, however, recognized in the prevailing opinion that the general maritime law under which jurisdiction was reserved to the federal courts might be changed, modified, or affected by state legislation, and that it was impossible to define with exactness just how far this might be done. The limitation which was placed upon this power was defined in the general proposition that "no such legislation [by the state affecting maritime jurisdiction] is valid, if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." 244 U. S. 216, 37 Sup. Ct. 529, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

The enactment by the states of Workmen's Compensation Acts has become very general. Public sentiment has justified and demanded

the enactment of these statutes, as offering speedy and simple relief to injured workmen and their dependents, and as being a positive and decided step in the interest of industrial welfare and of better relations between employers and employes. In recognition of this widespread public sentiment, and realizing it is desirable that the states should be given power to enact and administer such statutes as these, the Congress, since the decision of the Jensen Case, has very materially modified the federal statute under which it was held that our decision in the latter case could not stand. It has amended this statute, so that it now saves from the jurisdiction of the federal courts "to suitors in all cases the right of a common-law remedy when the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state."

In view of the close division of opinion amongst the learned justices of the Supreme Court, involved in the decision of the Jensen Case, and in view of the concession made in the prevailing opinion that it was difficult to determine just how far the jurisdiction of the federal courts in maritime matters might be limited or affected by such legislation, we think that we are justified in assuming that the Congress has acted within its powers under the Constitution when, after due consideration, it has confided to the states the power to enact and enforce Workmen's Compensation Acts in respect of injuries received in the course of maritime employment. We think that it would be altogether an unjustifiable concession of lack of state jurisdiction in this field of compensation to injured workmen or their dependents, if, after this amendment by the Congress, we should hold that our statute was unconstitutional.

The order should be affirmed, with costs.

CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order affirmed.

(233 Ill. 262)

G. H. HAMMOND CO. v. INDUSTRIAL COMMISSION et al. (No. 12470.)(Supreme Court of Illinois. April 15, 1919.
Rehearing Denied June 4, 1919.)**1. MASTER AND SERVANT §405(4)—WORKMEN'S COMPENSATION—CAUSE OF INJURY—SUFFICIENCY OF EVIDENCE.**

Evidence held to warrant conclusion that abscess which developed in hip of injured employé resulted from the injury.

2. MASTER AND SERVANT §374—WORKMEN'S COMPENSATION—CAUSE OF DEATH.

Where injury to employé caused abscess which necessitated cutting and chiseling away a part of the bone, so that the limb gave way because of weakened bone while employé was getting out of bed, causing hemorrhage requiring operation from which he died, the death was the result of the injury.

3. MASTER AND SERVANT §405(1)—WORKMEN'S COMPENSATION—NOTICE TO EMPLOYER—EVIDENCE.

Evidence held to tend to show that wife of injured employé notified employer of injury.

4. MASTER AND SERVANT §417(7)—WORKMEN'S COMPENSATION—PROCEEDINGS—REVIEW.

Where there is evidence tending to show that notice of injury was given to employer, the award of the Industrial Commission will not be disturbed by the Supreme Court, though the court is of the opinion that such finding was contrary to the weight of the evidence.

5. MASTER AND SERVANT §400—WORKMEN'S COMPENSATION—RIGHT OF ADMINISTRATOR.

Under Workmen's Compensation Act, § 7, par. f, administrator of deceased employé has right to prosecute application for compensation and collect any award made; the employer being protected by the requirement of such statute that the administrator shall relieve the employer of all obligation as to distribution of the award.

6. MASTER AND SERVANT §386(4)—WORKMEN'S COMPENSATION—COMMUTATION OF COMPENSATION IN LUMP SUM.

Under Workmen's Compensation Act, § 7, pars. a and f, the right to have compensation commuted to lump sum is available only to employer who voluntarily pays compensation, and not to employer who denies liability and refuses to make compensation until he has been adjudged liable in a proceeding conducted under that provision of the statute.

7. MASTER AND SERVANT §386(5)—WORKMEN'S COMPENSATION—AWARD TO ADMINISTRATOR—DISTRIBUTION.

Under Workmen's Compensation Act, § 7, pars. a and f, Industrial Commission, in awarding compensation to administrator in lump sum, was not required to declare the proportion of the award each of the beneficiaries should receive, since such distribution is to be made under the direction of the court appointing the administrator.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by David Eichberg, administrator of the estate of Wowzymec Bonkowski, for compensation for the death of Wowzymec Bonkowski, opposed by the G. H. Hammond Company, employer. Award by the Industrial Commission for claimant confirmed by the circuit court, and the employer brings error. Affirmed.

T. M. Coen, of Chicago, for plaintiff in error.

Scott Osten Cavette, of Chicago, for defendant in error.

FARMER, J. The circuit court of Cook county confirmed an award made by the Industrial Commission against the G. H. Hammond Company in favor of the administrator of the estate of Wowzymec Bonkowski, and certified that the case was a proper one to be reviewed by this court.

Bonkowski was employed by plaintiff in error November 9, 1914. His work was loading and unloading barrels of meat. He continued to work until the 16th of November, after which time he did not do any more work. He returned to his home after the last half day he worked for plaintiff in error, lame, complained of his leg hurting him, said he was sick, and went to bed. Nine days later he was taken to the Cook County Hospital. The surgeon who treated him there testified that he had an abscess on the left thigh which contained pus. The doctor opened it and drained the pus. He testified the abscess was the result of an injury to the leg. After it was drained, the patient got better, but later osteomyelitis developed, necessitating an operation on the bone, which weakened the bone. When the operation was performed, January 15, 1915, Bonkowski was pale, anæmic, had lost flesh, and could hardly walk. His general physical condition, due to infection, was run down and weakened, and his vitality and powers of resistance lowered. The attending physician ordered him kept in bed, but subsequently an interne in the hospital permitted him to get out of bed. He fell and broke the bone at the place where it was diseased, which caused a severe hemorrhage. Afterwards, on September 6, 1915, another operation was performed, and a few hours later Bonkowski died. The doctor testified the death resulted from osteomyelitis, lowered resistance from long illness, hemorrhage, and shock. The treatment given Bonkowski he said was necessary.

[1, 2] Plaintiff in error insists that the death was not due to an accident arising out of and in the course of the employment of the deceased, but was due to an intervening

cause. The testimony shows that November 16, 1914, deceased, with others, was engaged in unloading barrels of meat from a car. A barrel weighing about 500 pounds was pried from its position on top of other barrels, suddenly fell, and rolled, striking deceased, knocking him down and injuring his leg. The proof warrants the conclusion that the abscess which developed and caused deceased's removal to a hospital resulted from that injury. But plaintiff in error contends Bonkowski's death did not result from that injury, but was due to his fall in the hospital, which intervened between the accident received where he was employed and the death. The testimony of the physician who treated Bonkowski was, in substance, that the abscess on his thigh was caused by an external injury; that the pus which had formed had eaten through and destroyed the tissue and blood vessels and attacked the bone, which necessitated curetting and chiseling away a part of the bone. This weakened the bone, and while getting out of bed the limb gave way, Bonkowski fell to the floor, and the femur broke at the place it was eaten by disease. He was operated on six days later and died from the shock the same day. The Industrial Commission was warranted by the proof in finding death resulted from the injury. *Bailey v. Industrial Com.* (No. 12525) 236 Ill. 623, 122 N. E. 107.

[3, 4] It is insisted notice of the injury alleged to have caused the death was not given plaintiff in error within 30 days after the accident, as required by section 24 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 149). The evidence shows that the deceased, while engaged in performing the duties of his employment, was struck by a falling or rolling barrel of meat weighing in the neighborhood of 500 pounds. The foreman of the men with whom deceased worked testified Bonkowski told him he had been struck by a rolling barrel, had a pain in his leg, and could not work any more. The foreman told him to go to the company doctor. Another witness testified to hearing the foreman notified by the deceased of his injury by the barrel. The widow testified he came home sick, complaining that his leg hurt him, and his walk indicated it. The leg was bruised black and blue from about two inches above the knee to the thigh. He was at home nine days before he was taken to the hospital. Mrs. Bonkowski went to plaintiff in error's office twice. She testified there were three men in the office. She could not tell who they were, but thought one of them was timekeeper. It was the office where the men got their pay. She asked for half pay for her husband, and told the men in the office her husband was hurt while at his work by a barrel falling on his leg and was in bed. She was not known to the men in the office, and they refused to pay her unless she was identified. The statute requires

notice of the accident to be given not later than thirty days after it happens. Notwithstanding the testimony of Mrs. Bonkowski was contradicted by witnesses for plaintiff in error, her testimony and that of other witnesses tends to show that notice of the accident was given within the time required, and, that being the case, we cannot reverse the judgment and award, even if we were of the opinion, which we are not, that the finding that notice was given was contrary to the weight of the testimony.

[5, 6] Bonkowski left surviving him his wife and two children. An administrator of the estate was appointed and qualified and filed an application for compensation for a fatal injury to his intestate. The application was heard by an arbitrator October 11, 1916, and award made of \$5.10 per week for a period of 416 weeks, as provided by paragraph (a) of section 7 of the Workmen's Compensation Act (section 132). The award was confirmed on review by the Industrial Commission. Counsel for plaintiff in error moved the arbitrator to dismiss the proceeding brought by the administrator, and stated plaintiff in error elected, if liable, to make compensation to the beneficiaries of the deceased. The motion was denied, and it is claimed the judgment of the circuit court should be reversed and the award set aside for that reason. The argument in support of this position is that the right to the compensation is vested in the dependents of the deceased, is no part of his estate, and plaintiff in error elected, pursuant to paragraph (f) of section 7, to pay compensation, if liable therefor, to the dependents of deceased. The statute clearly recognizes the right of an administrator to prosecute an application for compensation and collect any award made, and provides that the payment of compensation to the personal representative of the deceased shall relieve the employer of all obligation as to the distribution of the fund; but such distribution shall be made by the personal representative pursuant to the order of the court appointing him. Section 7, par. (f), *supra*. Plaintiff in error did not elect to pay an award to any one without compulsion, so is in no position to invoke the provision of paragraph (f) of section 7 that compensation for an injury which results in death may, at the option of the employer, be paid either to the personal representative of the deceased employé or to his beneficiaries. That provision may be availed of by one who voluntarily pays the compensation, and does not apply where the employer denies liability and refuses to make compensation until he has been adjudged liable in a proceeding conducted under that provision of the statute. *Smith-Lohr Coal Co. v. Industrial Com.*, 236 Ill. 34, 121 N. E. 231. Here plaintiff in error denied liability, and it was necessary that an application for adjustment of claim for compensation be filed

and determined in the regular way. Plaintiff in error at no time unequivocally elected to pay compensation to the beneficiaries of deceased, but the announcement of its election to pay the beneficiaries was qualified by the condition that it would do so if it was liable to make compensation on account of the death of the employé. Some one had to institute proceedings to determine that question, and the administrator was authorized to do that. Plaintiff in error was in no way injured or prejudiced by the requirement that it pay the administrator. The statute expressly provides that payment to the administrator shall relieve plaintiff in error of all obligation as to its distribution.

[7] The proof showed deceased left a wife and two children. The amount of the award is authorized by paragraph (a) of section 7, and paragraph (f) of said section authorizes the distribution to be made under the order of the court appointing the administrator. The Industrial Commission was not required, therefore, to find and declare the proportion of the award each of the beneficiaries should receive.

The judgment is affirmed.
Judgment affirmed.

(233 Mass. 91)

BLAISDELL v. HERSUM & CO.

(Supreme Judicial Court of Massachusetts.
Middlesex. May 21, 1919.)

1. PRINCIPAL AND AGENT §25(2)—WAREHOUSEMEN—AUTHORITY OF AGENT FOR CUSTOMER—DUTY OF INQUIRY.

A warehouseman, before delivering all of its customer's goods to a dealer in secondhand furniture, was bound to inquire and ascertain the nature and extent of the dealer's authority over such goods from the customer.

2. PRINCIPAL AND AGENT §22(1), 122(1)—PROOF OF AUTHORITY OR EXTENT—ACTS AND DECLARATIONS OF AGENT.

In an action for the conversion of household goods by a warehouseman, which delivered them to a dealer in secondhand furniture, who represented that he was authorized by the warehouseman's customer to sell them, the acts and declarations of the dealer were incompetent to prove his authority from the customer or its extent.

3. WAREHOUSEMEN §25(3)—DELIVERY OF GOODS TO THIRD PERSON—EXCUSE.

A warehouseman, as bailee of its customer's household goods, impliedly contracted to return them to her or to some third person with her express or implied consent, and merely because the customer employed a secondhand dealer to sell certain articles, which she directed him to obtain from the warehouseman, the latter is none the less liable for its delivery of all the goods, though the dealer stated by neg-

ligence or mistake that he was employed by the customer to sell all.

4. WAREHOUSEMEN §25(5)—UNAUTHORIZED DELIVERY.

Delivery of property by a warehouseman to a person not authorized by the owner to receive it is of itself a conversion, rendering the bailee liable, without regard to the question of due care or negligence.

5. MASTER AND SERVANT §304—MASTER'S LIABILITY FOR SERVANT'S NEGLIGENCE.

The rule that a master is liable for the negligence of his servant, committed while engaged in the master's business and within the scope of his employment, is not applicable where a warehouseman's customer instructed a secondhand dealer in furniture to sell certain articles in the custody of the warehouseman, with the result that the dealer negligently secured all of the stored goods and sold them, and the warehouseman is liable to customer for conversion, without regard to dealer's negligence.

Exceptions from Superior Court, Middlesex County; Loranus B. Hitchcock, Judge.

Action by Florence A. Blaisdell against Hersum & Co. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Thomas A. Glennon, of Cambridge, for plaintiff.

Harry F. R. Dolan, James H. Morson, and Joseph S. O'Neill, all of Boston, for defendant.

CROSBY, J. This is an action to recover for the alleged conversion by the defendant of certain household goods which had been delivered to it by the plaintiff to be stored in its warehouse.

The plaintiff testified that, while the goods were stored in the defendant's warehouse, she stated to the defendant's treasurer and general manager, one Hersum, that she would like to dispose of a sideboard so stored and asked him if he knew of any one who could sell it for her; that he referred her to one Hines who conducted a secondhand furniture and auction room; that, later, she instructed Hines to obtain from the defendant certain specific articles named by her and sell them; that afterwards, she learned that Hines had taken all her goods which she had stored with the defendant, and had sold them.

Hines testified that the plaintiff told him she wanted the furniture stored with the defendant sold, and that she did not enumerate any particular articles.

Hersum testified that Hines told him the plaintiff had instructed him (Hines) to obtain all her goods stored with the defendant and sell them, and that thereupon the defendant sent all the goods to Hines.

[1, 2] The evidence discloses that Hines was a special agent of the plaintiff, with

limited authority. The defendant before delivering all the plaintiff's goods to Hines was bound to inquire and ascertain the nature and extent of his authority. *Lovett, Hart & Phipps Co. v. Sullivan*, 189 Mass. 535, 75 N. E. 738; *A. Blum Jr.'s Sons v. Whipple*, 194 Mass. 253, 257, 80 N. E. 501, 13 L. R. A. (N. S.) 211, 120 Am. St. Rep. 553. The acts and declarations of Hines were plainly incompetent to prove his authority or its extent. *Manning v. Carberry*, 172 Mass. 432, 52 N. E. 521; *Baldwin v. Connecticut Mutual Life Ins. Co.*, 182 Mass. 389, 65 N. E. 837.

[3] The defendant's second, third and fourth requests in substance were that, if Hines was employed by the plaintiff to sell certain articles which she directed him to obtain from the defendant but by negligence or mistake Hines informed the defendant that he was employed by the plaintiff to obtain and sell all the goods, the defendant is not liable. These requests properly could not have been given. The defendant as a bailee of the plaintiff's property impliedly contracted to return it to her, or to some third person with her express or implied consent. *Doyle v. Peerless Motor Car Co.*, 226 Mass. 561, 116 N. E. 257.

[4] Delivery of property by a bailee to a person not authorized by the owner is of itself a conversion, rendering the bailee liable without regard to the question of due care or negligence. *Hall v. Boston & Worcester R. R.*, 14 Allen, 439, 443, 92 Am. Dec. 783; *Murray v. Postal Telegraph-Cable Co.*, 210 Mass. 188, 195, 96 N. E. 316, Ann. Cas. 1912C, 1183; *Stevens v. Stewart-Warner Speedometer Corp.*, 223 Mass. 44, 111 N. E. 771.

[5] The well-settled principle that a master is liable for the negligence of his servant committed while engaged in his master's business, and within the scope of his employment, is not applicable to the facts in the case at bar; accordingly, *Howe v. Newmarch*, 12 Allen, 49, and similar cases cited and relied on by the defendant, are not authorities in favor of its contention that the rulings requested should have been given. The instructions given were correct and fully protected the rights of the defendant.

Exceptions overruled.

(233 Mass. 39)

McKEON v. BRIGGS.

(Supreme Judicial Court of Massachusetts.
Suffolk. May 21, 1919.)

1. ARREST \Leftrightarrow 56 — POOR DEBTOR PROCEEDINGS—ACTION AGAINST SURETY ON RECOGNIZANCE—EVIDENCE.

In action against surety on poor debtor recognizance, breach relied on being that debtor did not deliver himself for examination within

30 days from arrest, written application to take poor debtor's oath, signed by one of debtor's attorneys on his behalf, being no part of the record, should have been excluded.

2. EVIDENCE \Leftrightarrow 386(7)—PAROL—POOR DEBTOR PROCEEDINGS—RECORD.

Record of municipal court of city of Boston, which, correctly construed, shows that debtor on certain date delivered himself for examination in accordance with Rev. Laws, c. 168, § 30, and gave notice of his desire to take oath for relief of poor debtors, cannot be contradicted or controlled by extrinsic evidence, but is conclusive and binding upon parties in action against surety on debtor's recognizance.

3. ARREST \Leftrightarrow 56 — POOR DEBTOR PROCEEDINGS—ACTION ON RECOGNIZANCE—BURDEN OF PROOF.

In action against surety on poor debtor recognizance, burden was on plaintiff to show there had been breach of recognizance, under which debtor agreed to deliver himself up for examination within 30 days from date of his arrest and abide order of court.

4. ARREST \Leftrightarrow 56 — POOR DEBTOR PROCEEDINGS—BREACH OF RECOGNIZANCE—SUFFICIENCY OF EVIDENCE.

In action against surety on poor debtor recognizance, breach relied on being debtor did not deliver himself for examination within 30 days from his arrest, evidence held insufficient to prove such breach.

5. ARREST \Leftrightarrow 53, 56—POOR DEBTOR PROCEEDINGS—APPEARANCE OF DEBTOR—PRESENCE OF MAGISTRATE.

Poor debtor, in surrendering himself to court and making his application to take oath, need not be in actual presence of magistrate; it is sufficient if the latter is accessible for transaction of business, so that it is immaterial on liability of surety on poor debtor recognizance, as for breach by debtor's having failed to deliver himself for examination, that magistrate was not in courtroom when debtor appeared, but was in lobby and did not see him.

Exceptions from Superior Court, Suffolk County; Henry A. King, Judge.

Action by Patrick McKeon against Frederick L. Briggs. There was a finding for plaintiff, and defendant excepts. Exception sustained, and judgment ordered entered for defendant.

E. M. Shanley, of Boston, for plaintiff.

Clarence F. Eldredge, of Boston, for defendant.

CROSBY, J. This is an action against the surety on a poor debtor recognizance. The breach relied on is that the debtor did not deliver himself up for examination within 30 days from the day of his arrest.

The debtor, one George W. Choate, was arrested on an execution on January 9, 1917, and entered into a recognizance under R. L. c. 168, § 30. There was evidence that on

February 6, 1917, he appeared with his surety in the poor debtor's session of the municipal court of the city of Boston, delivered himself up for examination, and made application to take the oath for the relief of poor debtors. An order of notice issued thereon to the judgment creditor, returnable February 27, 1917, at 9 o'clock in the forenoon. The notice required the judgment creditor to "pay to the clerk the fee of \$3 for these proceedings forthwith."

The record of the court was introduced in evidence and contained the following recital:

"Patrick McKeon v. George W. Choate. Fee not paid. Attorney for creditor, E. M. Shanley. Attorneys for debtor, C. F. Eldredge and Harold Caverly. February 6, 1917. Notice of debtor's desire to take the oath for the relief of poor debtors issues, returnable February 27, 1917, 9 a. m. February 24, 1917. Notice returned with service."

[1] The plaintiff offered in evidence, subject to the exception of the defendant, a written application to take the oath, signed "Harold Caverly on Behalf of George W. Choate." It was no part of the record in the case, and should have been excluded; the exception to its admission must be sustained.

[2] The record of the court correctly construed shows that the debtor on February 6, 1917, delivered himself up for examination in accordance with the statute (R. L. c. 168, § 80), and gave notice of his desire to take the oath for the relief of poor debtors. That the record cannot be contradicted or controlled by extrinsic evidence, but is conclusive and binding upon the parties, is well settled. *Niles v. Silverman*, 216 Mass. 242, 103 N. E. 476; *Haskell v. Cunningham*, 221 Mass. 49, 53, 108 N. E. 915.

It was decided in *Howard v. Roach*, 226 Mass. 80, 115 N. E. 289, that when the application is made the debtor must appear personally, not merely by attorney, within 30 days of his arrest, in order to comply with the condition of the recognizance; in that case counsel for the debtor appeared and made application to take the oath in the absence of the debtor, while in the case at bar the debtor himself appeared in court and personally made the application. As the evidence that the debtor was present in court on February 6 was conclusively established by the record, the testimony of the plaintiff to the effect that the debtor told him he had never been in the poor debtor session before March 20, was inadmissible, and the exception thereto must be sustained.

According to the docket entries, the notice was served on the creditor's attorney on February 9, 1917, the fee was paid by the creditor on February 26, 1917, on February 27, 1917, at the time and place fixed, the creditor's attorney and the debtor appeared, and the hearing was continued by order of the court to March 20, 1917, at 9 o'clock, in the

forenoon. The court record also contains the following recital:

"March 20, 1917. Debtor sworn. Examination ordered to proceed. Justice Burke. March 20, 1917, 10:27 a. m. Debtor appears; creditor does not appear. Burke, Justice."

[3] The undisputed evidence shows that the creditor and his counsel and the debtor and his counsel were present in the poor debtor's court on February 27, 1917. The plaintiff testified as follows:

"I was there the second time, March 20, 1917, to which time the case had been continued. Mr. Shanley was there; Mr. Choate was there and his counsel. That is the day the court ordered the examination to go forward. Then later Mr. Shanley, my counsel, and I went out, and left Mr. Choate and his counsel there."

The burden was on the plaintiff to show that there had been a breach of the recognizance, under which the debtor agreed to deliver himself up for examination within 30 days from the date of his arrest and abide the order of the court.

[4] If the oral evidence to show that the debtor was present in court on that day was not believed by the jury still there was no competent evidence introduced to the effect he was not there. It follows that the plaintiff has wholly failed to prove a breach of the recognizance. The testimony of the plaintiff, admitted subject to the exception of the defendant, that the debtor told him that he (the debtor) had never been in the poor debtor court before March 20, 1917, was not admissible to establish that he was not present in court on February 6, 1917, because the record is conclusive upon that question; accordingly we need not consider whether under other circumstances the evidence would have been admissible against the plaintiff. *Simmons v. Poole*, 227 Mass. 29, 36, 116 N. E. 227; *Haney v. Donnelly*, 12 Gray, 361.

[5] The circumstance that when the debtor went to the poor debtor session of the court with his counsel to deliver himself up for examination and to make the application to take the oath, the magistrate was not in the courtroom but was in the lobby adjoining and did not personally see him, is immaterial. It is undisputed that during the month of February, 1917, the court was in session daily from 9 o'clock in the forenoon until 4 o'clock in the afternoon; it was open during that time for the transaction of business, and the judge was at all times available. The debtor in surrendering himself and making his application need not be in the actual presence of the magistrate; it is sufficient if the latter is at hand and is readily accessible for the transaction of such business as properly may be presented to him. See *Simon v. Justices of Municipal Court*, 224 Mass. 122, 112 N. E. 608.

The statute is complied with if the debtor within 30 days delivers himself up for exami-

nation before a magistrate qualified to act. *Howard v. Roach*, supra. The uncontradicted evidence shows that such a magistrate was present when the debtor appeared in court and made application to take the oath on February 6, 1917, and also that on March 20, 1917, the day finally fixed for the hearing, the debtor and the creditor, with counsel, were all present in court at the appointed time and that the creditor had ample opportunity to examine the debtor, but declined to do so and left the courtroom with his counsel.

We need not determine whether the appearance by the creditor's counsel on the return day fixed for the examination, his subsequent appearance at the hearing on March 20, 1917, and the payment by him on February 26 of the required fee, without raising any objection whatever to the regularity of the proceedings, operated as a waiver of any failure of the debtor properly to surrender himself for examination, or of any want of jurisdiction in the court over the person, because we are of opinion that as matter of law the evidence did not warrant a finding that there had been a breach of the recognizance. See *McInerny v. Samuels*, 125 Mass. 425; *Sturman v. McCarthy*, 232 Mass. 44, 121 N. E. 522.

The defendant's request, that the court direct a verdict for the defendant on the ground that on all the evidence the plaintiff was not entitled to recover, should have been given; the exception to the refusal of the court so to do, is sustained; and judgment is to be entered for the defendant under St. 1909, c. 286.

So ordered.

(233 Mass. 39)

WHITE v. WHITE.

(Supreme Judicial Court of Massachusetts.
Franklin. May 21, 1918.)

1. DIVORCE \S 271 — DECREE FOR SEPARATE MAINTENANCE OR ALIMONY—SUIT.

A decree for separate maintenance or alimony ordered in divorce proceedings is like any other money judgment in an action at law for a debt, or a decree of a court of equity for the payment of money, and in relation to the right to sue thereon it is immaterial whether the original decree was based on an action of contract or on a petition for separate support in divorce proceedings.

2. DIVORCE \S 331—FOREIGN DECREE FOR MAINTENANCE OR ALIMONY—ENFORCEMENT IN MASSACHUSETTS—REMEDIES.

A wife who secured in New Jersey in her divorce proceedings a decree for separate maintenance or alimony is entitled to enforce such foreign judgment in the courts of Massachusetts, but cannot insist that it be executed by means of the remedies directed in the New Jersey de-

creed itself, since the decree before the courts of Massachusetts is merely for the payment of money.

3. DIVORCE \S 331—SEPARATE MAINTENANCE OR ALIMONY—ENFORCEMENT OF DECREE BY CONTEMPT PROCEEDINGS—STATUTE.

Under Rev. Laws, c. 168, §§ 80, 81, the superior court sitting in equity has jurisdiction to enforce by attachment for contempt a money decree for separate maintenance or alimony secured by a wife in her divorce proceedings in New Jersey.

Report from Superior Court, Franklin County; John A. Alken, Judge.

Motion by Anna G. White for an order of notice to J. Louis White why he should not be adjudged for contempt, whereon the judge of the superior court ruled the court had no jurisdiction, and reported the case to the Supreme Judicial Court. Motion ordered to stand for hearing.

William A. Davenport and Charles Fairhurst, both of Greenfield, for plaintiff.

Frank J. Lawler and Roland H. P. Jacobus, both of Greenfield, for defendant.

CARROLL, J. In February, 1918, on petition of the plaintiff in the Court of Chancery in the State of New Jersey—it appearing in divorce proceedings instituted by the defendant that the plaintiff and defendant were lawfully married in 1899 and the defendant without justifiable cause abandoned, and neglected to provide for, the plaintiff—the defendant was ordered to pay her "ten dollars per week from and after the date of the filing of the bill of complaint in this cause (August 16, 1915) for and toward the support and maintenance of the complainant and her infant child." On May 19 an execution issued on this decree for the sum of \$1,248 for "arrears of alimony and maintenance and * * * \$161.72 costs, * * * against the goods and chattels" and "the lands, tenements, hereditaments and real estate" of the defendant.

In July, 1918, the plaintiff brought a bill in equity in the superior court, Franklin county, alleging that she is the wife of the defendant; that the defendant had failed to make the payments decreed; that "said judgment by said decree is in full force and has not been reversed, annulled or satisfied in whole or in part; * * * that the defendant has removed * * * to the commonwealth of Massachusetts, so that said execution cannot be levied on his body; and that the defendant has no goods or estate in the state of New Jersey," and praying that "judgment be entered for the plaintiff" and "that a decree be entered authorizing execution to issue in this commonwealth for the amount due on said execution" with interest and costs. The de-

defendant demurred to this bill. The demurrer was overruled and no appeal was taken therefrom. The defendant answered, the case came on for hearing before a judge of the superior court and a final decree was entered ordering the defendant to pay to the plaintiff the sum of \$1,435.09 and \$17.89 costs, and that execution issue therefor. There was no appeal from this decree, and to enforce it these proceedings for contempt were instituted. The plaintiff moving for an order of notice to the defendant to show cause why he should not be adjudged in contempt, the judge of the superior court ruled that the court had no jurisdiction to punish the defendant for contempt for failing to pay money according to the decree of the superior court, "when that decree is based upon a decree of a New Jersey court, in separate support or divorce proceedings," and reported the case with the stipulation that if his ruling was right the motion is overruled; and if his ruling is wrong the motion is to stand for hearing.

The right to bring an action at law or a suit in equity upon a decree of a court of a foreign state, ordering the payment of arrears in alimony, was discussed in *Page v. Page*, 189 Mass. 85, 75 N. E. 92, 4 Ann. Cas. 296. See *Allen v. Allen*, 100 Mass. 373, 375. In *Wells v. Wells*, 209 Mass. 282, 95 N. E. 845, 35 L. R. A. (N. S.) 561, it was decided that an action at law could be maintained in this commonwealth upon a final decree of the circuit court of Michigan for an ascertained sum of money payable to the divorced wife for the support of herself and children. In *Taylor v. Stowe*, 218 Mass. 248, 105 N. E. 890, an execution for arrears of alimony was issued by the Supreme Judicial Court of Maine. The plaintiff brought an action in this commonwealth and recovered on the decree. This court said at page 250 of 218 Mass., at page 892 of 105 N. E.:

"The defendant became indebted to the plaintiff for the instalments of alimony as they accrued. The decree was an enforceable judgment in the state where it was rendered; and, at the latest, after execution was issued, it was not open to revision. Our duty to give effect to it clearly results from the full faith and credit clause of the federal Constitution."

See *Sistare v. Sistare*, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061.

[1] A decree for separate maintenance or alimony ordered in divorce proceedings is like any other money judgment in an action at law for a debt, or a decree of a court of equity for the payment of money; and it is immaterial whether the original decree was based on an action of contract or on a petition for separate support in divorce proceedings. *Sistare v. Sistare*, supra. "Whether the original decree was founded upon a common debt or a claim for alimony is entirely immaterial. In the sister state it was

known as a decree for the payment of money, and is seen in no other light." *Page v. Page*, 189 Mass. 85, 88, 75 N. E. 92, 94, 4 Ann. Cas. 296.

[2] The New Jersey decree directed the defendant to furnish a bond with sureties to secure the performance of the decree, and if he neglected to give such bond or provide for the payments ordered the plaintiff was at liberty to apply to the court for process of sequestration or for such other order as the court deemed equitable. These were matters of execution and were no part of the judgment; while the judgment will be enforced in our courts, the plaintiff cannot insist that the foreign judgment be executed by means of the remedies directed in the New Jersey decree. *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810. That decree when it is before the courts of this commonwealth for enforcement, is a decree merely for the payment of money.

[3] The record presents, on the point reported, the single question whether a court of equity has jurisdiction to enforce a decree by contempt proceedings when that decree is merely for the payment of money. Originally the only way by which a court of equity could enforce its decrees was by process of contempt with imprisonment and sequestration of property, and until the power was conferred by statute or rule of court, a court of equity could not issue an execution in common form. This was true of a decree for the payment of money and such a decree was enforced by a process of attachment for contempt, and not by execution as in an action at law. See 2 Daniels, Ch. Pr. (6th Am. Ed.) 1032, 1042; 10 R. C. L. 353; *Orchard v. Hughes*, 1 Wall. 73, 77, 17 L. Ed. 560; *Noonan v. Lee*, 2 Black. 499, 509, 17 L. Ed. 278. Power is now given by R. L. c. 159, § 39, to courts of equity to issue writs of execution in common form for the enforcement of their decrees if such process is appropriate and also by rule 37 of the equity rules of the Supreme Judicial Court, which rule provides that where a decree in equity is solely for the payment of money, final process to execute the decree may be by writ of execution in common form. See *Burrows v. Purple*, 107 Mass. 428, 434; *Slade v. Slade*, 106 Mass. 499, 500.

Although in modern practice a money decree in equity is generally enforced by process of execution as in ordinary cases and not by contempt proceedings (see *Clements v. Tillman*, 79 Ga. 451, 5 S. E. 194, 11 Am. St. Rep. 441; *Bailey v. Hornthal*, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. Rep. 645; *United States Equity Rule 8*, 33 Sup. Ct. xxi; *Equity Rule 37*, Supreme Judicial Court; *Martin v. Barnes*, 214 Mass. 29, 100 N. E. 1023. See in this connection *Davis v. Davis*, 29 App. D. C. 258, 9 L. R. A. [N. S.] 1071; *Bennett v. Bennett*, 63 N. J. Eq. 306, 49 Atl. 501), nevertheless a court of equity still retains its juris-

diction to enforce or carry out its decrees, including a decree for the payment of money, by proceedings for contempt (see 2 Daniels Ch. Pr. supra; Jones v. Boston Mill Corporation, 4 Pick. 507, 16 Am. Dec. 358). And this power to enforce a money decree by attachment for contempt is no greater than the power conferred by R. L. c. 108, §§ 80, 81; Brown's Case, 173 Mass. 498, 53 N. E. 998. It follows that the court had jurisdiction to enforce its decree for a money payment by issuing an attachment for contempt, and the ruling of the superior court that it "had no jurisdiction to punish the defendant for contempt in failing to pay money according to a decree of that court, when that decree is based upon a decree of a New Jersey court in separate support or divorce proceedings in New Jersey" was wrong.

According to the terms of the report, the motion is to stand for a hearing.

So ordered.

(233 Mass. 112)

ROXBURY PAINTING & DECORATING CO. et al. v. NUTE et al.

(Supreme Judicial Court of Massachusetts. Suffolk. May 23, 1919.)

1. MECHANICS' LIENS § 75(2) — CONTRACT FOR REPAIRS BY PURCHASER—AUTHORIZATION BY OWNER.

When the owner of land agrees to sell it, and allows the purchaser to take possession, the owner does not thereby authorize the purchaser to impose on the land a lien for repairs on the building, within Rev. Laws, c. 197, § 1, unless by implication he authorizes the purchaser to contract for such repairs; mere notice of the purchaser's intention to repair and knowledge of the progress of the work and appreciation of the improvement not being enough to establish a lien.

2. CONTRACTS § 238(2) — MODIFICATION BY PAROL.

Original written contract may be modified by a subsequent parol agreement.

3. MECHANICS' LIENS § 281(3)—CONSENT OF OWNER—SUFFICIENCY OF EVIDENCE.

On petitions to enforce mechanics' liens, evidence held sufficient to justify finding that one of defendant owners consented that an agreed purchaser from them might make the contracts for labor performed and materials furnished on the building on the land within the meaning of the mechanics' lien statute (Rev. Laws, c. 197).

4. MECHANICS' LIENS § 281(3)—AUTHORIZATION OF CONTRACT BY OWNER—SUFFICIENCY OF EVIDENCE.

On petitions to enforce mechanics' liens, testimony of one owner of the premises that she talked with the other owner, her sister, and informed her as to the progress of work on the house, contracted for by the agreed purchaser of the land, held insufficient to show that such

other owner consented to a change in the original agreement of sale, which carried no authorization to the purchaser, within the mechanics' lien statute (Rev. Laws, c. 197), to contract for repairs.

5. TENANCY IN COMMON § 30, 35, 46, 55(9)—INTEREST OF ONE TENANT—ESTABLISHMENT OF LIEN.

Though one tenant in common cannot incumber the estate of his cotenant, the interest of one tenant can be conveyed or taken on execution, and a mechanic's lien can be established on her interest alone in the property.

6. MECHANICS' LIENS § 57(2)—PROCEEDINGS TO ENFORCE AGAINST OWNERS — PROOF OF LIABILITY OF ONE ONLY.

Where claimed mechanics' lienors proceed against two sisters, cotenants, as owners, describing them as such, and alleging that the labor and materials were supplied with their consent, and it appears that one sister only consented, within the meaning of the mechanics' lien statute (Rev. Laws, c. 197), to the doing of the work, the lienors can nevertheless enforce their lien against her interest in the land alone.

Exceptions from Superior Court, Suffolk County; James H. Sisk, Judge.

Petitions to enforce mechanics' liens by the Roxbury Painting & Decorating Company and others against Marietta Nute and another. Verdict was ordered for defendants, and plaintiffs except. Exceptions in the case of defendant Nute sustained, and in the case of the unnamed defendant overruled.

Richard J. Lane, of Boston, for plaintiffs.
Philip Nichols, of Boston (Hudson & Nichols, of Boston, of counsel), for respondents.

OARROLL, J. The plaintiffs seek to establish a lien for labor performed and materials furnished in the repair and alteration of a building on land owned by the respondents Mrs. Young and Miss Nute (hereinafter called the owners), as tenants in common. The work was performed under contracts of the respondent Hathaway with the petitioners. Hathaway made no appearance; his deposition was taken on interrogatories propounded by the plaintiff and cross-interrogatories of the owners. In the superior court a verdict was ordered for the owners.

It was not denied that on March 25, 1914, the owners, by a contract under seal, agreed with Hathaway to sell him the premises for \$5,000. Of this amount \$250 was paid, and the agreement provided that the deed was to be delivered on or about April 20, 1914. The remainder of the purchase price was to be paid by a note of \$2,500 secured by a first mortgage on the premises, payable to Marietta Nute (one of the owners) and by payment in cash of \$2,250 on delivery of the deed. It was further provided that possession was to be given to Hathaway on delivery of the

deed, the premises to be in the same condition as when the agreement was signed, "reasonable use and wear of the building thereon only excepted." Hathaway never paid or tendered payment of the \$2,250 and the agreement was not carried out. The owners retained the \$250 paid by Hathaway.

A few days prior to the execution of the agreement Hathaway contracted with the petitioners for extensive repairs and alterations upon the house, representing that he was the owner. The petitioners entered upon the premises and made the repairs and alterations. April 3, 1914, a second contract was made by Hathaway with the petitioner the Roxbury Painting & Decorating Company to do additional papering and painting, which work was performed. Work on the house was discontinued by the petitioner Duff on April 15, 1914, by the petitioner Lewis on April 18, 1914, and by the petitioner the Roxbury Painting & Decorating Company on April 24, 1914. There was evidence that Miss Nute was on the premises March 28, 1914, when the work was in progress, and when asked if "she wanted to come in" said "No," that * * * she would just walk around the house," and again on April 11th she visited the premises and then went through the building and remarked "how beautiful the house looked and what a great deal of work was put in the house." Hathaway in his answers to interrogatories stated that "Miss Nute visited the place while the repairs were going on four or five times," and "spoke of the great change he had made in the appearance of the place; she said it looked like a palace"; that "he employed other mechanics to do other work on the house, amounting to about \$1,700"; and that "the work of the petitioners was necessary to make the house habitable."

[1] Under R. L. c. 197, § 1, a lien may be established for labor performed and materials furnished in the repair of a building by virtue of an agreement with "or by consent of the owner of such building," or "of a person * * * rightfully acting for such owner in procuring or furnishing such labor or materials." By the contract of sale dated March 25, 1914, the owners were to convey the premises to Hathaway on or before April 20, 1914; and if this contract was not subsequently modified, then the owners did not agree that Hathaway could charge them with responsibility for his contracts; and the work was not done with their consent within the meaning of the statute, and he was not rightfully acting for them in procuring or furnishing such labor or material. Mere notice that he intended to repair the house, and knowledge of the progress of the work and appreciation expressed over the improvements made, were not enough to establish a lien on the owners' estate. When an owner of land agrees to sell it and allows one who has agreed to buy it to take possession of the property, the owner

does not thereby authorize such person to impose a lien on the land, unless by implication the owner authorized the purchaser to contract for the repair and alteration of the building. As stated in *Hayes v. Fessenden*, 106 Mass. 228, at page 230:

"Their [the owners'] contract for a sale of the land to Fessenden, notice that he intended to build upon it, and knowledge of the progress of the work, charged them with no responsibility for it to any one." *Saunders v. Bennett*, 160 Mass. 48, 35 N. E. 111, 39 Am. St. Rep. 456; *Courtemanche v. Blackstone Valley St. Ry.*, 170 Mass. 50, 48 N. E. 937, 64 Am. St. Rep. 275.

The petitioners contend that the contract of sale of March 25, 1914, was not the final agreement between Hathaway and the owners; that the owners knew that Hathaway could not carry out this agreement, and agreed that he should make the repairs and place a mortgage on the property, and pay them the purchase price out of the money secured by the mortgage. To support this contention they offered the evidence of Hathaway, that he talked with Miss Nute before and after March 25, 1914, about the necessity "of raising money required to purchase said estate by placing a mortgage thereon with some bank," and that Miss Nute agreed "to my raising a mortgage on the place, providing they were paid in full," and it was agreed "that I would repair the property in order to raise money to pay them off in full." "The house was unfit for any one to live in and we agreed that I would put it in condition; such would allow my raising funds to pay them off in full"; that he told Miss Nute "about the alterations that were being made, both before the agreement was signed and afterwards. * * * He explained fully to Miss Nute about his repairing the house and putting it in suitable condition to live in, and Miss Nute agreed with him fully as to all his plans, and even with a knowledge that he was going to obtain a mortgage in the bank"; that he also told her "he had taken it up with the Five Cents Savings Bank in Boston and had obtained figures from the Roxbury Decorating Company in regard to decorating the place"; that he first saw Miss Nute on March 10, 1914, and saw her almost daily for over a month after that date.

William H. Fanning, treasurer of the Roxbury Painting & Decorating Company, testified that on April 11, 1914, he called on Miss Nute and wanted to know if Hathaway had a deed of the property. She told him he did not have a deed, that he had agreed to purchase the property, and paid a substantial amount down, and "was negotiating for a mortgage from the bank, in order that he might carry through the deal." He further testified: "I told her we were there doing work, painting, and had a contract with Mr. Hathaway, two contracts, one for the inside and one for the outside." She said she ex-

pected to hear from Hathaway every day, but up to that time he had not called on her; that "he was negotiating with the bank for a mortgage in order that he might live up to the terms of his agreement and carry through the deal of the property and she expected to hear from him most any day"; that "Hathaway would have to put the house in condition * * * in order to get the money from the bank, and he was making the repairs." He also testified that Miss Nute did not tell him to cease work on the building, and that one of his workmen reported to him that a couple of days after this interview Miss Nute was about the premises.

Clarence P. Adams, a foreman employed by the Roxbury Painting & Decorating Company, testified that about April 11th Miss Nute came to the premises and went through the building; that "she asked a carpenter what he was going to do with the bathroom floor" and "he told her that he was waiting for the electricians to finish wiring and he would put the floor down." Much of this evidence was denied by Miss Nute. She testified that before the agreement of March 25th was signed she gave the key to Hathaway to look over the premises, but was unable to get it back from him; that he represented to her that he was a contractor and had employes who were idle and asked if they could clean up the house; that she never consented to his making any repairs on the house and first discovered that the men were not Hathaway's employes when Mr. Fanning called on her. She further testified that there was no extension of the agreement and no consent that Hathaway should mortgage the premises; that she was not informed and had no knowledge that he could not carry out the agreement.

The counsel for the owners "duly objected to the admissibility of so much of the foregoing testimony as related to the placing of a mortgage upon the premises by a bank, or to the making of repairs or alterations upon the premises and to communications by the witness with Miss Nute in regard to the same, and the court excluded, subject to the plaintiffs' exceptions duly saved, so much thereof as related to matters occurring prior to the signing of the contract, but subject to the respondents' said objections and exceptions admitted the remainder of said evidence objected to."

[2, 3] The parties could modify the original contract by a subsequent parol agreement. *Gilman & Son, Inc. v. Turner Tanning Machinery Co.*, 122 N. E. 747. The evidence of what was said by Miss Nute after the written contract was made tended to show that the original contract was so modified by agreement of Hathaway and Miss Nute; and if the jury believed this evidence they could have found that Hathaway was to make the repairs in order that he might secure a mortgage on the premises and pay the owners the

entire purchase price in money, and that Miss Nute, by this arrangement, consented to Hathaway's making the contract for the labor performed and materials furnished, within the meaning of the mechanic's lien statute (R. L. c. 197). *Davis v. Humphrey*, 112 Mass. 309; *Carew v. Stubbs*, 155 Mass. 549, 30 N. E. 219; *Brown v. Haddock*, 199 Mass. 480, 85 N. E. 573.

[4] If this evidence showing that the written contract was qualified by a subsequent, parol agreement were believed, a lien might be established on the interest of Miss Nute in the property, although there was no evidence to show that Mrs. Young was in any way indebted to the petitioners. She was a sister of Miss Nute, and while the latter had control and management of the property and collected the rents, Mrs. Young resided in another city and knew nothing of the repairs or alterations and made no agreement with Hathaway except the written agreement of March 25th; the statement of Miss Nute that she talked with her sister after Fanning's visit and informed her as the work progressed is not enough to show that Mrs. Young consented to a change in the written agreement; and on all the evidence she was not shown to have consented to any modification of the agreement, or to have authorized any one to make a separate and independent agreement for her.

[5] While one tenant in common cannot encumber the estate of his co-tenant (*Muskeget Island Club v. Prior*, 228 Mass. 95, 117 N. E. 2), the interest of Miss Nute could be conveyed or taken on execution, and a lien could be established on her interest in the property. We can see no valid objection to establishing a mechanic's lien on the interest of one tenant in common of real estate. See *Kirby v. Tead*, 13 Metc. 149; *Webber Lumber & Supply Co. v. Erickson*, 216 Mass. 81, 102 N. E. 940; *Mellor v. Valentine*, 3 Colo. 260; *Hillburn v. O'Barr*, 19 Ga. 591.

[6] Nor do we think it fatal to the petitioners that they have proceeded against both owners and have described them as such, and in their petition state that the labor and materials were supplied with their consent. There is nothing in the statute which prevents a creditor who petitions to establish a lien against two or more tenants in common of real estate, from securing his lien upon the interest of the tenant who makes the contract or who authorizes the improvement to be made. The share of that tenant may be held for the work thus authorized and a lien established against it. See in this connection *Taft v. Church*, 164 Mass. 504, 41 N. E. 671; *Washburn v. Burns*, 34 N. J. Law, 18. It follows that in the case of Mrs. Harriet E. Young the petitioners' exceptions are overruled; in the case of Miss Marietta Nute they are sustained.

So ordered.

(233 Mass. 62)

PURCELL et al. v. PURCELL.

(Supreme Judicial Court of Massachusetts. Middlesex. May 21, 1919.)

1. ABATEMENT AND REVIVAL \S 55(3), 71—SURVIVAL OF CAUSE OF ACTION—SETTING ASIDE CONVEYANCES.

A father's cause of action against his son to set aside conveyances procured by fraud and undue influence survives and can be prosecuted by an ordinary administrator without asking leave of court.

2. ABATEMENT AND REVIVAL \S 72(6)—CONTINUANCE OF ACTION BY SPECIAL ADMINISTRATORS.

Under Rev. Laws, c. 137, § 10, as to special administrators, the probate court had power to authorize such administrators, pending allowance of the will in which they were named as executors, to prosecute decedent's suit already brought against his son to set aside certain conveyances of realty and personalty as procured by fraud and undue influence, or to bring a new one in order to preserve the estate for the executor or administrator when appointed.

Appeal from Supreme Judicial Court, Middlesex County.

Suit by James Purcell against James F. Purcell, wherein Mary J. E. Purcell and others, executors of James Purcell, petitioned as special administrators for leave to prosecute. From decree allowing the special administrators to prosecute the suit, respondent appealed to the Supreme Judicial Court, where the decree was affirmed by a single justice, and respondent appeals to the full court. Decree affirmed.

John P. Feeney and George F. McKellegher, both of Boston, for appellant.

John G. Brackett, of Boston, for appellees.

DE COURCY, J. Among the facts alleged in the petition are the following: James Purcell, late of Arlington, died on May 17, 1917, leaving a will in which these petitioners are named as executors. The will was allowed in the probate court on October 18, 1917, and the respondent appealed therefrom. Pending the appeal the petitioners were appointed special administrators of the estate; and that appointment is still in full force.

The petition further alleges that about January 7, 1916, said James Purcell, through the fraud and undue influence of his three sons (of whom the respondent is one), was induced to execute certain instruments purporting to transfer to them his farm and the personal property used in connection therewith; that they occupied a fiduciary relation toward him at the time; that in January, 1916, he filed a bill in equity against his sons, seeking a reconveyance of

said real estate; and that the suit is still pending.

The probate court decreed:

"That said petitioners as special administrators of the estate of James Purcell be authorized and empowered for the purpose of settling the question of the validity of the title to the real and personal property above referred to, to prosecute said suit now pending in said Supreme Judicial Court or to bring a new suit for said purpose as in their judgment may be for the best interests of said estate and to prosecute such suit pending the determination of the question of the allowance of the will of said James Purcell or until further order of the court."

The respondent James F. Purcell appealed to the Supreme Judicial Court, where the decree was affirmed by a single justice. On the present appeal to the full court the only question raised is whether the probate court had authority to enter the decree in question.

[1, 2] Among the provisions of R. L. c. 137, dealing with special administrators, is the following (section 10):

"A special administrator shall collect all the personal property of the deceased and shall preserve the same for the executor or administrator when appointed, and for that purpose may commence and maintain suits. If he is appointed by reason of delay in granting letters testamentary, the court may authorize him to take charge of the real property of the deceased or of any part thereof, and to collect the rents, make necessary repairs and do all other things which it may consider needful for the preservation of such real property and as a charge thereon."

It seems plain from this that the probate court in its discretion may grant to special administrators the power to prosecute the pending suit. The cause of action survived and could be prosecuted by an ordinary administrator of the estate of James Purcell, without asking leave of court. *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401; *Raymond v. Flint*, 225 Mass. 521, 114 N. E. 811; R. L. c. 171, § 17. The statute makes it the duty of these special administrators to collect the personal property of the deceased which was included in the alleged fraudulent transfers. See *Meagher v. Kimball*, 220 Mass. 32, 107 N. E. 431. And where, as here, the appointment is made by reason of delay in granting letters testamentary the statute in terms empowers the court to authorize the special administrators "to take charge of the real property of the deceased * * * and do all other things which it may consider needful for the preservation of such real property." R. L. c. 137, § 10. That this power exists even where the interest of the deceased in the real estate was only an equitable one, see *Lufkin v. Jake-man*, 188 Mass. 528, 533, 74 N. E. 933. In

Busiere v. Reilly, 189 Mass. 518, 75 N. E. 958, in circumstances similar to those here presented a bill in equity to cancel a deed alleged to have been obtained by fraud was maintained, although originally brought by a special administrator. **Brigham v. Hunt**, 152 Mass. 257, 25 N. E. 468, relied on by the defendant was a writ of entry, which at common law would abate upon the decease of the demandant; and the only persons who had a right by statute to prosecute the action after his death were his heirs or devisees.

We are of opinion that on the facts disclosed the probate court had power to authorize the special administrators, pending the question of the allowance of the will, to prosecute the suit already brought, or to bring a new one, in order to preserve the property of the deceased for the executor or administrator when appointed. See R. L. c. 137, § 11.

Decree affirmed, with costs.

(333 Mass. 55)

NOYES v. NOYES.

(Supreme Judicial Court of Massachusetts. Essex. May 22, 1919.)

1. SPECIFIC PERFORMANCE ⇨86—CONTRACTS AS TO DISPOSITION OF PROPERTY AFTER DEATH.

Contracts as to disposition of property after death may be specifically enforced in equity.

2. WILLS ⇨718—ELECTION—ACCEPTANCE OF LAND.

Where testator's son accepted devise of at least four parcels of land under the will which were not included or mentioned in testator's contract to give such son his homestead, etc., and the son took possession and continued to hold such parcels, he elected to accept the provisions of the will which were inconsistent as to him with the contract, and he cannot enforce the latter against another son, either by suit for specific performance or by action for its breach.

3. EXECUTORS AND ADMINISTRATORS ⇨433—ACTION AGAINST—DEFENSE OF ELECTION.

The executor of a will may set up the defense of election by testator's son to take under the will instead of under a contract executed by testator by answer in the son's action at law against him for breach of the contract, in view of Rev. Laws, c. 173, § 28, as amended by St. 1913, c. 307.

4. JUDGMENT ⇨403—RESTRAINING ENFORCEMENT OF COMMON LAW.

Equity has jurisdiction to enjoin the enforcement of a common-law judgment.

5. EXECUTORS AND ADMINISTRATORS ⇨427—RIGHT OF EXECUTOR TO SUE IN PERSONAL CAPACITY—PRIOR FAILURE TO PLEAD DEFENSE IN REPRESENTATIVE CAPACITY.

Testator's son, an executor of his will, may sue in his personal capacity as devisee and leg-

atee to enjoin his brother from bringing or prosecuting action against the estate for testator's breach of contract to give the homestead, etc., to such brother, who has elected to take under the inconsistent provisions of the will, despite prior failure of the personal representatives to plead the election as defense to an action on the contract by the brother.

Case Reserved from Supreme Judicial Court, Essex County.

Suit by James A. Noyes, as surviving executor of the last will and testament of James Noyes, also as devisee under the will, against Elbridge Noyes, resulting in interlocutory decree overruling demurrer to the bill, defendant appealing, and reservation of the case for the determination of the Supreme Judicial Court. Decree ordered affirming the interlocutory decree and enjoining defendant.

Boyd B. Jones, of Boston, and Ernest Foss, of Newburyport, for plaintiff.

Robert E. Burke, Arthur Withington, and Edward E. Crawshaw, all of Newburyport, for defendant.

RUGG, C. J. This suit in equity is brought by the plaintiff, both as surviving executor of the will of James Noyes and as devisee under that will in his personal right, to enjoin the defendant from further prosecuting an action at law upon a written agreement executed by the testator. A demurrer to the bill was overruled. Then the case was sent to a master, who has filed an elaborate report, and it comes before us on a reservation for determination upon the pleadings, demurrer and the master's report. The relevant facts are these: James Noyes died in January, 1913, leaving real estate of the value of \$10,935 and personal estate of the value of \$12,921.44, aggregating \$23,856.44. By his will executed in July, 1903, and admitted to probate on April 21, 1913, he made specific devises and bequests, which, together with the values of the several properties at the time of the testator's death so far as now pertinent are these:

To the defendant he gave:

"The Jerry field \$600, the Halsey field \$650, the barn lot \$200, the Smith lot \$250, 1/4 Bradley meadow \$75, 1/2 Highfield pasture \$500, 1/2 Knight pasture \$300, 1/4 stock, farm implements, carts and wagons \$1,287.50, total \$3,862.50."

To the plaintiff he gave:

"The homestead \$6,168.46, the Cook lot \$60, the Pettingell meadow \$60, the Newhall lot \$300, 1/2 Highfield pasture \$500, 1/2 Knight pasture \$300, 1/4 Bradley meadow \$75, 1/4 stock, farm implements, carts and wagons \$1,287.50, total \$8,750.96."

The clause of the will whereby the stock, farm implements, carts and wagons were

given in equal shares to the plaintiff and the defendant contained these words:

"It being my desire that my two sons, James Addison and Elbridge, shall occupy my homestead and farm together as long as they can agree to do so. In case they should decide to separate, I provide that my son Elbridge shall be given a suitable time in which to arrange for the removal of his share of the live stock, farming tools, etc., and that that time be not less than sixty days."

The will was read on the day of the funeral in the presence of most of the heirs at law, including the defendant. He expressed no dissatisfaction with it. Shortly after the allowance of the will he took possession of the property by it devised and bequeathed to him and proceeded for several months to occupy and manage the farm jointly with the plaintiff pursuant to the desire of the father expressed in his will. It was the defendant's intention at this time to try to get on with his brother, the plaintiff, and to carry out the terms of the will of his father. In November, 1913, the brothers separated and the live stock, farming tools and crops were divided between them and they ceased to carry on the farm together. Since then the defendant has retained possession of the real and personal property given him by the will and used it as his own. In April, 1914, the defendant wrote to the executors a letter in which he made claim to \$500 per year for services for nineteen years and for the first time referred to an agreement whereby his father had promised him the homestead. He had not then found the written agreement, but in July, 1914, he brought the action at law (sought by the suit at bar to be enjoined) to recover damages arising from the breach by his father of an agreement in writing of the tenor following:

"December 4, 1895. This is to certify that I, James Noyes, do promise to give to my son Elbridge Noyes my homestead place, all of my adjoining meadow, my Knight pasture, Highfield pasture, all of my stock, consisting of cows, horses, hogs, and all of my farming implements, carts, wagons, so forth, in consideration that he remain on the farm and manage the same for me in my old age; if he should leave at any time this agreement shall be valid and he shall share as I may make further provisions. James Noyes. And I, Elbridge Noyes, do promise to stay on the farm and comply with the above wishes and to carry out this agreement with my father James Noyes to the best of my ability. Elbridge Noyes."

Of the property described in this agreement, the will made specific disposition of the homestead wholly to the plaintiff, and divided the Knight pasture, the Highfield pasture and the stock, farm implements, carts and wagons equally between the plaintiff and the defendant. The defendant's action at law on the agreement ultimately resulted in a verdict in his favor. See *Noyes v. Noyes*, 224 Mass. 125, 112 N. E. 850.

The provisions of the will for the defendant and the terms of his contract with the testator present a case for the application of the doctrine of election. That doctrine is well established in Massachusetts. It was stated by Chief Justice Shaw in *Hyde v. Baldwin*, 17 Pick. 303, at page 308, in these words:

"If any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will, or in other words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat, or in any way prevent the full effect and operation of every part of the will." *Watson v. Watson*, 128 Mass. 152; *Smith v. Wells*, 134 Mass. 11; *Tyler v. Wheeler*, 160 Mass. 206, 209, 35 N. E. 666.

The rule of election has been expressed in various phrases with reference to different states of facts. It was said by Lord Chancellor Cairns in *Codrington v. Codrington*, L. R. 7 H. L. 854, 861:

"By the well-settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate' and in our courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them."

"The general rule is that a person cannot accept and reject the same instrument and this is the foundation of the law of election." *Birmingham v. Kirwan*, 2 Sch. & Lef. 444, 449.

It was stated by Lord Hatherley in *Cooper v. Cooper*, L. R. 7 H. L. 53, 70, as follows:

"The main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit: and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect."

[1, 2] The defendant accepted devises of at least four parcels of land under the will which were not included or mentioned in his contract and entered into possession of them and has continued to hold them. Their total value was \$1,700. He also has continued in possession of other property given him by the will of a value of over \$2,100. The contract between the defendant and his father the testator was of such a nature that specific performance of its provisions could have been decreed if the former had sought that remedy and had prevailed on the facts. That contract related to real property and speci-

fied personal property, which of course could not have been bought in the general market. *Butterick Publishing Co. v. Fisher*, 203 Mass. 122, 130, 89 N. E. 189, 133 Am. St. Rep. 283. Contracts as to the disposition of one's property after death may be specifically enforced in equity. *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; *Murphy v. Murphy*, 217 Mass. 233, 104 N. E. 466. If the defendant had undertaken to enforce specific performance of his contract, and had succeeded in proving the contract, he would have deprived the plaintiff entirely of the homestead and of one-half of the Highfield pasture, of the Knight pasture and of the stock, farm implements, carts and wagons, which by the will were specifically given to the plaintiff. Thus he would have prevented the operation of the will as to these definite estates and goods. Manifestly it would be contrary to the doctrine of election to endeavor to profit by the will to the extent of its benefits conferred on him and at the same time thwart the working of the will upon most of the property therein given to the plaintiff. A party cannot evade the effect of a principle of substantive law merely by shifting the form of action. It is elementary that equity looks through form to substance. If the effect of enforcing the contract by action for its breach is to prevent the operation of the will as to substantial provisions, then the defendant is as much precluded from enforcing it by that form of action as he would be by suit for specific performance. There is no distinction in essence between the case at bar and the case where a testator by will devises blackacre, which belongs to A, to B, and devises whiteacre, of which the testator is seized to A. Yet it is too well settled for discussion that A. cannot claim the devise of whiteacre without releasing blackacre to B. The defendant stands on no higher or more secure ground because he had a contract for the conveyance or devise of the homestead and other property than he would have stood if he had owned it in fee. Plainly the testator could not have intended both his will and his contract with the defendant to stand. Their provisions are utterly incompatible. The benefactions given by the will to the plaintiff are repugnant in every particular to the terms of the contract with the defendant. There is no room for a contention that there was mistake or oversight on the part of the testator. His expression of desire in the will that the defendant live on the farm with the plaintiff and that if they decided to separate, the defendant should be given a reasonable time within which to remove, demonstrate that the testator had abandoned whatever idea he once may have entertained that the homestead should go to the defendant. The case as now presented is not one where all provisions of the will must wait on the payment of damages for breach of the contract sought to be enforced by the defend-

ant by his action at law. That is not a mere pecuniary obligation, but an agreement for the transfer of specific property. The contract and the will cannot both stand according to their express terms. But the defendant as a beneficiary under the will, who has in that respect accepted its provisions, is barred from enforcing his contract to the extent of preventing the operation of the will as to other beneficiaries. The defendant therefore comes within the scope of the doctrine of election. He must either relinquish his own benefits under the will and rely wholly on his contract, or abandon the contract if he chooses to accept the provisions of the will in his behalf. He has made his election. He chose at the outset to take his benefactions under the will and has continued constant in that course. *Hyde v. Baldwin*, 17 Pick. 303; *Gorham v. Dodge*, 122 Ill. 523, 14 N. E. 44; *Towle v. Towle*, 79 Wis. 596, 48 N. W. 800; *Utermehle v. Normont*, 197 U. S. 40, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520; *Central Trust & Safe Deposit Co. v. Snider*, [1916] App. Cas. 266, 274; *Jackson v. Bevins*, 74 Conn. 96, 100, 49 Atl. 899; *Drake v. Wild*, 70 Vt. 52, 57, 39 Atl. 248; *Wise v. Rhodes*, 84 Pa. 404; *Cox v. Rogers*, 77 Pa. 160; *Bigelow on Estoppel* (6th Ed.) pp. 733, 734, and cases there collected.

[3] The plaintiff in his capacity as executor might have set up the defense of election by answer in the action at law. *Watson v. Watson*, 128 Mass. 152; R. L. c. 173, § 28, as amended by St. 1913, c. 307. But ordinarily the remedy of an independent suit in equity is concurrent. *Eustis Mfg. Co. v. Saco Brick Co.*, 198 Mass. 212, 217, 84 N. E. 449.

[4] There is jurisdiction in equity to enjoin the enforcement of a common-law judgment. *Brooks v. Twitchell*, 132 Mass. 443, 65 N. E. 843, 94 Am. St. Rep. 662.

That equitable defense was not pleaded in the action at law brought by the defendant against the executors of the will of his father. No reference is made to it by name. The paragraphs in that answer, pleading as credits upon the plaintiff's claim the amounts received by him under the will, relate to a defense of a different kind. It was so held in *Noyes v. Noyes*, 224 Mass. 125, 134, 112 N. E. 850.

[5] Fundamentally, the reason why the plaintiff may proceed at equity by the present suit is that he appears now in his personal capacity as a devisee and legatee under his father's will, whose individual property rights as such devisee and legatee will be affected by the enforcement of the action against him as executor. In this capacity he does not stand as he would if his rights were alone those of the executor of the will, but he asserts independent rights. *McCarthy v. William H. Wood Lumber Co.*, 219 Mass. 566, 107 N. E. 439, and cases there collected. *Wall v. Massachusetts Northeastern St. Ry.*, 229

Mass. 506, 118 N. E. 864. The conduct of the executor does not bind the plaintiff in his individual capacity in this particular. The failure to plead election as a defense to the action at law on the contract by the defendant does not preclude the plaintiff in his individual capacity from now relying upon that doctrine. In this view of the case the question of accident, mistake or ignorance of the plaintiff in omitting to raise the question of election in the action against him as executor is not material. The denial of the motion for a new trial setting up the principle of election does not bar him. It is not necessary to determine what might be the effect of these factors against the estate of the testator, if it alone were concerned in the present suit. Therefore cases like *Fuller v. Cadwell*, 6 Allen, 503, *Payson v. Lamson*, 134 Mass. 593, 45 Am. Rep. 348, and *Boston & Maine R. R. v. D'Almeida*, 221 Mass. 380, 108 N. E. 1065, relied upon by the defendant, are not controlling. A decree is to be entered affirming the interlocutory decree which overruled the demurrer, and enjoining the defendant from further prosecuting his action at law, but without costs.

So ordered.

(233 Mass. 105)

GONDEK v. CUDAHY PACKING CO. (four cases).

(Supreme Judicial Court of Massachusetts.
Middlesex. May 22, 1919.)

1. LICENSES ⇨14(1) — **AUTOMOBILES — FOREIGN CORPORATION AS NONRESIDENT.**

The provisions of the automobile law respecting nonresidents (St. 1914, c. 204, § 1) were not applicable to a foreign corporation which had places of business in Massachusetts, and it was subject, respecting all its automobiles within the commonwealth, to the absolute prohibition against operating them on the highway unless registered in accordance with St. 1909, c. 534, § 9.

2. MUNICIPAL CORPORATIONS ⇨705(12) — **AUTOMOBILES — OPERATION OF UNREGISTERED CAR — LIABILITY OF OWNER.**

One permitting a nuisance, such as operation of an unregistered automobile on a highway, is responsible for injuries caused thereby, though the car at the moment is being used in the business or pleasure of another.

3. MASTER AND SERVANT ⇨330(3) — **AUTHORITY OF SERVANT TO OPERATE AUTOMOBILE — SUFFICIENCY OF EVIDENCE.**

In an action against a company for injuries in a collision with its automobile driven without registration in Massachusetts by the company's chauffeur under direction of the manager of its New Hampshire plant on such manager's personal business, evidence held insufficient to warrant finding that the company expressly or impliedly authorized its manager to operate

the automobile or cause it to be operated in Massachusetts on his own business.

4. TRIAL ⇨424 — **WAIVER OF REQUESTS FOR INSTRUCTIONS — REMARKS OF COUNSEL.**

In action for injuries in collision with defendant's automobile, remarks of attorney for defendant respecting the form of the third question submitted to the jury held not to amount to a waiver of his requests for instructions covering the point that the manager of defendant company's New Hampshire branch was not authorized to cause the company's automobile to be operated on his own personal business in Massachusetts.

Exceptions from Superior Court, Middlesex County; Loranus E. Hitchcock, Judge.

Actions of tort by John Gondek, Josephine Gondek, Edward Gondek, and Mary Gondek against the Cudahy Packing Company. Verdicts for plaintiffs, and defendant excepts. Exceptions sustained.

The defendant filed the following requests for rulings which were denied by the presiding justice and exceptions duly taken, viz.:

"(1) On all the evidence the plaintiffs are not entitled to recover.

"(2) On all the evidence the automobile of the defendant was not being used on the business of the defendant at the time of the accident.

"(3) On all the evidence the automobile of the defendant was not being used with the permission of the defendant at the time of the accident.

"(4) The automobile was duly registered according to the laws of the state of New Hampshire, and was not being used in Massachusetts in violation of any laws of the commonwealth of Massachusetts; it was therefore duly registered and not a trespasser upon the highways.

"(5) If the automobile was being used at the direction and on the business of one Lacaille, the manager of the defendant, such use was not in the course of the business of the defendant, and the knowledge and permission of Lacaille was not knowledge and permission of the defendant.

"(6) The permission of any officer or manager of the defendant to use the defendant's automobile for any use other than that of the defendant's business was ultra vires and was not therefore the act of the defendant.

"(7) There is no evidence on which the jury would be warranted in finding that the automobile at any time during the trip was being used on the business of the defendant.

"(8) The defendant was a nonresident within the meaning of the automobile statutes and the automobile was duly registered in the state of the defendant's residence; it was therefore legally operated upon the highways of the commonwealth.

"(9) There was no evidence that the defendant's automobile had been operated in Massachusetts more than twenty days in the calendar year; the automobile was not therefore in that respect violating the statutes of the commonwealth and was not a trespasser upon the highways.

"(10) Even if it were found that the trip to Lawrence was on the defendant's business, the subsequent trip to Lakeview Park and return to Lowell was a departure from the defendant's business, and the defendant was not liable for the acts of Larivee and others during that period of departure.

"(11) Such departure from the defendant's business did not terminate until the automobile had returned to the direct route back to the defendant's place of business.

"(12) The permission of Lacaille to use the automobile on anything except the business of the defendant was ultra vires and therefore not binding upon the defendant.

"(13) The negligence of Larivee, the operator of the automobile, was not the negligence of the defendant, and the plaintiff is not entitled to recover.

"(14) Larivee, the driver of the automobile, was not the servant or agent of the defendant at the time of the accident, and the plaintiff cannot recover.

"(15) Lacaille was not an officer or director of the corporation, and any ultra vires act of his should not bind the corporation.

"(16) There is no evidence that any officer or director of the corporation assented to or had knowledge of Lacaille's use of automobile for his own purposes."

After the judge had delivered his charge, the following colloquy took place at the bench:

The attorney for the defendants objected to the form of the third question, and stated that the defendant claimed that the real question was whether Lacaille had authority, or whether it was within the scope of his employment, to permit the use of the automobile on his own business, and whether that permission amounted to the consent of the company, and the defendant's counsel stated he thought that, if the manager had authority generally to use the automobile for his own business, it would follow that he would have authority to use it in Massachusetts as well as in Nashua for that purpose, and that he thought that was the real question at issue in the case; that whether or not Lacaille had authority to permit the commission of an illegal act was not the issue from his point of view.

"The Court: You would like to have added, 'Authority to operate the automobile upon business of Mr. Lacaille'?"

"Mr. Avery: Yes; and then whether it happened on the highways of Massachusetts or not I don't care."

The court thereupon reframed the third question to be submitted to the jury.

Qua, Howard & Rogers, Albert S. Howard, and Melvin G. Rogers, all of Lowell, for plaintiffs.

H. S. Avery, of Boston, for defendant.

RUGG, C. J. These are four actions of tort, whereby the plaintiffs seek to recover

compensation for injuries sustained by them on June 22, 1918, through collision with an automobile owned by the defendant. Confessedly the plaintiffs, at the time travelers on a highway in Dracut in this commonwealth, were in the exercise of due care and the operator of the automobile was negligent. The defendant is a corporation domiciled in Maine, but had maintained in 1918 for more than thirty days before the plaintiffs' injuries several places of business in Massachusetts. It also maintained at Nashua, in the state of New Hampshire, a place of business in connection with which the automobile in question was used. It was registered in New Hampshire, but not in Massachusetts. It was purchased in July, 1917, by the defendant on requisition from one Lacaille, who for over five years had been manager of the defendant's business at Nashua. It appeared that in 1917 Lacaille used the automobile five or six times to go from Nashua to Lawrence in this commonwealth, chiefly on business of his own, but there was no evidence on the point whether it was registered in Massachusetts in that year. He occasionally, and whenever he so desired, used it in his own business around Nashua without complaint by the defendant. He had sole control over its use. He had ten or twelve men under him in the employ of the defendant at Nashua where a general meat packing business and the business of storing furs and household furniture was conducted. There were executive officers of the defendant in Boston, but none in New Hampshire. A general superintendent visited the Nashua place of business every other week, and perhaps once or twice a year other officers of the defendant went there. On June 22, 1918, Lacaille having sold a gas stove, which he had stored without pay for several months in the defendant's storehouse at Nashua, to his cousin in Lawrence, Mass., asked one Larivee, employed by the defendant as chauffeur at Nashua, to take the stove to its new owner. It was while returning to Nashua from that journey to Lawrence that the automobile collided with the plaintiffs, causing the injuries here in suit.

[1] The automobile at the time of the accident was an outlaw upon the highways of Massachusetts. The defendant was not a "nonresident" within the meaning of St. 1914, c. 204, § 1, in force on the day of the accident. By that statute "nonresidents" as used in the automobile laws, in substance, is defined to mean "residents of states or countries who have no regular place of abode or business in this commonwealth for a period of more than thirty days in the calendar year." It is conceded that the defendant had places of business in Massachusetts. Therefore the provisions of the automobile law respecting nonresidents were not applicable to it. It was subject respect-

ing all its automobiles within the commonwealth to the absolute prohibition against operating them upon the highway unless registered in accordance with our law (St. 1909, c. 534, § 9). *Dudley v. Northampton St. Ry.*, 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561; *Holden v. McGillicuddy*, 215 Mass. 563, 565, 102 N. E. 923; *Dean v. Boston Elev. Ry.*, 217 Mass. 495, 498, 105 N. E. 616. The words of the statute are so plain as to render any other construction not rationally possible. If it be thought harsh to impose such stringent liability upon actual nonresidents who have places of business in this and other states relief must be sought from the Legislature and not from the judiciary. See St. 1919, c. 88.

There is no evidence whatever to the effect that the automobile at the time of the accident was being operated on the business of the defendant. The evidence shows that it was a personal matter of Lacaille upon which it was driven into Massachusetts.

[2, 3] There is no evidence on this record which warrants the conclusion that the defendant expressly or impliedly authorized Lacaille, the manager of its Nashua branch, to operate or cause to be operated its automobile on the highways of Massachusetts on his own business. There was evidence from which the inference might be drawn that Lacaille was authorized to use the automobile in the neighborhood of Nashua on his own business and pleasure. The general course of conduct would constitute evidence to that end. But it was a wholly different matter to use the automobile in Massachusetts. The operation of the automobile in Massachusetts by the authority of the defendant not only would subject it to a fine (St. 1909, c. 534, § 10), but also would render it liable to heavy and unusual civil liability. It would be responsible for injuries caused by the negligent operation of the automobile even though not at the time being used in its business. The consequence of one permitting a nuisance, such as an un-

registered automobile operated upon a highway, is that he is responsible for injuries caused thereby even though it is at the moment being used in the business or pleasure of another. *Gould v. Elder*, 219 Mass. 396, 107 N. E. 59; *Koonovsky v. Quellette*, 226 Mass. 474, 116 N. E. 243, Ann. Cas. 1918B, 1146. Authority to impose liabilities of this kind upon the defendant, having their origin in authority to commit a crime, cannot be inferred from mere employment as manager of a business dealing in the necessities of life. For all things done within the natural course of the management of its Nashua branch and in furtherance of its business by Lacaille, the defendant would be liable. On the occasion in question the automobile was not being used to promote its affairs, but for something quite outside its business.

There is nothing in the evidence which warrants the inference that the defendant knew or ought to have known that Lacaille was using the automobile in Massachusetts for his own business or pleasure, so that acquiescence in such use might be implied. The day of the accident was the first time it had been used in Massachusetts in 1918. If it be assumed in favor of the plaintiffs that the automobile was not registered in Massachusetts in 1917, the use of it by Lacaille five or six times to visit his family in Lawrence is not enough to fasten knowledge, consent, and responsibility upon the defendant under all the circumstances. It does not appear that this use was at times and under conditions likely to come to the attention of the defendant.

[4] The defendant's requests for instructions plainly cover this point. The remarks of counsel respecting the form of the third question did not amount to a waiver of his requests and do not appear to have misled the judge in any particular. They were made after the requests for rulings had been denied and the law thus established for the trial.

Exceptions sustained.

(128 Ind. 724)

INDIANAPOLIS TELEPHONE CO. v.
STATE. (No. 23584.)

(Supreme Court of Indiana. June 6, 1919.)

APPEAL AND ERROR ¶1161—CONFESSION OF
ERROR.

Appellee having confessed error of record, the judgment will be reversed, and the case remanded for further proceedings.

Appeal from Circuit Court, Marion County; Louis B. Ewbank, Judge.

Controversy between the Indianapolis Telephone Company and the State of Indiana. From the judgment rendered the former appeals. Reversed and remanded.

L. Ert. Slack, of Indianapolis, Charles M. Bracelear, Foster & Smith, and Myers, Gates & Ralston, of Indianapolis, for appellant.

PER CURIAM. In this case the appellee confesses error of record. The judgment is therefore reversed, and this case is remanded for further proceedings.

(128 Ind. 323)

SISK et al. v. STATE ex rel. ERIE STONE
CO. (No. 23247.)

(Supreme Court of Indiana. June 3, 1919.)

APPEAL AND ERROR ¶544(2)—MATTERS RE-
VIEWABLE—BILL OF EXCEPTIONS.

Any question depending upon the evidence cannot be considered, where the bill of exceptions was not filed within the term in which the cause was tried, nor within the time given by the court for that purpose.

Appeal from Circuit Court, Adams County; David E. Smith, Judge.

Action by the State, on the relation of the Erie Stone Company, against J. Leonard Sisk and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. L. Sharpe, of Bluffton, and Jesse C. Sutton, of Decatur, for appellants.

Peterson & Moran and O. J. Lutz, all of Decatur, Moran & Gillespie, of Portland, and H. B. Heller, of Decatur, for appellee.

MYERS, J. This was an action by appellee, the Erie Stone Company, to recover upon a contractor's bond for stone and material furnished appellants in the construction of a macadam road. The complaint, in two paragraphs, answered by general denial, a plea of payment, set-off, and a counterclaim in two paragraphs, with a reply of general denial to each affirmative paragraph of answer and to each paragraph of the counterclaim, formed

the issues submitted to a jury for trial, resulting in a verdict for \$8,237.94 in favor of the stone company, and judgment followed in its favor against appellants.

The overruling of appellants' motion for a new trial is assigned as error, and is the only error assigned and not waived. The specifications relied upon to support the motion require a consideration of the evidence. The giving of certain instructions are challenged, but not on the ground that they were improper and erroneous upon any state of the evidence admissible under the issues. The instructions are here, if at all, only by a bill of exceptions. Appellee makes the point that neither the evidence nor the instructions are properly a part of the record.

It appears from the record that the jury returned its verdict into the Adams circuit court on May 3, 1916. On May 15, 1916, appellants filed their motion and specifications for a new trial. On October 27, 1916, appellants' motion for a new trial was overruled and the stone company was given judgment on the verdict. On that day appellants prayed an appeal to the Supreme Court, which was granted, amount of bond fixed, and 30 days given in which to file same; also 90 days given in which to file their bill of exceptions. The transcript fails to disclose an order book entry showing the filing of any bill of exceptions within the time allowed by the court, or that any extension of time was given in which to file bills of exception, nor is there any order book entry or certificate of the trial judge showing that any bill of exceptions was filed, or even tendered to the court for settlement, within the time allowed therefor. The only order book entry which is of date April 23, 1917, in any manner referring to the filing of a bill of exceptions, is as follows:

"Come now the defendants, by their attorney, A. L. Sharp, and file herein their bill of exceptions No. 1 in these words, (H. I.) and the same is signed, sealed, and made a part of the record herein."

This order book entry refers to what purports to be the bill of exceptions No. 1 embodying the evidence, and to which is attached the certificate of the trial judge in effect authenticating the correctness of the transcript of the evidence as made by the report from his shorthand notes of the evidence taken at the trial, together with all objections and rulings of the court and exceptions thereto. This certificate is dated April 23, 1917.

This state of the record, as pointed out by appellee and unchallenged by appellants, and which upon examination we find to be correct, compels us to hold that neither the evidence given in the cause nor the instructions tendered by the appellants and refused, as well

as the instructions given by the court, are a part of the record. Therefore any questions depending upon the evidence, or questions pertaining to the instructions, are not presented, for the reason it clearly appears from the record that the bill of exceptions relied on by appellants were not filed within the term at which the cause was tried nor were they filed within the time given by the court for that purpose. *Lengelsen v. McGregor*, 162 Ind. 258, 67 N. E. 524, 70 N. E. 248; *Taylor v. Schradsky*, 178 Ind. 217, 97 N. E. 790; *Haehnel v. Seidentopf*, 63 Ind. App. 218, 114 N. E. 422; *North American Union v. Oleske* (App.) 116 N. E. 68; *Huntingburg Bank v. Morgenroth* (App.) 115 N. E. 798.

Judgment affirmed.

(189 Ind. 243)

STATE ex rel. DAUBENSPECK v. DAY et al.*
(No. 23508.)

(Supreme Court of Indiana. May 27, 1919.)

1. TELEGRAPHS AND TELEPHONES §6 — STOCKHOLDERS — NUMBER OF SHARES ONE MAY HOLD—PROVISIONS OF ARTICLES.

In view of *Burns' Ann.* 1914, §§ 5794, 5800, articles of incorporation of telephone company in question providing that no one shall at any one time own or control more than five shares of the capital stock is without force, not being required by section 5790, as to articles of incorporation, and owner of more than five shares is entitled to vote all shares; there being no statute or by-law to the contrary.

2. CORPORATIONS §55 — BY-LAWS — WHO MAY MAKE.

While ordinarily by-laws are made by the stockholders, yet, where the statute gives that power to the board of directors, the stockholders cannot change it or interfere with the board in this particular so long as such by-laws are reasonable and do not interfere with the vested and substantial rights of the stockholders or are not contrary to public policy or established law.

3. TELEGRAPHS AND TELEPHONES §5 — INCORPORATION OF COMPANIES—"SUPPLEMENTAL" ACT—CONSTRUING TOGETHER.

Acts 1881, c. 101, entitled "An act concerning telephone companies and supplemental to an act for the incorporation of manufacturing companies," etc., supplemented the manufacturing act, and the acts must be construed together and as applicable to telephone companies; "supplemental" referring to "that which is added to a thing to complete it."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Supplemental Act.]

4. STATUTES §211—CONSTRUCTION—TITLE—LEGISLATIVE INTENT.

The title of an act may be used as a guide in determining the intention of the lawmakers.

Appeal from Circuit Court, Hamilton County; Ernest E. Cloe, Judge.

Quo warranto on the relation of George B. Daubenspeck against Elbert H. Day and others. From the judgment rendered, relator appeals. Reversed and remanded, with instructions.

Frederick Van Nuys and Elias D. Salsbury, both of Indianapolis, and Gentry & Campbell, of Noblesville, for appellant.

Emsley W. Johnson and Joseph W. Hutchinson, both of Indianapolis, for appellees.

MYERS, J. This is a proceeding in quo warranto brought by the relator, George B. Daubenspeck, against appellees to determine the right of each appellee to the office of director of the Union Telephone Company of Carmel, Ind. Issues were formed, trial had, special finding of facts made, and conclusions of law stated thereon in favor of appellees, and judgment against appellant. The errors assigned question: (1) The ruling of the trial court on relator's demurrer to the second paragraph of answer; and (2) each conclusion of law.

The assignments of error present the same question. The following facts taken from the special findings will suffice to indicate the question for decision: The Union Telephone Company was incorporated on August 19, 1903, under an act of the General Assembly of this state approved April 7, 1881 (Acts 1881, c. 101), and acts amendatory thereof and supplemental thereto. From then until now the board of directors has been composed of five stockholders. It was the custom of the company to elect annually three, one for the term of one year and two for the term of two years. 96½ shares is a majority of all the shares of stock issued and outstanding. Appellees are now acting as directors of the company, claiming to have been elected at a regular annual stockholders' meeting. The facts pertaining to their election are as follows:

Three directors were to be elected. Tellers were chosen, and six persons, appellees and three others, all qualified for the office of director, were nominated to be voted for. Appellees each received 68 votes and all counted for them. The other three nominated received 96½ votes each, but the tellers only counted for them 28½ votes, and rejected and refused to count the other 68 on the sole ground that these votes represented 68 shares of stock of the company owned and controlled by the relator over and above the 5 shares voted by him, and that to count the 68 votes would be in violation of, and contrary to, article 11 of the articles of association, which reads as follows:—

"No person, firm or company can ever at any one time own or control more than five shares of the capital stock of this company, and every such person, firm or company shall be entitled to only one telephone connection for each paid-up share of stock so owned."

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied.

That said 68 shares were not in the name of the relator on the books of the company, and never had been, but were held by others in blocks of 5 shares or less, under an agreement with the relator that said stock should be voted as directed by him at all stockholders' meetings, and for the purposes by him of controlling the corporation and its policies notwithstanding article 11.

[1] Appellees claim that article 11 has the force and effect of a by-law, and also that it amounts to a stipulation between the stockholders as to their holdings of stock.

The by-law contention of appellees cannot be sustained. The power to adopt by-laws for the government of a telephone corporation and the management of its business, and to determine the manner in which the stock of the company shall be held and assigned, is by statute conferred exclusively upon the board of directors. Sections 8 and 11, Acts 1881, p. 698; sections 5794, 5800, Burns 1914; *Manufacturers', etc., Co. v. Landay*, 219 Ill. 168, 76 N. E. 146.

[2] Ordinarily by-laws are made by the stockholders, but, where the statute gives that power to the board of directors, the stockholders cannot change it or interfere with the board in this particular so long as such by-laws are reasonable and do not interfere with the vested and substantial rights of the stockholders, or is not contrary to public policy or the established law of the land. *State v. Anderson*, 31 Ind. App. 34, 67 N. E. 207; *Manufacturers', etc., Co. v. Landay*, supra; *Van Atten v. Modern Brotherhood of America*, 131 Iowa, 232, 108 N. W. 313; *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 398. In this case the board of directors has never assumed to pass any by-law other than to define the duties of the president, secretary-treasurer, and manager. Neither of these by-laws have any reference to the holding, transferring, or assigning of the stock from or to stockholders. If only the board of directors had power to pass by-laws, and none were passed by that body, limiting the number of shares of stock an individual person might own or control in the corporation, then it cannot be said that a by-law on that subject was passed by any authorized authority. This is not a case where the corporation has exceeded its authority or is in any manner guilty of criticizable conduct. Consequently the question before us does not involve any act of the corporation, but relates alone to the power of the incorporators to limit the number of shares of stock which may be held at any one time by an individual stockholder.

It will be noticed that articles of incorporation under the telephone act require only three affirmative statements, namely:

(1) The name assumed by the company; (2) the counties or places within which such company proposes to establish, maintain, and

operate telephones and telephone exchanges; and (3) the amount of capital stock and the number of shares into which it is divided. Acts 1881, p. 698, § 2; section 5790, Burns 1914. Other provisions of this act provide:

Section 6:

"The board of directors shall adopt by-laws for the government of the corporation and the management of its business."

Section 11:

"The board of directors shall have power. * * * It may also, in their by-laws, determine the manner in which the stock of the company shall be held and assigned." Section 5800, Burns 1914.

Section 5 requires the principal office of the company to be maintained in this state. Section 7 limits the life of corporations organized under this act to 50 years, and section 4 as amended (Acts 1899, p. 124):

"The stockholders shall elect, from among their number, not less than three directors."

[3] It thus appears that this act contains no provision expressly restricting stock ownership or any provision relative to the voting of the stock of such company. The title of the act is:

"An act concerning telephone companies, and supplemental to an act for the incorporation of manufacturing and mining companies and companies for mechanical, chemical and building purposes, approved May 20, 1852, and all acts amendatory thereof and supplemental thereto; and declaring an emergency."

At this point we meet the question: Is the telephone act a part of the manufacturing act, and, if so, must they be construed together and as applicable to telephone companies?

Appellees insist that the telephone act is independent legislation, and to it alone the corporation must respond, and to which it must look for its limitations. True, this act does not purport to be an amendment, and for that reason it is suggested that these acts must be construed separately, because there is no power in the General Assembly to pass supplemental acts. This court has held otherwise, and we know of no good reason why this rule should be changed. *McCleary v. Babcock*, 169 Ind. 228, 234, 82 N. E. 453.

[4] There is nothing to indicate that the Legislature used the word "supplemental" in any sense other than as generally understood. Thus considered, it will be regarded as referring to "that which is added to a thing to complete it." *Bouvier's Law Dict.* (Raw. 3d Rev.) p. 8187. It means an addition which cannot be made in the form of an amendment. "It is that which supplies a deficiency, adds to, or completes, or extends that which is already in existence without

changing or modifying the original." *McCleary v. Babcock*, supra. The title of the manufacturing act is fully incorporated into the title of the telephone act; therefore, if the title of an act may be used as a guide in determining the intention of the lawmakers, and it certainly can, it would be hard to find a title more expressive of intention to supplement an act than the one under consideration.

At the time the manufacturing act was passed, telephones and telephone companies were unknown, but as time passed on and the demand for a law authorizing the incorporation of such companies arose, it was met by the General Assembly adding to the manufacturing act, as amended and supplemented and in force April 7, 1881, provisions whereby such companies might be created, and also provisions especially applicable to this new class of companies, and otherwise they should be subject to the laws then in force. But in applying these laws it must be understood that the provisions of the manufacturing act step in only where there is no supplemental provision covering the point involved.

As we have seen, by amended section 4 of the telephone act the stockholders are required to elect not less than three directors, who shall serve for one year and until their successors are elected. This statute, when read in connection with section 3 of the manufacturing act (1 Rev. St. 1852, c. 60), makes it the duty of the stockholders to elect such directors annually. In 1861 section 4 of the manufacturing act of 1852 was amended by re-enacting the privilege to absent stockholders to vote by proxy, and by repealing the limitation that "no one stockholder shall give more than 20 votes," and in place thereof "and each share of stock shall entitle the owner thereof to one vote." This amendment has been in force continuously since its adoption. Acts 1861, p. 135; section 5071, Burns 1914. While section 7 of the act of 1852 was amended in 1891, yet no change was made in that part of the section which provided that "the stock of such company shall be deemed personal estate, and when fully paid in shall be transferable in such manner as the by-laws may prescribe." Acts 1891, p. 344; section 5088, Burns 1914.

These considerations require us to hold that the telephone act should be considered a part of the manufacturing act, and hence the manufacturing act of 1852 as amended and supplemented must control the rights of the parties to this appeal.

We have seen that the articles of incorporation must contain three affirmative statements as a condition precedent to a legal incorporation. When incorporated, it, and likewise the stockholders, are granted certain rights and powers, and at the same time they are subject to certain corporate regulations. For instance, upon the incor-

poration of the Carmel Telephone Company, the statute provided that "the board of directors shall adopt by-laws for the government of the corporation and the management of its business," also that the board of directors may by the adoption of by-laws determine the manner in which the stock of the company shall be held, assigned and transferred. Sections 5800, 5088, supra. These restrictions are intended for the benefit of the corporation, whereby its rights may be protected from the transfer of stock to irresponsible persons, thereby rendering authorized assessments worthless, to the impairment of the company's credit, and for the further reason to enable the corporation to know its stockholders. As to the stockholder, he is given one vote for each share of stock owned by him, and, if absent from stockholders' meetings, he may vote by proxy. His shares of stock are to be deemed personal estate and transferable in the manner prescribed by the by-laws. In the particulars mentioned, the stockholder is secured by legislative enactment. He knows his shares of stock have been classed as personal property, along with which goes the inseparable right of alienation unless the paramount law imposes some inconsistent restriction. In case of a telephone company he is bound to know that the Legislature has confided to the board of directors, as a part of the internal management of the corporation's affairs, the power to determine the necessary restrictions to be placed on the alienation and transfer of its stock. However, this general authority of the board is qualified by the declaration that the stock "shall be deemed personal estate," thereby impliedly saying to the board of directors that all such regulations or restrictions, unless otherwise provided, shall be adopted in accordance with the law applicable to personal property generally. True, as appellees claim, the Carmel Telephone Company is a voluntary association of persons engaged in a common enterprise, but we cannot agree that the article in question is responsive to any specification in the law which is necessary to give it any force or effect as a charter regulation. *O'Brien v. Cummings*, 13 Mo. App. 197. Nor can we agree that the incorporators were free to make a law for themselves limiting every stockholder to not more than 5 shares of stock at any one time. That was a restriction, no doubt, intended for the benefit of the corporation, but it is with reference to a matter expressly by statute referred to the board of directors on which it is conceded the board had neglected to act.

From these considerations we conclude that the article in question is without force or effect; that the facts fail to disclose any legal restriction as to the number of shares of stock which an individual stockholder may own and control in the Carmel Telephone Company. As to the relator it appears

that he owned and controlled 68 shares of stock which was not in his name on the stock book of the company, but in the name of other persons. However, persons representing 55 shares thereof were present in person and voted the same, and relator held the proxies of persons in whose name thirteen shares was so shown and held.

From all the facts we conclude that the relator was the owner of the stock in question, and, in the absence of any statute or valid by-law to the contrary, was entitled to vote the same, and the fact that another voted this stock will not have the effect of invalidating such votes.

It is conceded that appellees received only 68 votes each, and each of their opponents received 96½ votes. Under such circumstances appellees cannot be regarded as the choice of the stockholders at such election. The exclusion and rejection of certain votes, for the reason stated by the tellers, was error, and, neither of the appellees were duly elected. *People v. Phillips*, 1 Denio (N. Y.) 388.

Judgment reversed, causé remanded, with instructions to the trial court to restate its conclusions of law in accordance with this opinion, and render judgment in conformity with the restated conclusions of law.

(128 Ind. 685)

STATE ex rel. GERMAN INVESTMENT & SECURITIES CO. v. CITY OF INDIANAPOLIS et al. (No. 23354).*

(Supreme Court of Indiana. May 27, 1919.)

1. MANDAMUS ⇐1—SCOPE OF REMEDY.

Mandamus will be issued only in cases where the facts show a clear legal right on the part of relator to the relief sought and a clear legal duty resting on the defendants to do and perform the thing demanded.

2. MUNICIPAL CORPORATIONS ⇐353—STREET IMPROVEMENTS — CONTRACTOR—ASSIGNMENT OF ASSESSMENTS—RIGHTS OF ASSIGNEE.

Assignment by contractor of assessments to be made on completion of street improvement, and its acceptance by the city, conferred on assignee an equitable interest therein, which was subject to any defenses which might exist against contractor, and gave him no right thereunder which contractor could not have successfully asserted, in absence of assignment.

3. MUNICIPAL CORPORATIONS ⇐365—STREET IMPROVEMENTS—ACCEPTANCE OF WORK.

Under Burns' Ann. St. 1914, § 8711, contractor of street improvements has no right to have work finally accepted by board of public works of a city until it is completed in accordance with the terms of the contract.

4. MUNICIPAL CORPORATIONS ⇐374(2) — STREET IMPROVEMENTS — FINAL ASSESSMENTS.

In view of Burns' Ann. St. 1914, § 8711, contractor's assignee cannot require board of pub-

lic works to make final assessments to pay for street improvements, unless the work has been finally accepted.

5. MUNICIPAL CORPORATIONS ⇐365—STREET IMPROVEMENTS—ACCEPTANCE OF WORK—RESCISSION OF ORDER.

Board of public works, having made an order approving report of city engineer that street improvements have been made according to contract and accepting the work, can rescind order upon discovery that work has not been properly constructed, and has duty of so doing, unless rights of innocent parties have intervened, so as to make such a course inequitable.

6. MUNICIPAL CORPORATIONS ⇐406(1) — STREET IMPROVEMENTS — AUTHORITY TO MAKE ASSESSMENT.

Municipality has no power to make assessment for street improvements without statutory authority.

7. MUNICIPAL CORPORATIONS ⇐374(1) — STREET IMPROVEMENTS—ACTS OF OFFICERS—PAYMENT OF CONTRACT PRICE—CITY'S LIABILITY.

In awarding contracts and performing other duties imposed by the statute authorizing assessment for street improvements, the municipal officers do not act in behalf of the municipality in such a way as to create any liability against it under the contract, but contract price is to be paid for from proceeds of special assessments.

8. MUNICIPAL CORPORATIONS ⇐327—STREET IMPROVEMENTS—CONTRACTS—STATUTES.

Street improvement contractor is bound by the provisions of the statute which authorizes the contract, governs its execution, and provides for its acceptance.

9. MUNICIPAL CORPORATIONS ⇐365—STREET IMPROVEMENTS — COMPLIANCE WITH CONTRACT—ACCEPTANCE.

Board of public work's decision as to whether street improvements have been made in substantial accordance with the contract is quasi judicial in its nature, and when made is conclusive, in absence of fraud, on all persons affected thereby, being immune from collateral attack, and subject to be set aside by the court only in a direct proceeding for that purpose based on fraud.

10. MUNICIPAL CORPORATIONS ⇐365—STREET IMPROVEMENTS — COMPLIANCE WITH CONTRACT—WAIVER OF DEFECTS.

Whether street improvement substantially complies with contract is to be determined by board of public works from the real character and condition of the improvement tendered for acceptance, unaffected by any considerations of waiver arising from conduct of the engineers or inspectors who superintended the work; such engineers having no authority to waive defects or radical departures from the contract.

11. MUNICIPAL CORPORATIONS ⇐365—STREET IMPROVEMENTS — ASSIGNMENT OF ASSESSMENT—RIGHTS OF ASSIGNEE.

Where contractor assigned assessments before board of public works had taken any ac-

tion toward accepting or rejecting the work, the board, in rescinding order of acceptance thereafter made, did not prejudice assignee's rights; assignee being in no more advantageous position than contractor would have occupied.

12. MUNICIPAL CORPORATIONS—§386—STREET IMPROVEMENTS—NONCOMPLIANCE WITH CONTRACT—DUTY TO COMPLETE WORK.

Contractor's assignee cannot complain of refusal of board of public works, upon rejection of work for noncompliance with the contract, to take steps, by contract or otherwise, to complete the work and make it conform to the contract; the city being under no duty to contract or cause work to be completed.

Myers, J., dissenting.

Appeal from Superior Court, Marion County; Lann D. Hay, Judge.

Mandamus by the State, on the relation of the German Investment & Securities Company, against the City of Indianapolis and others. Judgment for defendants, and relator appeals. Affirmed.

Florea & Seldensticker and Harvey & Austin, all of Indianapolis, for appellants.

Samuel Ashby, Thos. D. Stevenson, and Harry B. Yockey, all of Indianapolis, for appellees.

LAIRY, C. J. This is an appeal from a judgment in an action of mandamus, brought by appellant against the city of Indianapolis, and Joseph A. Rink, George B. Gaston, and Ernest L. Zeigler, as members of the board of public works of said city. The purpose of the action was to compel appellees by mandate to take such steps as would lead to the adoption of a final assessment roll fixing a lien on property abutting on Thirty-Sixth street in said city, between the east line of Pennsylvania street and the west line of Central avenue, to pay the cost of construction of an improvement of that portion of the street made under a contract between the city and the Bitu-Mass Paving Company. The interest of relator in the assessments to be made was acquired by an agreement by which the Bitu-Mass Paving Company, as a contractor, assigned to it the assessment roll and all assessments to be made therein arising from the construction of the improvement mentioned, to be held by the relator as collateral security for the repayment of a certain sum of money loaned by relator to the contractor and used by it in paying for labor employed and material used in the construction of said improvement.

The case was tried by the court without the intervention of a jury. On proper request the court made a special finding of facts and pronounced its conclusions of law thereon in favor of appellees. Judgment was rendered on the finding in conformity with the conclusions of law. The only error as-

signed on appeal is that the trial court erred in its conclusions of law on the facts found.

The special finding shows that on the 11th day of July, 1910, the city of Indianapolis entered into a contract with the Bitu-Mass Paving Company, by the terms of which that company was to improve that part of Thirty-Sixth street between the east line of Pennsylvania street and the west line of Central avenue, except the crossing of Washington boulevard, the improvement to consist of a bitu-mass roadway, with curbs and other incidental work, according to certain plans adopted by the city. The proceedings under which the contract was let were instituted and conducted under the provisions of the statute of the state with reference to the improvement of streets by special assessments on real estate benefited by such improvements, and was originated by the board of public works of said city on the 20th day of May, 1910, by the adoption of a declaratory resolution providing for said improvement.

It further appears from the finding that the contractor executed and filed a bond as provided by statute, with the Fidelity & Deposit Company as surety thereon, which bond was in the penal sum of \$4,120, conditioned for the full and faithful performance of said contract by the contractor. This bond was accepted and approved by the proper officers of the city. The finding sets out at length the conditions of the bond, as well as certain provisions of the contract, the performance of which the bond was given to secure. It thus appears that the work to be done was to be completed according to the terms of the contract on or before the 10th day of September, 1910, and that the contractor was to pay all moneys due to subcontractors, or to persons furnishing material or labor for the prosecution of the work to be done under the contract.

The court further found that the contractor entered on the execution of the work under the direction and supervision of the engineering department of the city, and that such work was so prosecuted until the contractor claimed that it was completed in accordance with the contract. As the work progressed the kind and character of the material used was inspected by the engineering department of the city, and on the 4th day of November, 1910, the civil engineer of said city reported to the board of public works that the work was completed according to the terms of the contract and recommended that it be accepted by said board. On the same day the board of public works entered an order approving the report of the civil engineer, accepting the work, and directing the chief clerk of the assessment bureau to prepare the primary assessment roll for said improvement in accordance with the law. Thereafter the primary assessment

roll was so made and approved by the board of public works, and the assessments so made aggregated the full amount of the contract price. The board fixed the 16th day of November, 1910, as the date on which the owners of property affected by the assessments for such improvement might be heard as to any objections to or remonstrance against such assessment, and the notice provided by statute was published. The hearing was not finished on the day fixed, but was continued from time to time; and on the 18th day of December, 1911, the board of public works entered an order rescinding all action previously taken and setting aside the acceptance of the work and the approval of the primary assessment roll, after which time it refused to further consider the making of a final assessment to pay the cost and expenses of such improvement.

Some parts of the roadway, as shown by the finding, were constructed of material not properly mixed or prepared, which parts crumbled away, and as a result holes of considerable size and depth were worn in the street, while other parts of the street remained in good condition; but the court finds that, as a whole, the improvement was no benefit to the abutting property. As the finding shows, the portion of the street covered by the work was opened to public use and travel on the 4th day of November, 1910, and was used by the public continuously, and was being so used at the time of the trial. During the time it was being so used the city on different occasions repaired worn places in the roadway by filling them with cinders and with asphaltum.

The court finds that, before the commencement of the action, relator repeatedly demanded of the city that it take such steps as were necessary to cause said roadway to be made to comply with the contract, and that it do such things as would result in the making and confirmation of a final assessment roll to pay the cost of the improvement, but that the city, about 30 days before the commencement of the action, finally refused to take any such steps.

Relator, as shown by the finding, took an assignment from the contractor of all its beneficial interest in and to all assessments to be made by the city on account of work done under the contract and of the proceeds in cash or bonds to be collected and received by virtue of such assessments. This assignment was made, on the 8th day of October, 1910, for the purpose of securing to relator the repayment of money to be loaned to the contractor to be used for paying the costs for the labor and material which entered into the construction of the work. On the 12th day of October, 1910, relator loaned said contractor in consideration of such security the sum of \$6,000, and on the 3d day of November, 1910, relator loaned the contractor on the strength of the same security

the further sum of \$500, all of which was to bear interest at the rate of 8 per cent. The sums so loaned to the contractor were expended in paying for labor and material used in the construction of the work. Shortly after November 4, 1910, the contracting company became insolvent, and so remained at the time of the trial, and relator has no security for the repayment of the money so loaned, other than the rights and interests acquired by said assignment, and has no other means of collecting the amounts so due it from the contractor, although no part of the money so owing has ever been paid. The court also finds that, before taking the assignment and making the loan, the relator made inquiry of the engineering department of the city as to the completion of the work, and was informed by that department that the work had been completed according to the contract, and that the acceptance of the work would be recommended by the department to the board of public works.

[1] It is well settled that a writ of mandate will be issued only in cases where the facts show a clear legal right on the part of relator to the relief sought, and a clear legal duty resting on the defendants to do and perform the thing demanded. *State ex rel. v. Graham* (1915) 183 Ind. 53, 108 N. E. 111; *County Council v. State ex rel.* (1911) 175 Ind. 610, 95 N. E. 253.

[2] The assignment by the contractor of the assessments to be made on the completion of the street improvement, and its acceptance by the city, conferred on the assignee an equitable interest therein, which was subject to any defenses which might exist against his assignor. *Lynip v. Alturas School Dist.* (1914) 24 Cal. App. 426, 141 Pac. 835; *Chambers v. Lancaster* (1899) 160 N. Y. 342, 54 N. E. 707; *Summers v. Hutson* (1874) 48 Ind. 228. The interest so acquired is not different in kind or superior in character to the rights which the assignor would have possessed in case no such assignment had been made. Nothing can be claimed under the assignment until conditions have arisen which would have enabled the contractor to assert a claim successfully in the absence of such assignment. *Aetna Trust, etc., Co. v. Nackenhorst* (1919) 122 N. E. 421.

[3] Under the statute the contractor has no right to have the work finally accepted until it is completed in accordance with the terms of the contract, and no duty rests on the board of public works of a city to accept such a work until it is so completed. Section 8711, Burns 1914. Until the work is completed and accepted, there is nothing upon which an assessment against the property affected by the work can be based, as the statute authorizes the making of such assessments only after the work has been finally accepted.

[4, 5] It thus appears that relator had no right to require the board of public works of

the city to make the final assessments to pay for the work, unless such work had been finally accepted. The special finding does not show that the work was finally accepted. While it appears from the finding that the board of public works made an order approving the report of the city engineers and accepting the work on the 4th day of November, 1910, and at that time opened the street to the use of the public, the finding also shows that the work was not properly constructed, and that, as a whole, it was of no benefit to the property affected. Upon discovering this fact, the board of public works had a right to rescind its order accepting the improvement, which it did on the 18th day of December, 1911. Under such a state of facts the board of public works had no authority under the law to make an assessment of benefits against the property affected.

Relator attempts to invoke the equitable doctrine of waiver, relying on the eighth finding as showing a state of facts constituting a waiver by the city of its right to reject the work after it was finished on account of material that had been inspected by the engineering department or of work that had been done to the approval of that department. The facts thus relied on are that the operations and work of the contractor, and the kind and character of the materials used in constructing the improvement, were supervised and inspected, as the work progressed, by the engineering department of the city. The theory of the relator is that, by permitting defective material, or material that was not properly prepared and mixed, to be put into the work after inspecting the same and supervising the work by its engineering department, the city thereby misled the contractor into the belief that the material and work were substantially in accordance with the contract and were acceptable to the city. It is asserted that it would be inequitable, and that it would work a great hardship on the contractor, if the city, after the material had become a permanent part of the improvement, were to be permitted to assert that the material used or the work done did not conform to the contract, thus putting the contractor to the expense of removing the part of the work condemned and of reconstructing it with new material. There is a line of cases which hold that, where it is the intention of the contracting parties, as evidenced by the contract, that the owner shall have a representative on the ground whose duty shall be to inspect material and oversee the work as it progresses, and to reject unsatisfactory material or inefficient work at once, the owner will be held to have waived, in the absence of fraud or collusion, any such defects as his representative, acting under such arrangement, observed or could have discovered by reasonable inspection. Board of

Commissioners v. O'Connor (1893) 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Schliess v. Grand Rapids (1902) 131 Mich. 52, 90 N. W. 700; Wildey v. Fractional School Dist. (1872) 25 Mich. 419; City Street Improv. Co. v. Marysville (1909) 155 Cal. 419, 101 Pac. 308, 23 L. R. A. (N. S.) 317; Laycock v. Moon (1897) 97 Wis. 59, 72 N. W. 372; Ashland Lime, etc., Co. v. Shores (1899) 105 Wis. 122, 81 N. W. 136.

[6] The cases cited show that the rule has been held to apply to work done under contracts awarded by individuals and by private corporations, and also to contracts awarded by municipal corporations in their corporate capacity for the construction of any work to be done at the general expense of the municipality; but the attention of the court has not been called to any case in which the rule has been applied to a local improvement to be paid for by assessments on property specially benefited. Such improvements are made and the assessments are imposed under special statutory authority, without which the municipality has no power to make assessments for such a purpose. *City of Bluffton v. Miller* (1904) 33 Ind. App. 521, 70 N. E. 989; *City of Ft. Wayne v. Shoaff* (1885) 106 Ind. 66, 5 N. E. 403.

[7, 8] In awarding contracts and performing other duties imposed by the statute authorizing such proceedings, the municipal officers do not act in behalf of the municipality in such a way as to create any liability against it under the contract. The contract price of such an improvement can be paid only from the proceeds of special assessments made under the authority of the statute, and the contractor is bound by the provisions of the statute, which authorizes the contract, governs its execution, and provides for its acceptance. Under the statute, the city engineer had no power to accept the work done under the contract. That power was lodged in the board of public works; and it is the duty of that board to determine, before accepting the work, that it is completed in substantial accordance with the contract.

[9] The decision as to whether the work is in substantial accordance with the contract is quasi judicial in its nature, and, when made, is conclusive, in the absence of fraud, on all persons affected thereby. *Dawson v. Hipskind* (1909) 173 Ind. 216, 89 N. E. 863; *Town v. Gorman* (1912) 179 Ind. 1, 100 N. E. 296. Such a decision is immune from collateral attack; but it may be set aside by the court in a direct proceeding for that purpose based on fraud. *Alsmeler v. Adams* (1916) 62 Ind. App. 219, 105 N. E. 1033, 100 N. E. 58.

[10] The board of public works is required to decide whether the work does or does not comply substantially with the terms of the contract. This must be determined from a consideration of the facts, showing the real

character and condition of the improvement tendered for acceptance, unaffected by any considerations of waiver arising from the conduct of the engineers or inspectors who superintended the work. Such engineers have no authority to waive any substantial defects in material or workmanship, or to recognize any radical departure from the requirements of the contract.

[11] It appears from the finding in this case that the defects were of such a substantial nature as to render the work absolutely worthless and of no benefit to the property affected. If that fact had come to the knowledge of the board at the time the work was tendered for acceptance, it would have been its duty to reject it; and the fact that an order of acceptance was entered on the 4th day of November, 1910, under a misapprehension as to the condition of the work, did not deprive the board of further power to act. If the true condition of the work was brought to its knowledge while engaged in hearing objections to assessments, it still had the power to set aside its former order of acceptance and to refuse to make any final assessments until the work was made to conform substantially to the contract, and it was the duty of the board to exercise that power, unless the rights of innocent parties had intervened, so as to make such a course inequitable. The setting aside of an order of acceptance improvidently made works no injustice to the contractor in this case, and it does not appear that the delay in taking such action caused any loss to the relator or in any other way prejudiced its rights.

The relator accepted the assignment and parted with its money before the board of public works had taken any action as to accepting or rejecting the work done under the contract. Therefore no claim can be made that the relator relied on the order of acceptance at the time of taking the assignment and making the loan, and that it was induced thereby to accept the security and make the loan when otherwise it would not have done so. Relator does not show that he was led by reliance on the order of acceptance to do anything which placed him in a more unfavorable position than he would have occupied in case the order had not been made. No question of estoppel is presented by the findings, and the relator stands in no more advantageous position than the contractor would have occupied, in case no assignment had been made.

[12] The relator is in no position to complain of the refusal of the board to take steps, by contract or otherwise, to complete the work and make it conform to the contract. The city was under no duty to the contractor to cause the work to be completed. *City of Auburn v. State ex rel.* (1908) 170 Ind. 511, 83 N. E. 997, 84 N. E. 990.

The trial court did not err in its conclu-

sions of law, and the judgment is therefore affirmed.

HARVEY, J., not participating.
MYERS, J., dissents.

(188 Ind. 314)

FAUVRE COAL CO. v. KUSHNER.
(No. 23299.)

(Supreme Court of Indiana. May 27, 1919.)

1. MASTER AND SERVANT \S 258(18)—INJURIES TO SERVANT — EMPLOYERS' LIABILITY ACT.

Employers' Liability Act of 1911, \S 2, makes no distinction between general and special orders to servants, and it is not necessary in an action by a servant for injuries to allege whether an order was general or special.

2. PLEADING \S 17—DEFINITENESS.

An allegation that plaintiff was, by the instruction of the defendant, sitting on a car of dirt while driving down a mine entry, was a direct averment of the fact that defendant had instructed the plaintiff to sit on said car of dirt while driving down the entry.

3. PLEADING \S 367(2) — MOTION TO MAKE MORE SPECIFIC.

Where a motion to make a complaint more specific might properly be sustained, it is not reversible error to overrule it, if the pleading is sufficiently specific to make apparent the precise nature of the charge the defendant is called upon to meet and defend.

4. PLEADING \S 407 — CONCLUSIONS — WAIVER OF OBJECTION.

If no motion is made to require a party filing a pleading to state the facts necessary to sustain conclusions alleged, all objections on account of the pleading of conclusions are waived, under Acts 1913, c. 322 (Burns' Ann. St. 1914, \S 343a).

5. PLEADING \S 34(3) — CONSTRUCTION — INFERENCES—DEMURRER.

In construing a complaint where a demurrer is interposed, it will be deemed sufficient whenever the necessary allegations can be fairly gathered from all the averments, even though stated illogically, and, by way of argument, all facts will be deemed stated that can be implied from the allegations made by fair and reasonable intendment, and facts so impliedly averred will be given the same force as if directly stated.

6. PLEADING \S 17 — POSITIVENESS — PARTICIPIAL PHRASES.

The rule that every material fact must be positively and directly alleged has been relaxed, and a fact alleged by participial phrases will be given the same force and effect as though directly stated.

7. MASTER AND SERVANT \S 258(1)—ACTION FOR INJURIES—COMPLAINT.

A servant's complaint for injuries is not insufficient on demurrer merely on the ground

that certain material facts are not directly averred, and that their existence is left to inference.

8. NEGLIGENCE ¶136(9) — QUESTIONS FOR JURY.

If reasonable men might honestly differ as to whether negligence exists, the question is for the jury.

9. MASTER AND SERVANT ¶258(2)—ACTION FOR INJURIES—COMPLAINT.

A servant's complaint for injuries need not specifically allege that a duty was owing from the master, since the existence of a duty depends upon the facts alleged and the law will imply its existence where the facts pleaded warrant such inference.

10. MASTER AND SERVANT ¶258(1) — ACTION FOR INJURIES—COMPLAINT.

A servant's complaint showing that defendant owed plaintiff a duty and containing a general charge of the negligent failure to discharge such duty, which resulted in the injury complained of, is sufficient to withstand a demurrer.

11. APPEAL AND ERROR ¶511(3)—BILL OF EXCEPTIONS—FILING.

Where the record does not show that Burns' Ann. St. 1914, § 681, relating to extension of time for filing a bill of exceptions, has been complied with, an order extending the time for filing the bill of exceptions is void, and a bill of exceptions filed during such extension of time is not in the record.

12. APPEAL AND ERROR ¶701(1)—MATTERS REVIEWABLE—INSTRUCTIONS.

A claim that the court erred in giving certain instructions because they were not applicable to the evidence and because they assumed certain facts to be true when there was a conflict in the evidence cannot be considered on appeal, where the evidence is not in the record.

Appeal from Circuit Court, Vigo County; Samuel D. Royse, Special Judge.

Action by John Kushner, by his next friend, against the Fauvre Coal Company. Judgment for plaintiff, and defendant appeals. Transferred from the Appellate Court under Acts 1901, c. 259. Affirmed.

Royse, Dix & Cooper, of Terre Haute, for appellant.

Charles S. Batt and Walter S. Danner, both of Terre Haute, for appellee.

WILLOUGHBY, J. This was an action by appellee against appellant to recover damages for personal injuries alleged to have been received by appellee while he was working in appellant's coal mine. The complaint counts on a liability under the Employers' Liability Act of March 2, 1911, and is in one paragraph.

The appellant filed a motion to require the plaintiff to make his complaint more specific

and more definite and certain, and also filed a demurrer alleging that said complaint did not state facts sufficient to constitute a cause of action against defendant. Both of these were overruled, and the appellant then filed an answer in general denial to the complaint, and the cause was submitted to a jury, resulting in a verdict for appellee in the sum of \$3,000, on which judgment was rendered, and from such judgment appellant appeals. The errors relied on for reversal are:

(1) The court erred in overruling the motion of appellant to require the appellee to make the amended second paragraph of complaint (his complaint herein) more specific and more definite and certain.

(2) The court erred in overruling appellant's demurrer to amended second paragraph of complaint.

(3) The court erred in overruling appellant's motion for a new trial.

The complaint alleges:

That the plaintiff is an infant under the age of 21 years; that the defendant is now, and was on and for a long time prior to December 2, 1912, a corporation duly organized and existing under and by virtue of the laws of the state of Indiana, and is engaged in business, trade, and commerce in Vigo county, state of Indiana, and did on and before the 2d day of December, 1912, and does now, employ more than five men; that the defendant is engaged in mining and selling coal, and has a mine located in Vigo county, Ind., known as Ice Plant mine No. 2; that plaintiff, on the 2d day of December, 1912, was a driver for the defendant in its said mine, and as such driver he was employed by defendant to drive in, along, and through various entries of its said mine, among which was an entry in defendant's mine known as the main east entry; that the defendant now has, and for a long time prior to the 2d day of December, 1912, had, a shaft sunk from the surface of the earth to the bed of the coal beneath, a distance of some 200 feet, and at the bottom of said shaft had entries leading out from the shaft, and cross-entries leading from the main entries, and rooms turned off from the main and cross entries; that leading off from the bottom of said shaft was one entry known as the main east entry; and that on said main east entry the defendant for a long time prior to said 2d day of December, 1912, had tracks laid on said main east entry, composed of iron rails placed on wooden ties, and over said tracks cars were drawn by means of mules up to the switch, known as the double parting in said main east entry, from which double parting the cars were hauled on said main east entry to the bottom of the shaft, to be hoisted through the shaft to the surface of the earth. Plaintiff further avers that he had, prior to the 2d day of December, 1912, been employed as a coal digger, and was employed in room 7, turned off — entry, turned off — entry; that the defendant had in its employ William Brown, who was the mine boss in charge of the defendant's said mine, said Brown having full charge of

said mine and full authority to hire and discharge all the employés in said mine, including this plaintiff, and he had charge of the work, machinery, and the placing and disposing of, hiring and discharging employés therein; that on said 2d day of December, 1912, the said William Brown, mine boss of defendant as aforesaid, instructed this plaintiff to drive a mule in the hauling of coal, dirt, rock, and slate from the various parts of the mine to the bottom of said shaft, and that among the entries he had to travel in the work assigned to him by the said mine boss was the said main east entry, and that he did travel through the said main east entry in the performance of his work, and doing the duties assigned to him by the said mine boss, Brown, as aforesaid; that on said 2d day of December, 1912, plaintiff was under the direction of the defendant, through its said mine boss, Brown, as aforesaid, hauling a car load of dirt through the said main east entry; that attached to said car was a mule, which this plaintiff was driving for the purpose of hauling said car of dirt as he was instructed to do by the said defendant; that the top of said car he was driving as aforesaid extended up to within about one foot of the roof of said main east entry. And plaintiff avers that in driving down said main east entry he was in accordance with the custom, rules, and usage obtaining and existing in defendant's mine, and with the knowledge and consent of defendant, and by the instructions of defendant, sitting on said car of dirt, and that it was necessary for him to bend his body forward so as to prevent it from being struck by coming in contact with the roof, which roof was about one foot above the car as aforesaid. Plaintiff further avers that as he was driving down said main east entry as aforesaid, and under said roof, at a point about ——— feet from the bottom of the shaft, a large boulder was carelessly and negligently suffered and permitted, and for a long time had been suffered and permitted, to project out and down from the roof for a distance of some six inches, and it thus and thereby came in contact with and jammed against plaintiff's shoulders, injuring him as hereinafter described; that said boulder had for a long time prior to the 2d day of December, 1912, carelessly and negligently been suffered and permitted to project out and down from the roof and had by the defendant been carelessly and negligently permitted to thus be and to thus remain in said roof, although it was likely to injure this plaintiff or any one else driving through the mine, while riding upon a mine car, in the usual course of their work; that the said main east entry was used by the employés of defendant in driving through said entry during various times every working day in the discharge of the defendant's business. And plaintiff avers that said stone carelessly and negligently projecting out and down from the said roof of the said main east entry as aforesaid did strike this plaintiff's left shoulder and the top of his back, and the said car in which the plaintiff was riding was moving forward rapidly at said time, and the said projecting stone did wedge this plaintiff down against and onto the said car in which he was riding; and did so firmly wedge this plaintiff between the said projecting stone and the said car that it stopped the said car, and the mule attached to

said car continued to pull forward, but was unable to move said car on account of the plaintiff being wedged in between the top of said car and the said projecting stone from the roof as aforesaid; that the mule, in pulling forward, did further mash this plaintiff so that he was thrown off to the side of the car in an unconscious condition, and remained unconscious for more than one hour, and further injuring this plaintiff by causing a curvature of the dorsal vertebrae of the spine of this plaintiff and of the sixth, seventh, eighth, ninth, tenth, and eleventh dorsal vertebrae, and did jam and injure the entire back and spine and the back of both shoulders of the plaintiff, and did bruise the top and the back of his head, and did puncture and injure both his lungs, and bruise and injure his bowels, kidneys, stomach, and did crush and crowd his stomach, bowels, and lungs downward in his body, which produced paralysis of the spinal nerves and displacement of the stomach, bowels, kidneys, and liver, and did crowd and push his bowels down into his pelvic cavity, all to the permanent injury of the plaintiff, and said injuries as aforesaid did affect all the nerves in the body of this plaintiff, which has left him a nervous wreck, and has resulted in injury to his mental condition, causing him lapse of memory and partial loss of mind. Plaintiff avers that before said injuries he was a strong, able-bodied man of 20 years, capable of earning and did earn \$5 per day as a coal miner, and that since his injury plaintiff has not been able to do any work, and is permanently injured. Plaintiff avers that said injury was caused solely by the carelessness and negligence of the defendant as aforesaid in carelessly and negligently having and permitting a boulder or stone to project out of the said roof in the said main east entry a distance of six inches, in such a manner as to cause it to come in contact with the bodies of drivers in the usual course of their work as aforesaid, and plaintiff has been injured by said carelessness and negligence of the defendant, in the sum of \$10,000, for which he demands judgment.

The appellant, in arguing its motion to make the complaint more definite and certain, says:

"The theory of the complaint is that plaintiff was a strong, able-bodied man of 20 years, and that his work was that of a mule driver; that the defendant permitted a stone or boulder to project six inches down from a roof in an entry through which plaintiff's work required him to go; that the top of the car furnished to plaintiff came within one foot of the roof; that plaintiff sat on top of the car because he was ordered to do so by the defendant."

On these facts the appellant asserts that the complaint would be demurrable as showing contributory negligence on the part of plaintiff, except as it might be saved by the averment "in accordance with the custom, rules, and usage obtaining and existing in defendant's mine, and with the knowledge and consent of defendant, and by the instructions of defendant"—in other words, the averment of obedience to an order.

It will be observed that the appellant says

that the complaint alleges that plaintiff sat on top of the car. An examination of the complaint shows that it does not contain such allegation. It does not say whether the plaintiff was riding on top of the car or on the side of the car or on the bumpers, but simply says he was sitting on said car of dirt. The allegation in that respect is as follows:

"And plaintiff further avers that in driving down said main east entry he was in accordance with the custom, rules, and usage obtaining and existing in defendant's mine, and with the knowledge and consent of defendant, and by the instruction of defendant, sitting on said car of dirt."

In another place in the complaint it says:

"And plaintiff further avers that said stone carelessly and negligently projecting out and down from the said roof of the said main east entry as aforesaid did strike this plaintiff's shoulder and the top of his back, and the said car in which the plaintiff was riding was moving forward rapidly at said time."

The appellant has not included in his motion to make more definite and certain any request that the plaintiff be required to state upon what part of the car he was riding, but simply assumes that he was riding on top of the car. The appellant further says in argument on motion:

"The complaint is sought to be bottomed on the averment that plaintiff sat on top of the car because of and in obedience and conformity to the order of defendant; that such order was a breach of defendant's duty to plaintiff and eliminated the defense of defendant that on the face of the pleading plaintiff was guilty of contributory negligence of such nature as that it contributed to the proximate cause of the damage, and that the appellant had a right to have the alleged instruction set out in substance or tenor so as to show whether it was a general instruction or a specific order."

And appellant contends that the order for the giving of which the master can be held liable must be a special order as contradistinguished from a general order.

[1] It was not necessary to show by any allegation in the complaint or in any manner whether the order alleged was general or special, and the defendant's contention in this regard cannot be sustained because it has been held that section 2 of the Employers' Liability Act of 1911 (Acts 1911, p. 145; section 8020b, Burns 1914) makes no distinction between general and special orders. *Vivian Collieries Co. v. Cahall*, 184 Ind. 473, 110 N. E. 672.

[2] The allegation in the complaint that the plaintiff was, by the instructions of the defendant, sitting on said car of dirt while driving down said main east entry, was a direct averment of the fact that defendant had instructed the plaintiff to sit on said

car of dirt while driving down said entry. *Cumberland Tel., etc., Co. v. Hatter*, 44 Ind. App. 625, 89 N. E. 912; *Pittsburgh, etc., R. Co. v. Bir*, 56 Ind. App. 598, 105 N. E. 921.

In the case of *Pittsburgh, etc., R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 845, an allegation of the complaint which sought to establish a duty toward the plaintiff at the place where he was working was that "in obedience to such order [of Early's] he went between said cars, and proceeded to adjust the couplers, using due care." Speaking generally of the merits of a motion to make the complaint more specific, the court said:

"That each paragraph of amended complaint fully meets the requirements of good pleading, and the several motions to make the same more specific were properly overruled."

[3] In the case of *Ohio, etc., R. Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. 297, it was held that a complaint alleging "that the defendant on the 31st day of May, 1889, without any fault or negligence on plaintiff's part, carelessly, negligently, and wrongfully ran its train over and upon the defendant's brown horse mule," was sufficiently specific. Where a motion to make more specific might properly have been sustained, it is not reversible error to overrule it if the pleading is sufficiently specific to make apparent the precise nature of the charge the defendant is called upon to meet and defend, he is not harmed by overruling such motion. *Kinmore v. Cresse*, 53 Ind. App. 693, 102 N. E. 403.

It was not error to overrule appellant's motion to make the complaint more specific.

[4] The defendant in the memorandum attached to its demurrer for want of facts asserts that the allegations in the complaint are mere conclusions and recitals of the pleader, and that the complaint on its face affirmatively shows contributory negligence. This contention cannot be sustained. As to recitals and conclusions the act of April 30, 1913 (Acts 1913, p. 850; section 343a, Burns 1914), provides that all conclusions stated in any pleading, paper, or writing shall be considered and held to be the allegation of all the facts required to sustain said conclusion when the same is necessary to the sufficiency of said pleading, paper, or writing, and further provides that, as against such conclusions, only the following remedy is given: That a motion may be made to require the party filing such pleading, paper, or writing to state the facts necessary to sustain the conclusion alleged, setting out therein the facts claimed to be necessary thereto. If no such motion is made and ruled upon, all objections on account thereof are waived. It also provides that all recitals in such pleading, paper, or writing shall be considered and held to be allegations of fact whenever necessary to the sufficiency thereof.

In this case the defendant did not make

any motion claiming that the allegations of the complaint were conclusions and to require the plaintiff to state the facts necessary to sustain the conclusions alleged, setting out therein the facts claimed to be necessary thereto. The complaint charges appellant with failure to furnish appellee with a safe place in which to work, and it describes the place and states why it was unsafe, and states the injury resulting from such breach of duty. It also shows by averment that the appellee was in the line of duty when injured, and that he was working under the instructions of the defendant.

[5] In construing a complaint where a demurrer is interposed, it will be deemed sufficient, whenever the necessary allegations can be fairly gathered from all the averments, even though stated illogically, and, by way of argument, all facts will be deemed stated that can be implied from the allegations made by fair and reasonable intendment, and facts so impliedly averred will be given the same force as if directly stated. *Domestic Block Coal Co. v. De Armev*, 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; *Agar v. State*, 176 Ind. 234, 94 N. E. 819; *Valparaiso Lighting Co. v. Tyler*, 177 Ind. 278, 96 N. E. 768; *Richmond Light, etc., Co. v. Rau*, 184 Ind. 117, 110 N. E. 666.

[6] The rule that every material fact must be positively and directly alleged has been relaxed, and a fact pleaded by means of participial phrases will be given the same force and effect as though directly stated. *Darter v. Grubb*, 56 Ind. App. 206, 102 N. E. 843.

[7] A complaint in a servant's action for personal injuries is not insufficient on demurrer merely upon the ground that certain material facts are not directly averred, and that their existence is left to inference. *Vivian Collieries Co. v. Cahall*, 184 Ind. 473, 110 N. E. 672.

[8] When the court can perceive that reasonable men might honestly differ in their conclusions, and the facts set out in the complaint are of a character to be reasonably subject to more than one inference or conclusion as to whether negligence or contributory negligence exists, the question is one for the jury, and cannot be determined as one of law. *Indiana Union Traction Co. v. Love*, 180 Ind. 448, 99 N. E. 1005.

[9] The complaint in this case shows a legal duty owing by the appellant to the appellee (to use reasonable care) to make the working place of appellee safe for the kind of work which he was doing, a breach of that duty by the appellant, and injury to the appellee as a result of that breach of duty. The complaint need not specifically allege that a duty was owing from defendant to the plaintiff, since the existence of a duty depends upon the facts alleged and the law will imply its existence where the facts

pleaded warrant such inference. *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; *Rock Oil Co. v. Brumbaugh*, 59 Ind. App. 640, 108 N. E. 260; *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551.

[10] A complaint showing that defendant owed the plaintiff a duty and containing a general charge of the negligent failure to discharge that duty which resulted in the injury complained of is sufficient to withstand a demurrer. *Kinmore v. Cresse*, 53 Ind. App. 693, 102 N. E. 403.

The court did not err in overruling the demurrer to the complaint.

The appellant assigns as error that the trial court erred in overruling appellant's motion for a new trial. The questions which appellant seeks to present under this assignment depend upon the bill of exceptions containing the evidence. The appellee asserts that this bill of exceptions is not properly in the record and is not before this court.

The record shows that on April 10, 1915, the motion for a new trial was overruled, and 90 days given in which to file a bill of exceptions, and on June 14, 1915, the time within which to file a bill of exceptions was extended 90 days from said June 14, 1915, and that on August 21, 1915, the bill of exceptions was filed with the clerk of the Vigo circuit court, and that said bill of exceptions had been presented to the trial judge for settlement and signature August 20, 1915. The time granted in the original order for filing the bill of exceptions expired July 9, 1915.

The only proceedings had in this cause to secure an extension of time was had on the 14th day of June, 1915, the entire proceeding being, as shown by the record herein, as follows:

"Comes now the defendant herein by its counsel aforesaid and asks the court for an extension of time within which to file a bill of exceptions herein, which said request of defendant the court now grants.

"It is therefore ordered by the court that the time of said defendant within which to file said bill of exceptions be, and the same is hereby, extended 90 days from this 14th day of June, 1915."

Section 661, Burns' R. S. 1914, provides that, whenever time has been given in which to file a bill of exceptions containing the evidence, and the party to which such time was given is unable to tender such bill of exceptions within the time given on account of the failure or inability of the court reporter to prepare and furnish a transcript of the evidence, the court during any subsequent term of such court, or the judge thereof in vacation, may grant a reasonable extension of the time already granted within which to file such bill of exceptions, under the following provisions:

(1) The party asking for the extension of time shall file a written application under

oath that said party is unable to tender such bill of exceptions within the time given on account of the failure or inability of the court reporter to prepare and furnish a transcript of the evidence.

(2) The party asking such re-extension of time shall give the opposite party or his attorneys of record at least three days' notice of the time when and the place where said application would be heard.

(3) The application must be made and a time for the hearing thereof set for a day prior to the expiration of the time first given.

(4) No extension of time shall be granted in any case unless it is shown that such failure or inability of the court reporter was not caused by the negligence of the party asking such re-extension of time.

[11] The record does not show a compliance with the statute (section 661, Burns 1914), but shows that said statute was ignored. Under the facts as shown by the record the order extending the time for filing the bill of exceptions is void, and said bill of exceptions is not in the record. *English v. English*, 182 Ind. 675, 107 N. E. 547; *Richmond Light, etc., Co. v. Rau*, 184 Ind. 117, 110 N. E. 666.

[12] The appellant claims that the court erred in giving certain instructions because they were not applicable to the evidence and because they assumed certain facts to be true when there was a conflict in the evidence regarding such facts.

In the absence of the evidence it cannot be held that there was error in regard to the instructions given or in relation to the refusal to give those tendered. *Richmond Light, etc., Co. v. Rau*, supra.

No reversible error being shown in the record, the judgment is affirmed.

(72 Ind. App. 118)

PHILLIPS v. YOUNT et al. (No. 10054).*

(Appellate Court of Indiana, Division No. 1
June 5, 1919.)

1. APPEAL AND ERROR §907(2) — INSTRUCTIONS—ABSENCE OF EVIDENCE—PRESUMPTION AS EVIDENCE ADMITTED.

Where the evidence is not of record, if instructions given would be proper under any evidence which might have been admitted under the issues, the appellate court will presume that such evidence was in fact admitted, and will not reverse the judgment for instructions given unless inapplicable to any supposed case possible under the issues.

2. TRIAL §296(7)—ERRONEOUS INSTRUCTION—CURE OF ERROR.

In a servant's personal injury action, an instruction that "the burden is upon plaintiff to prove all the material allegations of his com-

plaint," which consists of two paragraphs, the essential allegations of which are the same, but states more than one negligent act, while not correctly stating the law of the case, did not require reversal, where the jury were required to consider all the instructions, and were limited to the negligence proximately causing the injuries complained of.

Appeal from Superior Court, Marion County; Vincent G. Clifford, Judge.

Action by Tennyson Phillips, by his next friend, against Horace J. Yount and others, as partners. Judgment for defendants, and plaintiff appeals. Affirmed.

Nathan C. Redding, of Indianapolis, for appellant.

Paul G. Davis and Fred B. Johnson, both of Indianapolis, for appellees.

REMY, J. [1, 2] Appellant, suing by his next friend, commenced this action against appellees, a partnership, for personal injuries alleged to have been sustained by appellant as a result of alleged negligence of appellees, in whose machine shop he was at the time employed. To the complaint the defendants filed a general denial. Trial by jury resulted in a verdict for appellees. The only error assigned is the action of the court in overruling the motion for a new trial; and the only questions presented for our consideration arise upon exceptions to certain of the court's instructions. The evidence is not in the record. Therefore, if the instructions given would be proper under any evidence which might have been admitted under the issues, this court will presume that such evidence was in fact admitted, and will not reverse the judgment on instructions given, unless they are so radically wrong that they could not be correct as applied to any supposed case which might have been made under the issues. *Rapp v. Kester*, 125 Ind. 82, 25 N. E. 141. This will preclude the consideration of all the instructions 'challenged excepting instruction No. 3 given by the court on its own motion. This instruction is as follows:

"Under the issues thus formed, the burden is upon the plaintiff to prove all the material allegations of his complaint by a fair preponderance of the evidence before he can recover."

It is urged that the giving of this instruction was reversible error: (1) Because there were two paragraphs of complaint, proof of either of which was sufficient; and (2) for the reason that it was not necessary to prove all allegations of either paragraph, but only such as were necessary to constitute a cause of action. We find upon examination that there is no material difference between the two paragraphs of complaint. Not only that, but, as shown by the record, the court con-

strued the two paragraphs as substantially the same, and instructed the jury that, "Although the complaint is in two paragraphs, the essential allegations are the same in both." However, the complaint did state more than one act of negligence, any one of which might have caused the alleged injury. It will be seen that the instruction in controversy is an instruction on the burden of proof, and not an instruction which purports to set forth averments of the complaint that must be proved to entitle the plaintiff to recover. The instruction, standing alone, did not correctly state the law applicable to the case. Nevertheless the court by other instructions told the jury that in order to recover, it was necessary for the plaintiff to prove some act of negligence set out in the complaint, and that such negligence was the proximate cause of the injuries of which complaint was made. The court also instructed the jury "all the law applicable to the case is not embodied in any one instruction," but that, "in construing any one instruction, the jury must construe it in the light of, and in harmony with, every other instruction given." There was no reversible error in giving instruction No. 3.

Judgment affirmed.

(71 Ind. App. 245)

HOME PACKING & ICE CO. v. CAHILL
(No. 10488.)*

(Appellate Court of Indiana, Division No. 2
May 29, 1919.)

**1. MASTER AND SERVANT ⇐382—WORKMEN'S
COMPENSATION—AGREEMENT FOR COMPENSA-
TION.**

The employer cannot complain of an agreement for compensation to an injured employé, filed with and approved by the Industrial Board, because it made no provision for payment during a period of partial disability which might ensue in the course of recovery.

**2. MASTER AND SERVANT ⇐419—WORKMEN'S
COMPENSATION—APPEAL.**

Where the injured employé and employer entered into an agreement for compensation approved by the Industrial Board, and employer's petition to set aside the agreement was denied by the board and resumption of payments ordered, an appeal from such decision cannot raise the question that the sole power to enforce an award rests in the circuit court.

**3. MASTER AND SERVANT ⇐382—WORKMEN'S
COMPENSATION ACT—AGREEMENT AS TO
COMPENSATION.**

An agreement for compensation entered into between an injured employé and employer and insurance carrier, knowing all the details, made pursuant to the Workmen's Compensation Act, is an admission of liability.

**4. MASTER AND SERVANT ⇐382—WORKMEN'S
COMPENSATION ACT—AGREEMENT AS TO COM-
PENSATION.**

An agreement for compensation, entered into between an injured employé and employer and insurance carrier, approved by the Industrial Board, as provided in the Workmen's Compensation Act, has the force and effect of an award.

**5. MASTER AND SERVANT ⇐419—WORKMEN'S
COMPENSATION ACT—AGREEMENT AS TO LIA-
BILITY.**

An agreement for compensation, entered into between an injured employé and the employer and insurance carrier, with knowledge of the details of accident, approved by the Industrial Board, as provided by the Workmen's Compensation Act, cannot be set aside at the instance of employer and insurance carrier, merely to enable the employer to assert the subsequently raised contention that the injury did not arise out of and in the course of employment.

Appeal from Industrial Board.

Petition by the Home Packing & Ice Company against William Cahill, to set aside an agreement as to compensation under the Workmen's Compensation Act, which agreement was filed with and approved by the Industrial Board. The petition having been denied by the Industrial Board, the employer appeals. Affirmed.

Batt & Danner, of Terre Haute, for appellant.

A. J. Kelley and F. S. Rawley, both of Terre Haute, for appellee.

DAUSMAN, J. On April 1, 1917, the appellee received an injury by accident while at appellant's industrial plant. Thereafter appellant's insurance carrier made an investigation of the matter and reported to appellant that appellee was in the employment of appellant at the time of the accident, that appellee's injury arose in the course of the employment, and that his average weekly wage at said time was \$35. On November 5, 1917, the parties hereto entered into an agreement as to compensation under section 57 of the Workmen's Compensation Act (Laws 1915, c. 106). This agreement was signed also by the insurance carrier, and was filed with and approved by the Industrial Board. Pursuant to the agreement, appellant paid the medical, hospital, and surgical expenses occasioned by the injury, and also compensation aggregating \$435.60. On August 2, 1918, appellant filed its verified petition to set aside the agreement on the ground (1) that it was entered into by reason of mutual mistakes of fact, and (2) that it does not fully comply with the statute.

The specific facts, concerning which it is averred the parties acted mistakenly, are the following: (1) That appellee was in the employ of appellant when he received the injury, but

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied.

in truth he was not; (2) that appellee's average weekly wage was \$35, but in truth was only \$21.10; and (3) that the injury, by accident, arose out of and in the course of the employment, but in truth did not. The particular defect, which appellant claims constitutes an incompleteness, is that it provides compensation for the period of total disability only, and fails to make any provision for compensation for any period of partial disability which may ensue.

After hearing the evidence, the board found that there was no mistake, refused to set aside the agreement, and ordered appellant to resume payments thereunder. We have considered the evidence carefully, and we find that it tends fairly to support the decision of the board with respect to the alleged mistakes.

[1] The alleged incompleteness of the agreement, if it be a defect at all, is of such a character that appellant cannot complain of it. With some semblance of reason appellee might complain of it on the ground that in the course of recovery his total disability may cease and a period of partial disability may follow, for which partial disability no compensation is provided. But the statute supplies a way by which any change in the condition of the workman may be presented to the board and the proper relief obtained.

[2] Appellant asserts that the board has no power to order a resumption of payments, and that the sole power to enforce an award rests in the circuit court. But the attempt to procure a decision on that point in this appeal is manifestly premature.

[3-5] The sufficiency of the petition to raise the question whether the injury arose out of and in the course of the employment has not been presented. But we deem it advisable to say that we doubt the propriety of permitting that question to be tried on a petition to set aside an agreement for compensation. Appellant earnestly insists that the injury did not arise out of the employment, but does not claim that there was any mistake as to any specific fact entering into this element. Apparently appellant and its insurance carrier were fully informed concerning every evidential fact, and from these facts they drew their own conclusion. Knowing all the details, they concluded that the injury arose out of and in the course of the employment. By making the agreement they admitted and confessed liability. See *Retmier v. Cruse*, 119 N. E. 32. They recognized the agreement by continuing to make payments thereunder, but finally it occurred to them that perhaps they erred in their conclusion as to their liability. Evidently their petition was then filed in the hope that by this procedure they could have the board determine whether the injury arose out of and in the course of the employment, and thus procure a review of the very thing

which they had determined for themselves. An agreement for compensation, made in compliance with the statute and approved by the board, has the force and effect of an award. In *re Stone*, 117 N. E. 669. It would seem that an award resting on an agreement ought not to be set aside for the mere purpose of permitting an employer to try out the merits of his confession of liability. It may be proper in a proceeding of this character to show that there was a mistake as to some specific fact which would result in modifying the award in some particular; but we are inclined to the opinion that the question of liability cannot be raised in this manner. It is doubtful, also, whether the statute contemplates an appeal from the action of the board with respect to petitions of this kind.

The action of the Industrial Board is affirmed.

(70 Ind. App. 237)

BRUCE et al. v. HUBBELL et al. (No. 9852.)

(Appellate Court of Indiana, Division No. 2
May 27, 1919.)

1. JURY \S 14(2)—AT LAW OR IN EQUITY.

While plaintiffs who rendered services for defendant in a suit by her for divorce would have had their equitable lien upon note given by husband in settlement of property rights, yet where they averred that note was assigned by delivery without indorsement as collateral security to secure sum due for legal services, the case was triable by a jury.

2. TRIAL \S 341 — MOTION FOR VENIRE DE NOVO—TIME FOR FILING.

Plaintiff's motion for a venire de novo was timely, though not filed until after judgment against one defendant, where plaintiffs were not seeking relief from such judgment, but from judgment in favor of the other defendants, motion being filed before judgment was rendered for the other defendants, which judgment was the final judgment in the cause.

3. TRIAL \S 349(4)—INTERROGATORIES WITHOUT GENERAL VERDICT—EFFECT.

In view of *Burns' Ann. St. 1914, § 572*, interrogatories were without force as to two of defendants, where there was no general verdict as to them, and judgment in their favor is a nullity.

4. TRIAL \S 341 — VENIRE DE NOVO AS TO WHOLE CASE.

Though there was a general verdict as to one defendant, so that judgment against her was not a nullity, the venire de novo must be as to the whole case, judgment as to the other defendants being a nullity, since there was no general verdict as to them, so that answers to interrogatories were of no force.

Appeal from Circuit Court, Starke County; W. C. Pentecost, Judge.

Action by Milo M. Bruce and another against Mary E. Hubbell and others. From judgment that plaintiffs take nothing on their complaint against the unnamed defendants, plaintiffs appeal. Reversed, with instructions.

Oscar B. Smith, of Knox, and Otto J. Bruce and W. Vincent Youkey, both of Crownpoint, for appellants.

C. W. Barker, of Winamac, and Wm. J. Reed, of Knox, for appellees.

NICHOLS, P. J. This action is to recover a balance due appellants as attorneys for professional services rendered by them for appellee Mary E. Hubbell, in a suit by her for divorce against appellee Lewis W. Hubbell, and to enforce the collection of a note executed by appellees Lewis W. Hubbell and Joseph L. Beesley to appellee Mary E. Hubbell, in the sum of \$500, which note, it is alleged, was assigned and delivered by said Mary E. Hubbell, without indorsement, to appellants as collateral security for the balance due them as aforesaid, and out of the proceeds of which said note appellants seek to enforce the collection of their demand against said Mary E. Hubbell.

The complaint was in two paragraphs, upon which issues were formed, and, after demand by appellants that the cause be tried by the court without the intervention of a jury, which demand was overruled, the cause was submitted to a jury for trial, which returned a general verdict in favor of appellants, against appellee Mary E. Hubbell, for \$225, with 16 interrogatories submitted by the court, and their answers thereto. There was no general verdict against the appellees Lewis W. Hubbell and Joseph L. Beesley. October 20, 1916, judgment was rendered in favor of appellants, and against appellee Mary E. Hubbell on the general verdict against her for \$225 and costs. October 27, 1916, appellants filed their motion for a venire de novo, which was overruled, and thereafter on said date the court rendered final judgment that appellants take nothing on their complaint against appellees Lewis W. Hubbell and Joseph L. Beesley, and that said appellees recover costs of appellants. From this judgment this appeal is prosecuted.

The errors assigned as grounds for a new trial, and which are considered in this opinion are: (1) Overruling appellants' demand for trial by court instead of jury; (2) overruling appellants' motion for venire de novo.

In the suit for divorce, the property rights were settled between the parties by payment of \$5,000 to appellee Mary E. Hubbell by appellee Lewis W. Hubbell, \$500 of which sum was paid in cash, and the remainder thereof by the execution of a series of nine promissory notes, each in the sum of \$500 and executed by appellees Lewis W. Hubbell and Joseph L. Beesley, the note involved herein

being one of such series. As to the balance due appellants for their services, the first paragraph is upon an account stated, alleging a balance due appellants of \$225, with 6 per cent. interest, and \$50 for appellants' attorneys, for the collection of said note. It is averred that said appellee Mary E. Hubbell, by and through her agent (who was her son), assigned said note to appellants by delivery, without a written indorsement upon the back thereof, said note being so delivered as collateral security for the purpose of securing the payment of the sum due appellants; that said sum for services is due and unpaid, and demand for payment thereof has been made, but appellee Mary E. Hubbell fails and refuses to pay the same; and that said note is due and unpaid, and appellants have been required to employ an attorney to prosecute this cause of action.

There is demand for judgment against appellees Lewis W. Hubbell and Joseph L. Beesley on said note, and for judgment against appellee Mary E. Hubbell, for amount due appellants as stated, and that such sum be declared a lien upon the amount recovered upon the said promissory note.

The second paragraph is predicated upon the quantum meruit, alleging a balance due of \$275, and that appellee Mary E. Hubbell delivered said note without indorsement to appellants to secure to the appellants the payment of their fee for services rendered, and that they have a lien thereon therefor.

[1] Appellants contend that this suit is to enforce an attorney's equitable lien, which appears by each paragraph of the complaint, and that therefore the action is in equity, and that it was error for the court to refuse their demand for a trial by the court without the intervention of a jury. We fully recognize the equitable right of an attorney to his lien upon the fruits of the judgment which by his labor and skill he has obtained for his client, and his right of payment out of any funds, choses in action, or other thing of value which he may hold as a result of his efforts under his employment. In this case, under a paragraph of complaint with proper averments, it is apparent that appellants could have had their equitable lien on the proceeds of the note involved, regardless of the question of any agreement with their client. A full discussion of attorneys' liens is found in 6 Corpus Juris, 765. But it is averred in the complaint in this case that the note involved was assigned by delivery, without indorsement, as collateral security, to secure the sum due appellants for their services. We do not need to cite authorities sustaining the proposition that one holding a note as collateral may sue on it in his own name, without even averring that he so holds it, and that such suit is triable by a jury. The case was properly submitted to the jury for trial.

[2] Appellees contend that the motion for

a venire de novo is not available to appellants for the reason that it was not filed until after the judgment against appellee Mary E. Hubbell. Appellants are not seeking relief from this judgment, but from the judgment rendered in favor of appellees Lewis W. Hubbell and Joseph L. Beesley, and their motion for a venire de novo was filed before the judgment was rendered in favor of the last-named appellees, which was the final judgment in this cause. A venire de novo may be granted at any time before final judgment. *Parker v. Hubble*, 75 Ind. 580.

[3, 4] It is provided by Acts 1897, p. 128 (section 572, Burns' R. S. 1914), that—

In "all actions hereafter tried by a jury, the jury shall render a general verdict, but in all cases when requested by either party, the court shall instruct them when they render a general verdict to find specially upon particular questions of fact to be stated to them in writing in the form of interrogatories," etc.

It had been decided by numerous authorities, before the statute above quoted, that answers to interrogatories without a general verdict are of no force. *Eudaly v. Eudaly*, 87 Ind. 440; *Taylor v. Burk*, 91 Ind. 252; *L. N. A. & C. Ry. Co. v. Worley*, 107 Ind. 320, 7 N. E. 215; *Todd v. Fenton*, 66 Ind. 25. Since there was no general verdict as to appellees Lewis W. Hubbell and Joseph L. Beesley, and therefore since the interrogatories were without force as to them, the judgment in their favor was a nullity. While there was a general verdict as to one of the appellees, the venire de novo must be as to the whole case. *Maxwell v. Wright*, 160 Ind. 515, 67 N. E. 267; *Wysong v. Neallis*, 13 Ind. App. 165, 41 N. E. 388. Other alleged errors are discussed, but we do not deem it necessary to consider them.

The judgment is reversed, with instructions to the trial court to sustain the motion for a venire de novo, and for further proceedings.

(77 Ind. App. 523)

STENGER v. METROPOLITAN LIFE INS. CO. (No. 9846.)*

(Appellate Court of Indiana, Division No. 2. June 6, 1919.)

1. APPEAL AND ERROR ⇐606 — INDEX TO RECORD—SUFFICIENCY.

Where appellant indexed all the record made in compliance with the præcipe, and relating to questions presented by assignments of error, there is a sufficient compliance with rule 8 of the Appellate Court, as to preparing an index of the record, though there is no index showing where papers and entries other than those named in præcipe, which were copied by the clerk, can be found.

2. PLEADING ⇐367(5) — MAKING ANSWER MORE SPECIFIC—MATTERS FOR REPLY.

In action on life policy, there was no error in overruling plaintiff's motion to make the third paragraph of the answer more specific by stating whether persons who took the application and medical statements knew that the statements therein made were false and whether the persons taking and sending those papers were employes of the company; the facts, if material, being proper matter for reply.

3. APPEAL AND ERROR ⇐761—ASSIGNMENTS OF ERROR—WAIVER.

Where appellant has failed to state any point or proposition in support of assignment of error as to overruling of demurrer to a paragraph of the answer, she has waived any question as to sufficiency of the paragraph.

4. APPEAL AND ERROR ⇐1040(8)—ERRONEOUS RULING ON PLEADINGS—HARMLESS ERROR.

Where the third paragraph of defendant's answer pleaded facts sufficient to constitute a bar to recovery, and the facts pleaded in the second and third paragraphs of plaintiff's reply were in confession and avoidance of the third paragraph of answer and inadmissible under general denial, error in sustaining demurrers to the paragraphs of the reply was not harmless, but requires reversal.

5. INSURANCE ⇐379(1)—LIFE INSURANCE—VALIDITY OF CONTRACT—FALSE ANSWERS IN APPLICATION INSERTED BY AGENT.

Where insured made truthful statements as to his health to insurer's agent, who filled out the application, which insured signed without reading, in reliance on statement of agent that it was filled out in accordance with truthful statements, the agent's wrong in inserting false answers did not affect insured.

6. PLEADING ⇐178—ACTION ON POLICY—REPLY—CONFESSION AND AVOIDANCE.

Paragraph of reply alleging that insured made truthful statements as to his health to insurer's agent, who filled out the application, which insured signed without reading, in reliance on statement that it was filled out in accordance with the truthful statement, was in confession and avoidance of paragraph of answer setting up untruthfulness of answers to questions in application.

Appeal from Circuit Court, Whitley County; Edward O'Rourke, Special Judge.

Action by Bertha V. Stenger against the Metropolitan Life Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

W. A. Branyan and Wilbur E. Branyan, both of Huntington, and Wm. F. McNagny and Philip McNagny, both of Columbia City, for appellant.

Breen & Morris, of Ft. Wayne, for appellee.

McMAHAN, J. This action was brought by appellant against appellee to recover on an insurance policy issued by appellee on the

life of Carl Stenger, in which appellant was made the beneficiary.

The appellee filed an answer in three paragraphs. The only questions involved in this appeal relate to the third paragraph of answer and reply thereto.

The third paragraph of answer admits the issuance of the policy sued on, and alleges that on August 19, 1909, Carl Stenger, hereinafter designated as the insured, made a written application for said policy in which he made and signed a statement to the medical examiner, which application and statement were attached to and made a part of said policy; that it was agreed by appellee and the insured that no statements, promises, or information made or given by or to the person soliciting said insurance should be binding on the company or affect its rights unless in writing; that it was agreed between the parties that the statements in the said application and medical examination were correct and true, and that they should form the basis of the contract of insurance; that appellee issued the policy in reliance upon the truthfulness of said statements; that the insured in said application and medical statement stated that he had never had any disease of the heart, blood vessels, or kidneys; that he had no medical attendant and had had none, and had not consulted with any physician; that said statements were false and untrue; that said insured had within a year immediately preceding the signing of said application suffered and been afflicted, with heart disease, nephritis, or Bright's disease, and consulted and was treated by physicians for one or more of said diseases, and during said time had been attended by four or five different physicians who had treated him for said diseases and other diseases; that appellee had no knowledge and no reasons to know that said statements were false and untrue until after the death of insured, when it received the proofs of death, and that by reason of information set out in the proof of death it made an investigation, and then for the first time learned that said statements were actually untrue, and that it thereupon immediately notified appellant that it rescinded the contract of insurance and tendered her the premiums which the insured had paid, and on her refusing to accept the same brought the money into court for the use of appellant.

Appellant filed a motion to make the third paragraph of answer more specific, which motion was overruled, and exception saved. Appellant then filed a demurrer for want of facts, which was also overruled, and exception saved, after which appellant filed a reply in three paragraphs.

The first paragraph of reply was a general denial.

The second paragraph alleged that at the

time the application in question was signed George A. Lieber was the general agent and assistant superintendent of appellee, and maintained an office in the city of Huntington, was authorized by appellee to solicit insurance, and was furnished blanks for such purpose by appellee; that the insured was the plaintiff's husband, was a man of but little education and business experience, was simple-minded and confiding, was inclined to rely on the statements of those whom he regarded as his friends and possessed of superior ability; that he was a boiler maker by trade and was for some years prior thereto continuously employed at such work; that said Lieber was a persuasive talker, possessed of the arts and wiles of a diplomat; that he sought out the plaintiff and importuned him to take out a policy upon his life and urged that it was his duty to do so as a protection to his family; that it was a good investment, and that on the evening of the 19th of August, 1909, said Lieber, so acting as defendant's agent, came to his home and urged the necessity of the assured taking out the policy; that said agent asked the assured many questions about whether or not he had any infirmities or diseased condition about his health at that time; how it had been in the past; that the assured fully and truthfully answered all the said questions, and gave the said agent full information in response to his questions, and told him about any and all sick spells he had had including those set up in the third paragraph of answer; also what doctors had prescribed for him, their names, when they had called upon him, and what ailments they had reported to him. He also informed said agent that he was then working at his trade as a boiler maker, which was true; that he answered said agent fully about his last attack of illness, and gave him all the details thereabout as far as he knew; that he did not conceal from said agent any fact known to him, the assured, about his past or then physical condition or infirmities; that thereupon said agent, at the time acting for defendant, informed the insured that his past attack of sickness was of little importance, and would not prevent him from obtaining life insurance from the defendant, and further that, if he passed the physical examination of the company's physician, he would be a good and safe risk; that, as a formal matter, he would be required to make a written application for such insurance, but that as he, said agent, was familiar with such matters, he, said agent, would fill out the application for him, except that part that the medical examiner was to do, and that the medical examiner would do that; that said agent then proceeded to write the answers to the questions; that the assured did not read such application, but that said agent assured him that it was in proper

form, and that all parts thereof which were material were filled out in accordance with the truthful statement of the assured with reference to his then and past physical condition, and that he was a safe and reliable risk; the assured believed him, and relied upon his statement, and, so relying and believing, signed the application, and the agent put the same in his pocket and carried it away with him; that within an hour from that time Dr. F. B. Morgan, of Huntington, Ind., defendant company's physician, appeared at the assured's home and gave him a careful physical examination; that said Morgan was a reputable physician, in good standing in his community, and was so known to be by the assured at the time; that applicant truthfully answered all questions asked him by said physician about his then and past physical condition, did not conceal from him any facts known to the assured on this subject, and truthfully told him about the various times he had been sick, including those mentioned in the answer, so far as the assured knew, and said assured at that time had no knowledge that he had Bright's disease or organic heart trouble, and did not express any opinion as to whether he had any kidney disease; he communicated to said examining physician what doctors had given him medicine and what doctors he had consulted about any sickness he had had, and also told the examining physician what he had learned from said doctors as to any ailment he had had so far as he had the knowledge from them; that said examining physician was not employed by the plaintiff, but was employed by the defendant company, and was acting solely at its instance and request and under its employment. He was further informed by said Morgan at the time of the examination that the company did not care for every little detail about his physical condition, but that it was the serious illnesses and diseases which would affect him constitutionally that were important, and that he, the doctor, was making this examination for the defendant company to determine for the latter what his physical condition was and whether the company would write the policy on his life; that said physician conversed with the assured from time to time as he was making the examination and filling out the statement relative thereto, and, when he had finished, informed the assured that he was sound under the rules of the company, a good insurance risk, and that he should sign said document so filled out by said physician, which the assured then and there did without reading; said physician did not give the insured any instructions concerning the questions and answers in said report, but filled out the answers contained therein during the progress of said examination; that the insured depended upon said physician to decide wheth-

er he was a fit subject for insurance, and that he did not know himself whether he was or not, but believed he was and relied upon and believed all the statements made to him by said examining physician; that the latter told him that he was in good health, a first-class risk, and so reported to the defendant company; that upon the recommendation of said agent and physician the policy in suit was issued; that the assured did not make said application until he had been repeatedly importuned to do so by defendant's agents; that he did not make said application with any intent to deceive, mislead, or defraud defendant as to his then or past physical condition and state of health; that said physician and defendant all had more and better information about the assured's physical condition than the latter did himself; that when the assured made said application he honestly and in good faith believed that he was not suffering from any serious or organic disease nor from any of the diseases set forth in the answer; that up to the time of his death the assured had been a strong and apparently healthy man, and before said date of making application had never been confined to his bed since childhood; that after that time, as well as before, he worked at his trade, which was a hard and laborious one that required great physical vigor to be performed; that defendant, upon information furnished by its agent and physician, issued said policy, collected the premiums therefor, and retained the same, until the commencement of this suit; that with the information aforesaid and with the full knowledge of the real and true physical condition and state of health of the assured both before and after the said policy was issued, the defendant accepted said premiums, did not make any objection to the assured's physical condition, or take any steps to avoid said policy or return said premiums until after the death of the assured and a right of action had accrued on the policy to the plaintiff; defendant never gave the assured any notice that it did not regard said policy as valid and binding, or that in case of his death it would seek to avoid the liability on technical grounds and deprive the plaintiff of the provisions therein made for her; that the assured did not knowingly or purposely make any false or untrue statements or representations to the company or to any of its agents to induce it to execute said policy; that the assured had never, to his knowledge, been treated by a physician for any of the diseases alleged in the answer; that no physician had ever communicated to him that he was afflicted with any of said diseases; that defendant by collecting said premium and retaining the same, and treating said policy as valid and in force, did induce the assured and the plaintiff to believe that said policy was valid

and enforceable; that it is now estopped from repudiating said policy and turning the plaintiff away without relief; that, had not the defendant, by the conduct aforesaid, induced the assured to believe and rely upon the fact that said policy was valid, he would never have paid said premium; that, after such policy was delivered to him, the assured continued to work at his trade until five days prior to his death; that the plaintiff denies all the material allegations in said third paragraph of answer not specifically admitted to be true; that finally plaintiff avers that the assured acted in all things fairly, honestly, and in good faith with the defendant, was not guilty of any bad, deceptive, or fraudulent intent or practice in securing the policy, and the defendant is bound in fairness, good faith, and justice to pay said policy, together with the interest thereon to the plaintiff, etc.

The third paragraph of reply is substantially the same as the second.

Appellee's demurrers for want of facts were sustained to the second and third paragraphs of reply, to which ruling appellant excepted, and refused to plead further. Judgment was then entered for appellee.

The errors assigned are: (1) The overruling of the motion to make the third paragraph of answer more specific; (2) the overruling of the demurrer to the said paragraph of answer; (3) the sustaining of the demurrer to the second paragraph of reply; and (4) the sustaining of the demurrer to the third paragraph of reply.

[1] Appellee insists that appellant has failed to prepare an index of the record as required by rule 3 of this court, and that the appeal should be dismissed. The appellant indexed all the record made in compliance with the præcipe. The clerk, however, copied a number of papers and entries other than those named in the præcipe and which have no connection with or bearing upon the questions raised in this appeal. There is no index showing where these papers and entries can be found. All of the record relating to the questions presented by the assignments of error is indexed. This is a sufficient compliance with the rule.

[2] Appellant filed a motion to make the third paragraph of answer more specific by stating whether or not the persons who took the application and medical statements knew that the statements therein made were false and whether the persons taking and sending these papers to the appellee were employes of appellee. There was no error in overruling this motion. These facts, if material, were proper matter for reply.

[3] Appellant has failed to state any point or proposition in support of the second assignment of error, and she has thereby waived any question as to the sufficiency of the third paragraph of answer.

The appellant insists that the court erred

in sustaining appellee's demurrers to the second and third paragraphs of reply and to the third paragraph of answer. The questions raised by each of these demurrers are the same, and will be considered together.

[4-6] Appellee contends that no question is raised relative to the ruling of the court in sustaining said demurrers for the reason that it is conceivable that under the issues presented by the first, second, and third paragraphs of answer the ruling of the court in sustaining the demurrers to said paragraphs of reply were harmless, even though erroneous. We cannot agree with this contention. The third paragraph of answer pleaded facts sufficient to bar a recovery. The facts pleaded in the second and third paragraphs of reply were in confession and avoidance of the third paragraph of answer, and were not, as appellee contends, admissible under the general denial.

In determining the sufficiency of these paragraphs we are not without authority. In *Michigan, etc., Co. v. Leon*, 138 Ind. 636, 37 N. E. 584, the court said:

"It is settled in this state that, if the applicant for insurance, in good faith, gives truthful answers to such questions as are asked him, but the agent, whether purposely or otherwise, but without the knowledge or connivance of the assured, inserts false answers, the wrong is that of the company, and not that of the assured. Under such circumstances the company will be estopped from attributing the wrong to the assured. When truthful answers are given to their agent, in good faith, the company has acquired a knowledge of the truth, as it is charged with the knowledge imparted to its agent. As long as the assured acts in good faith, it is immaterial what the agent's motives may have been for suppressing or perverting the truth. The assured is justified in assuming that the agent has, in good faith, correctly recorded his answers to the questions asked him, and where he has, in good faith, made truthful answers, he is not chargeable with negligence if he signs the application thus prepared without reading it. When the company sends out its accredited agents to solicit insurance, those to whom such agents may apply have a right to rely upon the credit thus given them by their principal, and if the agent acts dishonestly, the dishonesty should be charged to his principal, and not to those with whom he may deal."

The authorities sustaining this view are numerous, and have been so often cited in our reports that it is unnecessary for us to cite them again. For a collection of authorities on this subject see *Germania Life Ins. Co. v. Lunkenheimer*, 127 Ind. 536, 26 N. E. 1082.

We hold that it was reversible error to sustain the demurrers to said second and third paragraphs of reply.

The cause is reversed, with directions to overrule said demurrers and for further proceedings not inconsistent with this opinion.

(70 Ind. App. 253)

PEALE v. TOWN OF ARCADIA et al.
(No. 10370.)(Appellate Court of Indiana, Division No. 2.
May 28, 1919.)**COURTS ⇐488(1)—TRANSFER OF CAUSE—EFFECT.**

Where plaintiff sued town and its trustees to enjoin enforcement of ordinance making it unlawful to maintain junkyard in limits including plaintiff's yard, because it was invalid, and there was judgment for defendants with a denial of a new trial, and where plaintiff appealed to Supreme Court attempting to question validity of ordinance, its transfer to appellate court for want of jurisdiction was equivalent to saying that power to enact ordinance must be regarded as settled, and it could not be considered on appeal.

Appeal from Circuit Court, Hamilton County; Ernest E. Cloe, Judge.

Action for injunction by Joseph Peale against the Town of Arcadia, Ind., and others. Judgment for defendants, motion for new trial overruled, and plaintiff appealed to Supreme Court, which transferred the cause to the Appellate Court. Affirmed.

Ralph H. Waltz and Floyd G. Christian, both of Noblesville, for appellant.

J. F. & N. C. Neal, of Noblesville, for appellees.

McMAHAN, J. The appellant commenced this action against the town of Arcadia and the members of the board of trustees of said town to enjoin them from enforcing an ordinance making it unlawful to maintain and operate a junkyard within certain prescribed limits.

The complaint alleges that the board of trustees of said town passed an ordinance on the 28th day of September, 1916, making it unlawful to maintain or operate a junkyard within certain described limits, that appellant has been a resident of said town for more than five years, and that during all of said time he has operated and maintained a junkyard within the corporate limits of said town and within the territory described in said ordinance, and that the appellees were threatening to prosecute appellant for violating said ordinance. It is alleged that the said ordinance is invalid and void, that the board of trustees of the said town had no legal authority to pass the same, and asking that appellees be enjoined from enforcing it.

The cause was tried by the court and resulted in a finding and judgment for the appellees. Appellant filed a motion for a new trial, assigning as reasons that the finding of the court is (1) contrary to law, and (2) not sustained by sufficient evidence.

The only error assigned is the overruling

of the motion for a new trial. This appeal was taken to the Supreme Court, where the appellant attempted to raise the question of the validity of said ordinance by claiming that the board of trustees had no power to pass the same. The Supreme Court transferred the cause to this court for want of jurisdiction, which is equivalent to saying that the power and authority of the appellees to enact the ordinance in question must be regarded as settled in this state and cannot be considered in this appeal. *Pittsburgh, etc., R. Co. v. Rogers*, 168 Ind. 483, 81 N. E. 212.

The validity of the ordinance being established, we know of no reason why the appellees should be enjoined from enforcing it. The appellant, both in his complaint and as a witness, admitted that he was maintaining and operating a junkyard in violation of the ordinance. There was no error in overruling the motion for a new trial.

Judgment affirmed.

(70 Ind. App. 333)

PITTSBURGH, C. & ST. L. RY. CO. v. BAUGHN. (No. 9808.)

(Appellate Court of Indiana. June 3, 1919.)

1. PLEADING ⇐201—WAIVER OF OBJECTIONS TO COMPLAINT—DEMURRER—MEMORANDUM.

Objections to complaint not stated in memorandum filed with demurrer are waived by virtue of Burns' Ann. St. 1914, § 344, cl. 6.

2. PLEADING ⇐201—MEMORANDUM ACCOMPANYING DEMURRER—SUFFICIENCY.

Objection to complaint, set out in memorandum filed with demurrer that "no facts are alleged to show or showing the defendant guilty of actionable negligence," is too general and indefinite.

3. RAILROADS ⇐439(3)—KILLING OF LIVE STOCK—COMPLAINT—SUFFICIENCY.

Complaint for killing an animal on an unfenced railroad *held* not demurrable.

4. RAILROADS ⇐447(1)—KILLING OF LIVE STOCK—NEGLIGENCE—INSTRUCTION.

In action for killing an animal on an unfenced railroad, instructions *held* applicable to the issues and correct.

Appeal from Circuit Court, Randolph County; Theo. Shockney, Judge.

Action by William J. Baughn against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

G. E. Ross, of Logansport, for appellant. Macy, Nichols & Bales, of Winchester, and Chas. E. Schwartz, of Portland, for appellee.

McMAHAN, J. The appellee brought this action to recover the value of a mare which

it is alleged was struck and killed by one of appellant's locomotives by reason of the negligence of appellant in failing to fence securely its right of way.

The complaint alleged that appellant operated and controlled a certain railway in Randolph county, Ind., and that it failed and neglected to construct and maintain a proper fence to restrain horses and cattle from straying on its right of way; that a mare owned by appellee by reason of the failure of appellant to fence its right of way strayed upon appellant's right of way at a place where it was not fenced, and that appellant negligently ran a locomotive and train of cars against said mare, killing the same, all of which was without appellee's fault.

Appellant filed a demurrer to the complaint for want of facts, which was overruled and exception saved. Answer of general denial was filed, and a trial by jury resulted in a verdict and judgment for appellee. Appellant filed a motion for a new trial for the reasons that the verdict is not sustained by sufficient evidence, is contrary to law, and for the giving of certain instructions.

[1-3] Appellant contends that the complaint is bad, and that the demurrer to it should have been sustained because it is not alleged: (1) That the appellant owned or operated the locomotive and train of cars which it is alleged ran against and killed the mare; (2) that it is not alleged that the servants of appellant who ran the locomotive and train were at the time in appellant's employ; (3) that it is not alleged that the mare which was killed entered upon appellant's right of way in Randolph county, where the fence was insufficient; and (4) that it is not alleged that the mare was killed in Randolph county. None of these objections to the complaint were stated in the memorandum which was filed with the demurrer and by virtue of section 344, cl. 6, Burns' R. S. 1914, are waived. The first objection to the complaint set out in the memorandum filed with the demurrer is that: "No facts are alleged to show or showing the defendant guilty of actionable negligence." This is too general and indefinite to present any question. The purpose of requiring the demurring party to file a memorandum stating wherein the pleading is insufficient for want of facts is so that the trial court will have the particular objection

in mind and act advisedly when ruling upon the demurrer. The day of filing a general demurrer to a pleading is a thing of the past in Indiana, and the filing of a memorandum which is as vague and indefinite as the general demurrer avails nothing. We know of no good reason why a party filing a demurrer to a pleading should not be as specific in pointing out the objections to the trial court as is done on appeal. We see no objection to the complaint. The demurrer was properly overruled.

Appellant contends that the verdict is not sustained by sufficient evidence in the following particulars: That there is no evidence: (1) That said mare was struck by or came in contact with a locomotive or car run on appellant's railroad; (2) that said mare was struck or killed in Randolph county, Ind.; (3) that said mare was struck or came in contact with a locomotive or car owned or operated by appellant; (4) that said mare was negligently run against and killed by a locomotive and train of cars operated and managed by the servants and agents of said defendant. We have examined the evidence, and find that there is evidence on every material allegation of the complaint, sufficient to sustain the verdict.

Complaint is made of the 1, 2, 3, and 7, instructions given by the court to the jury. By instruction 1 the court informed the jury as to the nature of the complaint and answer, and that the appellee had the burden of proving every material allegation of the complaint by a fair preponderance of the evidence. By instruction 2 the court correctly instructed the jury as to the law requiring railroads to fence their right of way. Instruction 3 informed the jury that, while appellee must prove his case by a preponderance of the evidence, that proof need not be by direct evidence of persons who saw the occurrence sought to be proved, and that facts might be proved by circumstantial evidence. By instruction 7 the jury was instructed as to the duty of a railroad to construct fences and to keep them in repair. Each of the instructions were applicable to the issues, were correct as to form, and there was no error in the giving of any of them. The motion for a new trial was properly overruled.

Judgment affirmed.

NICHOLS, P. J., not participating.

(70 Ind. App. 428)

KRABBE v. CITY OF LAFAYETTE.
(No. 9928.)(Appellate Court of Indiana, Division No. 1.
June 5, 1919.)**1. APPEAL AND ERROR ⇨757(2) — ASSIGNMENTS—REVIEW.**

Where neither motions to make complaint more specific, the complaint itself, the demurrer to complaint, nor memorandum required to be filed therewith are copied or set out in appellant's brief, assignments with reference to overruling motions and demurrer present no question for consideration of the court on appeal.

2. APPEAL AND ERROR ⇨757(4) — INSTRUCTIONS NOT SET OUT IN BRIEF—REVIEW.

Where none of the instructions given or refused, of which complaint is made are set out in appellant's brief, as required by the rules of the appellate court, no question is presented for consideration by the assignments of error with reference to instructions.

3. APPEAL AND ERROR ⇨761—REASONS NOT PROPERLY REFERRED TO IN BRIEF—WAIVER.

Reasons for new trial are waived by appellant's failure to refer to either of them in his brief under his "statement of points and citation of authorities."

4. TRIAL ⇨143—DIRECTION OF VERDICT—GROUNDS.

If there was a conflict in the evidence on any material point, the court erred in directing verdict for plaintiff.

5. TRIAL ⇨170—DIRECTION OF VERDICT—SUFFICIENCY OF EVIDENCE.

If evidence adduced, there being no conflict therein, was not sufficient legally to support a verdict, court erred in directing a verdict for plaintiff.

6. MUNICIPAL CORPORATIONS ⇨162(8)—OFFICERS—COMPENSATION—MONEY WRONGFULLY OBTAINED—RECOVERY.

Although plaintiff city authorized city clerk to employ a deputy and appropriated \$700 for salary, where deputy drew compensation from city at the rate of \$700 per year, but turned over to the clerk upon demand the difference between her stipulated salary and the amount received by her from the city, the difference legally and in equity and good conscience belongs to the city, and it may maintain action for money had and received.

7. MONEY RECEIVED ⇨1 — NATURE AND GROUND OF OBJECTION.

The action for money had and received lies whenever one person has money which legally or in equity and good conscience belongs to another.

Appeal from Circuit Court, Clinton County; Joseph Comb, Judge.

Action by the City of Lafayette against Albert J. Krabbe. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur D. Cunningham and Thomas W. Field, both of Lafayette, for appellant.
E. Burleigh Davidson and Geo. P. Haywood, both of Lafayette, for appellee.

ENLOE, J. Action by appellee against appellant for money had and received. The complaint was in two paragraphs, to each of which demurrers were filed and overruled, and appellant answered by general denial.

The issues thus formed were submitted to a jury, which, under instructions from the trial court, returned a verdict in favor of appellee, upon which the court rendered judgment. The appellant's motion for a new trial was overruled, and he duly excepted.

There are 18 specifications in appellant's assignment of errors, but only the following are proper assignments, and therefore the only ones to be considered, viz.:

(1) "The court erred in overruling defendant's motion to make paragraph 1 of the complaint more specific."

(2) "The court erred in overruling defendant's motion to make paragraph 2 of the complaint more specific."

(3) "The court erred in overruling defendant's demurrer to the first and second paragraphs of the complaint and each of them."

(18) "The court erred in overruling defendant's motion for a new trial."

[1] As to the first, second, and third assignments of error, neither the motion to make the complaint more specific, the complaint itself, nor the demurrer to complaint or memorandum required to be filed therewith are copied or set out in the appellant's brief, and we are left entirely to conjecture as to what they or either of them contained, and therefore neither of these assignments presents any question for our consideration. *New Albany Nat. Bank v. Brown*, 63 Ind. App. 391, 114 N. E. 486; *Chaney, Adm'r, v. Wood*, 63 Ind. App. 687, 115 N. E. 333; *Robinson v. Horner*, 62 Ind. App. 456, 113 N. E. 10; *Harrold v. Whistler*, 60 Ind. App. 504, 111 N. E. 79; *Gary, etc., R. Co. v. Hacker*, 58 Ind. App. 618, 108 N. E. 756; *Steel v. Yoder*, 58 Ind. App. 633, 108 N. E. 783; *Haugh v. Haywood*, 121 N. E. 671.

Appellant's motion for a new trial contained 18 separate specifications, or reasons therefor, of these only the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth are proper reasons to be assigned in such motion. Section 585, Burns 1914.

Of the above specifications, Nos. 4, 5, relate to the giving of instructions, and Nos. 6, 7, 8, 9, and 10 relate to the refusal of the court to give certain instructions tendered by appellant.

[2] None of the instructions, either of those given or refused, of which complaint is made are set out in appellant's brief,

as required by the rules of this court, and therefore no question is presented for our consideration. *Traylor v. McCormick et al*, 63 Ind. App. 685, 115 N. E. 346.

[3] The eleventh and twelfth reasons for a new trial are waived by appellant's failure to refer to either of them in his brief, under his "Statement of Points and Citation of Authorities," and they are each therefore waived. *Chicago, etc., R. Co. v. Biddinger*, 63 Ind. App. 30, 113 N. E. 1027.

[4, 5] The third specification in the motion for a new trial challenges the correctness of the action of the court in directing the jury to return a verdict for the plaintiff.

If there was a conflict in the evidence in this case on any material point, or, if the evidence adduced, there being no conflict therein, was not sufficient legally to support a verdict, the court erred in directing a verdict.

In the case of *Moore, Ex'r, v. Baker*, 4 Ind. App. 115, 30 N. E. 629, 51 Am. St. Rep. 203, the court said:

"Where the evidence clearly establishes the right of the plaintiff to recover without contradiction, and no defense is proven against such right, it is proper for the court to direct a verdict for the plaintiff, but not otherwise." *McCardle v. Aultman Co.*, 31 Ind. App. 63, 67 N. E. 236; 15 Cyc. 254.

[6] With the foregoing rules in mind, we will proceed to examine the evidence upon which the verdict in this case rests.

We find from the record that in May, 1905, the appellee city passed an ordinance "authorizing and empowering the city clerk to employ a deputy for his office"; that for the four years, from January, 1910, to January 5, 1914, the appellant was city clerk of appellee city; that on the 3d day of October, 1910, appellee passed an appropriation ordinance, for the year 1911, and therein and thereby appropriated for "salary for deputy clerk, when employed \$700; that for the year 1912, appellant, by appropriation ordinance duly passed, appropriated for salary of deputy clerk when employed \$700; that the same amount was also appropriated annually, by ordinance duly passed, for the years 1913 and 1914, for salary for deputy clerk when employed; that one Elizabeth Yonker Reule began working as clerk in the office of the city clerk, under the appellant in June of 1911; that she served continuously thereafter as such deputy during the time appellant was city clerk; that she was hired as such deputy by appellant; that he offered her a salary of \$8 per week, which she agreed to accept; that she received \$8 per week for her services as deputy clerk from the beginning of her employment up to January 1, 1913; that during the year 1913 she received a salary of \$9 per week; that during the first half of her employment she received her salary weekly,

and later was paid monthly; that she was paid by warrant drawn by the city comptroller of appellee city; that during the time she was so employed she drew compensation from appellee city at the rate of \$700 per year, turning over to appellant the difference between her stipulated salary and the amount received by her from said city; that the appellant demanded of his said deputy that she turn over to him all of the salary drawn in excess of the stipulated weekly wage, telling her that such excess belonged to him; that such was the custom, and former city clerks had received the money that way, and that he was doing it with the council's permission; that appellant had kept all the money thus given to him; that said Elizabeth Yonker Reule never received any written appointment, or took any oath of office as deputy city clerk; that she supposed the excess over salary which she received from the appellee, by warrant, rightfully belonged to appellant; that she performed the work of deputy clerk while in the office of appellant; that each and all the warrants by which said Elizabeth Yonker Reule was paid were drawn against the appropriation made by appellee for payment of salary of deputy clerk; that the said warrants were drawn by the comptroller of said city at the direction of said appellant.

There is no dispute as to the ultimate facts of this case, but the real contention arises over the application of the law thereto.

The appellant insists that under the facts of this case the money in question is not the money of appellee city; that it either belongs to the girl, Elizabeth Yonker Reule, or to the appellant; and, if it rightfully belongs to either of said parties, this action will not lie. This contention necessitates a consideration of the evidence that we may determine as to whom this money belongs.

[7] The action for "money had and received" lies whenever one person, defendant, has money which legally, or in equity and good conscience belong to another, the plaintiff; and, unless the money in question, either legally or in equity and good conscience, belongs to appellee city, this action cannot be maintained.

Under a fair construction of the evidence in this case, Elizabeth Yonker Reule was hired by appellant to act as a clerk in his office, at a stipulated salary, at the beginning, of \$8 per week. Had this sum, and later the salary of \$9 per week, been paid to her, by warrant of said city duly drawn and paid, no one will for a moment contend that she could have maintained an action against appellee for a balance of salary, the difference between what she thus received and the amount appropriated by appellee to pay such salary. Evidently the money in question did not, and does not, belong to her.

Does it belong to appellant? It most certainly does not. It did not rightfully pass into the hands of the clerk, the stipulated wage agreed upon was all that she could rightfully receive. She had no title or right to this money so paid to her in excess of her stipulated salary, either legal or equitable, and by turning it over to appellant, under such circumstances as disclosed in this record, she could confer no rights therein to him. The time has passed when conduct, on the part of public officials, such as is disclosed in this record, will be allowed to pass unnoticed. Office holders must understand that "a public office is a public trust, and the official is the trustee thereof for the people."

No error has been presented, and the judgment is therefore affirmed.

(70 Ind. App. 308)

HAISLUP v. UNION ASPHALT CONST. CO. (No. 9857.)

(Appellate Court of Indiana, Division No. 2. May 29, 1919.)

MUNICIPAL CORPORATIONS — 488, 489(4) — IMPROVEMENTS — ASSESSMENTS — OBJECTIONS — ESTOPPEL.

Under Burns' Ann. St. 1914, §§ 8710, 8714, a landowner who silently and without objection stood by and watched the improvement of a street cannot avoid payment for the benefits he has received, even though the proceedings under which the improvement was made were void.

Appeal from Circuit Court, Marion County; Louis B. Ewbank, Judge.

Action by Alfred T. Haislup against the Union Asphalt Construction Company, in which defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Affirmed.

Charles B. Clarke and Walter C. Clarke, both of Indianapolis, for appellant.

Caleb S. Denny, Geo. L. Denny, Eugene C. Miller, and Joseph M. Milner, all of Indianapolis, for appellee.

NICHOLS, P. J. Appellant filed his complaint in the Marion circuit court against the appellee to quiet title to certain real estate in the city of Indianapolis, located within 150 feet of New York street, in said city, which said real estate was subject to assessment lien, for the improvement of a portion of said street passing in front of said real estate. Appellee filed his cross-complaint in such cause against appellant to foreclose said lien. Issues were formed on both the complaint and the cross-complaint, and there was a trial by the court, which

resulted in a finding and judgment against the appellant on his complaint, and a finding and judgment against the appellant on the said cross-complaint, foreclosing the appellee's lien as set up in his cross-complaint. Appellant filed his motion for a new trial, which was overruled, to which ruling of the court appellant excepted, and now prosecutes this appeal.

The only error relied upon for a reversal is the overruling of appellant's motion for a new trial, which alleges as errors that:

"(1) The decision of the court is not sustained by sufficient evidence.

"(2) The decision of the court is contrary to law."

As there were two cases tried, one on the complaint, and one on the cross-complaint, counsel for appellee question whether the motion for a new trial and the assignments therein are sufficient to present any matter for our consideration. We note, however, that this case seems to be a test case, and that 36 other parties who think themselves aggrieved are awaiting the result of this suit. We therefore deem it better to decide the case on its merits. The complaint was in the usual short form to quiet title.

The cross-complaint avers, in substance, that April 14, 1915, the board of public works of the city of Indianapolis adopted a declaratory resolution, No. 7888, for the improvement of New York street from the east property line of Randolph street to the west property line of Jefferson avenue, in said city, with full details, drawings, and specifications for said work which were then on file in the office of said board; that appellee was one of the parties who submitted bids, and, being the lowest bidder, was awarded the contract for the construction of said improvement. The costs and expenses of said work were to be assessed against, and collected from, the owners of the lots and parcels of land bordering on and adjacent thereto according to their benefits. On June 23, 1915, appellee entered into an agreement with such board for such improvement, and gave his bond for the faithful performance of his agreement, which was approved. The appellee completed said work in accordance with the specifications and stipulations of the agreement to the satisfaction of the board, and the same was duly accepted. At the time the contract was let appellant owned, and still owns, certain real estate, describing it, adjacent to the part of said street improved. The board made and adopted an assessment roll November 8, 1915, which was finally approved November 19, 1915, assessing each lot bordering on or adjacent to said street its pro rata share, the assessment against appellant's lot being \$27.99, said sum to be paid by appellant to appellee. Such assessment has been a lien

on appellant's said real estate since June 23, 1915, together with interest thereon since November 19, 1915. Said sum is due and unpaid. The lot cannot be divided and sold in parcels. More than 15 days before this suit was commenced, appellant was notified by mail of the above assessment and of the place of payment, but he has wholly failed and refused to pay the same. Cross-complainant has been compelled to employ an attorney, and a reasonable fee for such attorney is \$25. It is provided in section 8714, Burns' R. S. 1914, that in such foreclosure suits no defense shall be allowed upon any irregularity in the proceedings making, directing, or ordering such assessment, nor shall any question as to the propriety or expediency of any improvement or work be therein made. It is further provided by said section that it shall not be necessary in any foreclosure suit to set forth or refer to the proceedings at length or specifically, but it shall be sufficient to state in such complaint the day on which such contract was finally let, the name of the street or highway improved, the amount and date of the assessment, that the assessment is unpaid, and description of the lot or property upon which the assessment was levied. Upon the trial of such foreclosure suit it shall not be necessary to introduce proof of the various proceedings before said board preliminary to the final assessment, but it shall be sufficient to introduce said final assessment roll, or a copy thereof, properly certified, which said roll shall be prima facie evidence that all steps required be taken preliminary thereto were regularly and properly had and taken by and before said board.

By section 8710, Burns' R. S. 1914, being a part of the same act as said section 8714, it is provided that, in the event of the execution of any contract for any public improvement, the validity of such contract shall not be subsequently questioned by any person, except in a suit to enjoin the performance of such contract, instituted by such person within 10 days from the execution of said contract, or prior to the actual commencement of the work thereunder.

In the trial of the issues, the appellant introduced no evidence. Appellee not only introduced the final assessment roll, which under the statute, as above set out, was all that he was required to do, to make a prima facie case, but he further showed that appellant's land against which he sought to enforce his lien was within 150 feet of the street improved, and that appellant lived thereon during all the time said improvement was being made; that he had notice, both by publication and by mailing, of the resolution to improve, and of the time set for its hearing; that appellant did not join with 40 per cent. of the owners of property abutting on said street and liable for as-

essment, for the costs of improvement, in filing objections within 5 days after the making of the final order for the improvement as allowed by said section 8710, nor was such objection filed by any one; that, though he lived on his said property within 120 feet of said improvement during all the time the same was being made, and of course must have known that the same was being made, he did not at any time object thereto, and did not within 10 days after said contract was made, or at any time, bring suit to enjoin the performance thereof; that notice of the time and place of hearing objections to the final assessment was given by publication as required by law, but appellant did not appear at said time. These facts conclusively show that the appellant and his property were both subject to the jurisdiction of the board, and that, under the law as above set out, he had his remedy had he chosen to use it. Having failed to assert it under the law, and having stood by and silently watched the improvement, he cannot now avoid the payment for the benefits he has received (*Anheiler v. Fowler*, 53 Ind. App. 535, 102 N. E. 108), not even if the proceedings under which the improvement is made are void (*Vickery v. Board of Com'rs of Hendricks County*, 134 Ind. 554, 32 N. E. 880; *Phillips v. Kankakee, etc., Co.*, 178 Ind. 31, 98 N. E. 804, Ann. Cas. 1915C, 56).

The judgment is affirmed.

(70 Ind. App. 379)

KENNEY et al. v. MONROE et al. (No. 9883.)

(Appellate Court of Indiana, Division No. 2
June 10, 1919.)

1. MORTGAGES \S 594(1)—FORECLOSURE—REDEMPTION BY MORTGAGEE.

A mortgagee, after he has once sold the land upon an execution or decree, cannot redeem from his own sale, in case it produces less than the whole amount of the judgment, thereby restoring the lien of the judgment and subjecting the property to resale the same as if no previous sale had been made.

2. MORTGAGES \S 594(1) — ASSIGNMENT BY MORTGAGEE — FORECLOSURE BY ASSIGNEE — ASSIGNMENT OF DEFICIENCY JUDGMENT TO MORTGAGEE—REDEMPTION.

Where mortgagee assigned mortgage and note secured thereby as collateral security for payment of his note to assignee, and court upon foreclosure by assignee, gave assignee and another creditor of mortgagee liens upon proceeds of sale to the extent of their debts against mortgagee, and property was sold for amount thereof, mortgagee, who had merely constructive notice of foreclosure and to whom the unpaid balance of personal judgment rendered against mortgagor had been assigned, was entitled to redeem the land from sheriff's sale

upon compliance with Burns' Ann. St. 1914, §§ 814, 815.

Appeal from Superior Court, Marion County; W. W. Thornton, Judge.

Action by James G. Kenney and another against Clara A. Monroe, Samuel S. Rhodes, and others, in which Samuel S. Rhodes files cross-complaint. Judgment for defendants, and against cross-complainant, and plaintiffs and cross-complainant appeal. Reversed, with instructions to trial court.

D. A. Myers, of Indianapolis, for appellants.

NICHOLS, P. J. By this action appellants sought to require the appellee, Stein, Jr., who was clerk of Marion circuit court, to permit appellants to redeem certain real estate from a sheriff's sale, and to contest the rights of appellees Clara A. Monroe and others to redeem the same.

The cause was submitted to the court for trial without the intervention of a jury. There was a request for special findings of fact, which were made, with conclusions of law in favor of the appellees. Upon the conclusions of law judgment was rendered in favor of the appellees against the appellants James G. Kenney and Lucy W. Kramer upon their complaint, and in favor of appellee against the appellant Samuel S. Rhodes, upon his cross-complaint. From this judgment this appeal is prosecuted.

The errors relied upon for reversal, and here considered, are: Errors of the court, respectively, in its first, second, third, fourth, fifth, sixth, seventh, and eighth conclusions of law. Proper exceptions were saved to the court's conclusions of law.

Counsel for appellees has not favored us with a brief and we have no discussion of the law of this case from the appellees' standpoint.

The substance of so much of the special findings of fact as is necessary for this decision is as follows:

On May 26, 1913, Jacob C. Lipps and wife were the owners of certain real estate in Marion county, Ind., upon which they executed a mortgage to James G. Kenney to secure the payment of a note of \$2,000. Said mortgage and note were assigned to one Lena Dunham August 5, 1913, as collateral security for the payment of a note of \$300 executed by said Kenney on said date. Said \$300 note, and mortgage assigned as its collateral security, was on February 4, 1914, indorsed to one Jean Barnard. On February 18, 1915, said Jacob C. Lipps and wife conveyed said real estate to one Samuel E. Hamlin without any consideration therefor, and on May 4, 1915, said Hamlin executed to appellee Clara A. Monroe a mortgage on said real estate to secure the payment of a note of \$1,500. On June 1, 1914, said Jean Barnard

filed her complaint in the Marion circuit court making as defendants therein James G. Kenney, Jacob C. Lipps, and his wife, Alma K. Lipps, William S. Taylor and Lena Dunham; said action being to foreclose the said mortgage assigned as collateral security for the payment of said \$300 note, and for the further purpose of collecting by attachment a claim held by one William S. Taylor against said Kenney. In this foreclosure proceeding there was a judgment in favor of said Barnard, and against the defendant Jacob C. Lipps in the sum of \$2,258 and costs, and the foreclosure of the equity of redemption of Kenney, Lipps and his wife, William S. Taylor, and Lena Dunham and all other persons claiming from, under, or through them in and to the said real estate, being the real estate described in the complaint and cross-complaint. It was ordered and adjudged by the court that the said real estate be sold by the sheriff as other land was sold on execution without relief from valuation and appraisement laws. It was further adjudged that the said Barnard was entitled to recover from said appellant Kenney the sum of \$345 and costs, and that said Taylor was entitled to recover of said appellant Kenney \$268.75 and his costs, and that said Taylor have a lien upon the proceeds of the sale of said real estate, and that the same be paid from the proceeds of such sale, subject only to the lien of the said Barnard. There was an order that the proceeds of such sale be applied: First, to the payment of costs on the complaint and cross-complaint; second, to the payment to the said Barnard of the said sum of \$345, with interest and costs; third, to the payment to the cross-complainant William S. Taylor of the amount found due him, being \$268.75; fourth, and the overplus, if any, after the amounts found due herein from said appellant Kenney to said Barnard, and to said Taylor, to be paid to the clerk of the court for the use of said Kenney, or to the party lawfully entitled and authorized to receive the same.

A certified copy of said decree was placed in the hands of the sheriff of said county, directing him to sell said real estate, and he did so sell it to Jean Barnard for the sum of \$779.37, which amount was paid by said Barnard to the sheriff, and a certificate of sale in due form as required by law was issued by the sheriff to her. Said Barnard assigned and transferred said certificate for a valuable consideration to one James C. McDonald and said William S. Taylor, and these assignees transferred and assigned said certificate for a valuable consideration to appellee Samuel S. Rhodes, and the said Rhodes has ever since been the sole owner of said certificate. At the end of the year for redemption from such sale the said Rhodes presented said sheriff's certificate of sale to the clerk of Marion circuit court, and requested a certificate of no redemption, which

the clerk refused to give him, and thereupon said Rhodes presented said certificate of sale to the sheriff of said county, requesting him to execute a deed to said Rhodes, which the said sheriff refused to do. The said James G. Kenney did not appear in person or by attorney in the foreclosure proceedings in the Marion circuit court, and had no actual notice of the pendency of said action, or the rendition of said judgment and decree, until long after the date of said sheriff's sale. The said Kenney was a nonresident of the state of Indiana, and was notified of the pendency of said action by publication of notice. November 12, 1915, said Barnard assigned and transferred to said Kenney the unpaid balance of the judgment against Jacob C. Lipps, rendered in the foreclosure proceedings in the Marion circuit court, which assignment was duly recorded. November 6, 1915, said appellee Clara A. Monroe presented and filed with the clerk of the Marion circuit court an affidavit and statement in redemption of said real estate from said sheriff's sale, and paid to the clerk the amount of money required to effect the redemption, including costs of redemption, to wit, \$844.22. November 11, 1915, the appellants tendered to the clerk of the Marion circuit court an affidavit and statement for redemption of said real estate from sheriff's sale, and on the same date tendered in legal tender of currency the sum of \$846.72 for the purpose of redeeming said real estate from said sheriff's sale, which sum was more than sufficient for that purpose; and on November 12, 1915, said parties again tendered to him said affidavit and statement for the redemption of said real estate to said clerk and again tendered to him the said sum of money. Said clerk refused to accept and file the affidavit and statement, and refused to accept said sum of money thus tendered on both of said dates. It appears by the affidavit that the said appellants based their right to redeem said real estate upon the fact that the said appellant Kenney had the said valid mortgage upon the said real estate for \$2,000 which he had pledged to said Dunham as collateral security for the payment of a note of \$300 which said Kenney had executed, and that said note had been assigned to said Barnard, who, in the foreclosure suit, foreclosed said \$2,000 mortgage as collateral security for the payment of said \$300 note against said Kenney and others. Kenney was made a party defendant to said action by publication of notice, but said Kenney had no actual notice or knowledge of the pendency of said cause until after decree was rendered on September 18, 1914. There was due at that date \$2,158, not including attorney's fees of \$100, and said Kenney was entitled to the full amount thereof, less costs and the claims held by the plaintiff and cross-complainant, William S. Taylor, and that the balance due said Kenney under the terms of said decree was a lien

upon all of said real estate subsequent and junior to the claims of the appellee Monroe and said Taylor. The affidavit states that the appellant Kramer was the real owner of the balance due under said mortgage and decree, and that said Kenney desires to make this redemption for her use and benefit. The balance due upon said judgment was \$1,378.63, with interest at 6 per cent. since September 18, 1914. It was found by the court that nothing in this proceeding should in any manner affect the rights of the said defendant Rhodes as the present holder of the sheriff's certificate.

On these findings of fact the court states its conclusions of law as follows:

- (1) That the law is with the defendants.
- (2) That the plaintiffs are not entitled to have any of the entries of the clerk of this court relating to the redemption of said real estate from said sheriff's sale by the defendant Monroe vacated.
- (3) The plaintiffs did not have and hold the first right to redeem said lots from said sheriff's sale under and by virtue of their judgment rendered September 18, 1914.
- (4) The plaintiffs were not entitled to any order compelling the defendant Theodore Stein, Jr., clerk of this court, to accept and file said affidavit of November 12, 1915, and to allow plaintiffs to redeem from said sheriff's sale.
- (5) The defendant Theodore Stein, Jr., as clerk of this court, is not compelled to accept said sum of \$846.72 tendered by the plaintiffs.
- (6) That the plaintiffs are entitled to take nothing by the complaint or the defendant Rhodes anything by his cross-complaint.
- (7) and (8) are conclusions as to costs.

[1] We are not unmindful of the rule of law that a mortgagee, after he has once sold the land upon an execution or decree, cannot redeem from his own sale, in case it produces less than the whole amount of the judgment, thereby restoring the lien of the judgment and subjecting the property to resale, the same as if no previous sale had been made. *Greene v. Doane*, 57 Ind. 186, *Hervey v. Krost et al.*, 116 Ind. 268, 19 N. E. 125, and *Horn v. Indianapolis National Bank*, 125 Ind. 381, 25 N. E. 558, 9 L. R. A. 676, 21 Am. St. Rep. 231, sustain this principle of law. It is said, however, in the case of *Hervey v. Krost*, supra, that the courts favor and give a liberal construction to redemption laws in the interest of the debtor, and others who are concerned, that the debtor's property shall go toward the payment of his debts to the full extent of its value. It is evident that this has not been accomplished in the case at bar.

The cases above cited are to be distinguished from the instant case, in this, that it was evidently not the primary object in this action to foreclose the mortgage and collect the debt in favor of the appellant Kenney, but to collect the debt in favor of said Jean Barnard, and the debt in favor of the said William S. Taylor. The appellant

Kenney did not institute the foreclosure proceeding, had only constructive knowledge of it by publication of notice in a newspaper, and had no actual knowledge whatever of said suit, or of the foreclosure sale thereunder.

By the judgment of the court the plaintiff in said foreclosure suit was given a lien on the proceeds of the sale of \$345, and the cross-complainant, William S. Taylor, was given a lien against such proceeds in the sum of \$268.75, which respective sums were to be paid out of the proceeds of such sale, and the overplus, if any, to be paid to the appellant Kenney. The effect of this judgment was the same as if the said appellant Kenney had been a judgment creditor with a separate lien subject and second to the liens of the said Barnard and said Taylor.

It is evident that such real estate sold only for the amount of the Barnard and Taylor debts, plus attorney's fees and costs, and that no consideration whatever was given to the protection of the rights of the appellant Kenney; in other words, the primary purpose of this proceeding and sale was the collection of the debts of said Barnard and Taylor.

[2] Under these facts we have no hesitation in saying that equity and good conscience requires that appellant Kenney should have been permitted, under sections 814 and 815, Burns' R. S. 1914, and, upon complying with the terms of such sections, to redeem said real estate from the sheriff's sale thereof, and upon tender of the sum of \$846.72 to the appellee Stein, Jr., clerk, the same should have been accepted in redemption, and a proper certificate thereof should have been issued by the clerk to said appellant Kenney.

Other questions are presented for our consideration, but we do not deem it necessary to discuss them.

The judgment is reversed, with instruction to the trial court to restate its conclusions of law in harmony with this opinion, and the costs of this appeal are taxed to the appellees.

(73 Ind. App. 692)

THORNBURG v. LAWRENCE et al.*
(No. 9895.)

(Appellate Court of Indiana, Division No. 1,
May 28, 1919.)

1. APPEAL AND ERROR ¶758(2)—SPECIFICATIONS—REFUSAL OF TENDERED INSTRUCTIONS—NECESSITY THAT BRIEF SHOW EXCEPTIONS BELOW.

Where appellant's brief fails to disclose that any exception was taken to the action of the court in refusing to give a tendered instruction, specifications of error thereon are not properly before the appellate court.

2. PLEDGES ¶33—CONTRACT—BALANCE OF PAYMENT.

A sale contract for a new automobile, under which seller attempted to sell an old one belonging to buyer, construed as amounting to an agreement to extend to buyer a credit of three months for the \$200 balance of price of the new car, in which time seller would attempt to sell the old one for such sum, and, upon failure to do so, buyer's promise to pay the \$200 became absolute, and buyer's right to repossess himself of the old car accrued only after payment or tender of said amount.

3. SALES ¶82(1)—CONTRACT—TERMS—TIME—NOTICE OF FAILURE TO SELL.

Where a sale contract for new automobile provided that seller should attempt to sell buyer's old automobile, and that upon failure to do so buyer's liability for balance of price of new car should become absolute, but did not fix time within which seller should notify buyer of inability to sell, notice of such fact, given to the buyer a reasonable time after the three months allowed for sale, would be sufficient, time not being of the essence.

Appeal from Circuit Court, Marshall County; Smith N. Stevens, Judge.

Action by Oliver H. Lawrence and another against Willis W. Thornburg. Judgment for plaintiffs, and defendant appeals. Affirmed.

Harley A. Logan, of Plymouth, for appellant.

Lauer & Kitch, of Plymouth, for appellees.

ENLOE, J. This was an action begun by appellees and against the appellant to recover money alleged to be due them upon contract. The facts of the case, as disclosed by the record, and concerning which there is no controversy, and out of which the action arose, are as follows:

The appellees, Oliver H. and James W. Lawrence, are brothers engaged in the business of selling automobiles, at Plymouth, Ind., under the firm name and style of Lawrence Bros. In May, 1914, they were agents for and selling the Ford automobile, and appellant was at that time the owner of a Buick automobile. On May 29, 1914, the appellant and appellees entered into the following written contract, viz.:

"Articles of agreement, entered into by and between Lawrence Bros., of Plymouth, Ind., party of the first part, and Willis Thornburg, of Plymouth, Ind., party of the second part, witnesseth:

"Party of first part agrees to sell to party of second part a Ford automobile for the consideration of \$566. Party of second part agrees to pay \$300 cash, and in addition thereto to give a Buick automobile valued at \$265, which party of second part takes at that valuation. It is further agreed that in case party of first part cannot, or does not, dispose of said Buick car for at least \$200 in three months' time from date of this agreement, then party of second

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

*Rehearing denied. Transfer denied.

part shall pay to party of first part \$200 cash, at the expiration of said three months, and shall be given possession of said Buick car.

"Signed this 29th day of May, 1914.

"Lawrence Brothers.

"W. W. Thornburg.

"It is further agreed that, should first party make any changes in the above-mentioned Buick, it shall become the property of the first party.

"Lawrence Brothers."

The Buick car not having been sold within the three months specified in the contract, and the \$200 not having been paid by appellant, this suit was begun in January, 1915, to collect said sum, and also to collect storage charges on said car.

The cause was submitted to a jury for trial, which returned its verdict in favor of appellees in the sum of \$225, and, over appellant's motion for a new trial, judgment was rendered thereon.

No question is made on this appeal as to the sufficiency of any of the pleadings, and the only error assigned and relied upon for a reversal is the alleged error of court in overruling appellant's motion for a new trial. The causes assigned in appellant's motion for a new trial are:

(1) That the verdict is not sustained by sufficient evidence.

(2) That the verdict is contrary to law.

(3) That the court erred in refusing to give instruction No. 2 tendered by appellant.

(4) That the court erred in refusing to give instruction No. 3 tendered by appellant.

[1] As to the third and fourth specifications in said motion, a careful reading of appellant's brief fails to disclose that any exception was taken to the action of the court in refusing to give said tendered instructions, and they are not, therefore, properly before us for our consideration.

[2] A consideration of the first and second specifications of error in said motion involves the construction of said contract, to determine whether there was any evidence to support the verdict, and whether the same was or was not contrary to law.

The appellant insists that, under the terms of the contract between the parties hereto, the payment of the \$200 and the surrender

of the possession to appellant of the Buick car were to be concurrent acts, and that therefore, before the appellees were entitled to recover, as for a breach of this contract, they must have tendered back to appellant the car in their possession at the time they demanded payment, and, failing to make such offer, or tender, they could not maintain their action. As sustaining this proposition, counsel for appellant has cited numerous authorities, but an examination of them discloses that they are not in point. They are mostly cases of sales, when the title of some purchased article passed from vendor to purchaser at the time of payment; but in the instant case the title to the Buick automobile in question did not pass, and vest in the appellees, at the time the Ford was purchased. It continued at all times, so far as this record discloses, the property of the appellant, and was only to become the property of appellees in case they (appellees) should "make any changes in the above-mentioned Buick." We think that, under a fair interpretation of this contract, it simply amounts to an agreement to extend to appellant a credit of three months for the \$200 mentioned in said contract, during which time appellees would endeavor to sell, for him, the Buick car in question, and pay themselves from the proceeds of such sale, and on their failure to sell said car for at least said sum, within said time, then appellant's promise to pay said \$200 became absolute, upon his being given reasonable notice of that fact, and his right to repossess himself of said Buick only accrued after such payment or tender by him to appellees of said sum.

[3] The parties did not, by the terms of this contract, fix any time within which appellees should notify the appellant that they had been unable to sell and dispose of said automobile, and notice of such fact given to appellant a reasonable time after said three months had elapsed would be sufficient, as time was not of the essence thereof. *Bruce v. Smith*, 44 Ind. 1. There is ample evidence in the record to support the verdict, and the court did not err in overruling the motion for a new trial.

Judgment affirmed.

(70 Ind. App. 313)

CALDWELL v. ALLEY et al. (No. 9847.)(Appellate Court of Indiana, Division No. 2.
May 29, 1919.)**1. APPEAL AND ERROR ¶607(2) — MATTERS REVIEWABLE—BILL OF EXCEPTIONS.**

A bill of exceptions filed within time allowed for filing bills, but not filed until after the præcipe was filed, will be reviewed, whether or not such bill is included in the præcipe on account of such late filing, where there was a good-faith effort to comply with the rules of the court.

2. NEGLIGENCE ¶136(5) — DIRECTING VERDICT—EVIDENCE.

If the evidence upon any issue in a negligence case is insufficient in law to sustain the verdict in favor of the plaintiff, it is the duty of the court to direct the verdict upon such issue against him.

3. ELECTRICITY ¶17 — LIABILITY OF ELECTRIC COMPANY — NEGLIGENCE OF CUSTOMER.

Where a furnisher of electricity supplies a customer first through its own wires and then through wires owned and maintained by customer, over which furnisher has no control or supervision, and an injury results by reason of negligent manner in which the customer's wires are equipped and maintained, furnisher is not liable.

4. ELECTRICITY ¶16(5) — INJURIES TO PERSONS — NEGLIGENCE — NOTICE—WRONGFUL ACT OF THIRD PERSON.

A city cannot be charged with constructive notice that a private party has stretched a live wire where bathers in a creek over which the city has control may come in contact therewith, in the absence of evidence as to how long the wire has remained in such position.

5. ELECTRICITY ¶16(5) — INJURIES TO PERSONS—LIABILITY OF CITY—WRONGFUL ACT OF THIRD PERSON.

A city, having full power and control over a creek in which its citizens are in the habit of bathing, is not liable for the death of a bather who came in contact with an electric wire negligently and maliciously placed by a private individual, where the city had no notice of the existence of the wire.

6. APPEAL AND ERROR ¶1048(1)—HARMLESS ERROR—EVIDENCE.

Refusal to require witness to answer questions propounded to him cannot be held prejudicial, where the complaining party failed to make a statement of what he expected to prove by such witness.

Appeal from Circuit Court, Morgan County; A. M. Bain, Special Judge.

Action by Emery B. Caldwell against Jesse L. Alley, doing business under the firm name and style of the North Side Sand & Gravel Company, and others. From an adverse judgment, plaintiff appeals. Affirmed.

Joseph W. Williams, of Martinsville, and Harry E. Negley and George W. Galvin, both of Indianapolis, for appellant.

Walter Meyers, Wm. A. Pickens, Paul G. Davis, Russell J. Ryan, Elmer E. Stevenson, and Charles N. Thompson, all of Indianapolis, for appellees.

NICHOLS, P. J. This is an action by appellant against the appellees to recover damages for the death of his son by electrocution in Fall creek, a stream running through the city of Indianapolis, Marion county, Ind. The amended complaint upon which the appellant went to trial was in one paragraph. When the appellant closed his evidence the appellee city of Indianapolis filed its motion to instruct the jury in its favor, and the appellee Indianapolis Light & Heat Company filed its motion to the same effect. The appellant then dismissed the action as to the defendant Alley. Each of the motions to instruct the jury was submitted to and sustained by the court, and thereupon the court instructed the jury to return a verdict in favor of each of the appellees, which the jury did, and the court rendered judgment in favor of each appellee, and against the appellant. The appellant filed his motion for a new trial, which was overruled, to which ruling of the court the appellant excepted, and now prosecutes this appeal. Overruling appellant's motion for a new trial is the only error relied upon for reversal.

The substance of so much of the complaint as is necessary for this decision is as follows:

The defendant Alley for a long time prior to July 4, 1913, was excavating sand and gravel from the bed of Fall creek, a stream running through the city of Indianapolis, Ind., at a point where Thirty-Fourth street of said city, if extended, would cross the stream. That said city as such had full charge, control, and supervision of said stream within the limits of said city. The appellee Indianapolis Light & Heat Company was engaged in furnishing to the citizens of said city an electric current generated within the city. On and prior to said July 4, 1913, said Alley as a means of excavating sand and gravel from the bed of said creek, with the consent, approval, and acquiescence of said city in its control and supervision of said stream, had constructed and was then maintaining and operating at said point on said creek certain buildings, boats, buckets, cables, masts, framework, wires, and machinery of the sort that is commonly described as a gravel boat or gravel bucket outfit. That as a part thereof said Alley operated, with the consent, approval, and acquiescence of said city, a barge or houseboat, consisting of a boat with an ordinary hull and a superstructure or small house built thereon, and in the center thereof. Said boat had a platform running around the outside of said superstructure about five or six feet wide at

the ends of said boat. With the consent, approval, and acquiescence of said city, said Alley had kept said boat moored in the waters of said creek at the above point, with the north end of the boat moored near to the bank of said creek and the south end swinging loose, all of which was well known to said city.

Prior to July 4, 1913, said Alley had entered into a contract with the appellee Light & Heat Company to deliver him electricity from its plant and wires in said city, and said appellee Light & Heat Company had extended its wires carrying the electric fluid generated by it over and upon the boat, and had voluntarily undertaken to deliver along and over its wires the current of such electricity under its direction, supervision, and control, and had full knowledge of the uses to which said electric current was to be placed and the management, distribution and control of it, and said appellees knew, or could have known, that said electric current would be highly dangerous to life and safety of any person coming in contact with the wires through which it was conveyed, where such wires were not properly insulated or covered and protected. Said current was a subtle and highly dangerous commodity under the most favorable conditions and when guarded with the utmost care. Numerous citizens of said city resorted to said point in said stream as a bathing resort and swimming hole, and appellees well knew at said date and for a long time prior thereto that such place was resorted to by men, women, boys, and girls in that vicinity as a bathing place, and that it was so used with the consent, approval, and acquiescence of said city.

Appellees each of them knew, or could have known, that those engaged in bathing or swimming in said creek were induced and encouraged by the presence of said boat and the ready access thereto to use the platform thereof as a resting place or a place from which to dive into the waters of said stream, and they knew, or could have known, at said time because of the advancing heat of the summer, that many persons would be attracted to said place for the purposes aforesaid, and to the platform of the boat aforesaid for resting and diving. That with such knowledge said Alley did, prior to said 4th day of July, 1913, wrongfully and unlawfully place, or cause to be placed by his servants and employes acting for and on behalf of said defendant Alley, and in the line of their duty, on and around the outer edge of said boat and on the platform thereof of above described, a wire then and there retained and held fast with staples in such a manner that the same could not be seen by a person in the water near said boat, and which wire was wrongfully and unlawfully placed by said Alley, or by his agents or employes at the time acting for and on his be-

half, in the line of their duty at his direction, for the sole purpose of having the same wrongfully and unlawfully charged with electricity from the current so furnished as aforesaid, in such a manner that when any person should touch the said wire he would receive an electric shock from the current conveyed by said wire. That said wire was so placed by said Alley and so ordered placed by him with a malicious aforethought, and with full intention to injure and maim any such person that might come in contact with it, wholly without regard for the possible injury which might be inflicted upon such person; and, with full knowledge of the presence of said wire so charged as aforesaid, said Alley wrongfully and willfully suffered and permitted said wire to remain in said condition with such wrongful, unlawful, and willful purpose as aforesaid, and some time prior to July 4, 1913, caused said wire to be connected with the wires previously run upon said boat, charged as aforesaid, and upon said July 4th, knowingly, wrongfully, and unlawfully permitted said wire to carry a current of electricity so as aforesaid procured; and the said city knew, or by the exercise of reasonable care would have known, of the electric current being conveyed through said wire, but negligently and carelessly suffered the same to remain upon said boat, and negligently and carelessly permitted those in use of said stream to be endangered by the presence of said wire, and negligently and carelessly neglected to warn or guard the bathers in said stream; and appellee Light & Heat Company knew of the presence of the wire and the uses to which it was being put, but carelessly and negligently continued to furnish to said defendant Alley its electric current for such wrongful and unlawful use, and negligently and carelessly, with full knowledge of such use, suffered and permitted said current to flow through such wire in sufficient current to endanger the lives of those coming in contact with it, while it knew, or by the exercise of reasonable care could have known, that the bathers in said stream and those using the waters thereof would be in danger of their lives by the unguarded and unprotected electricity furnished by it and passing through such wires. That each of appellees knew of the presence on such boat of electricity in sufficient quantities to maim or kill one coming in contact therewith, and failed wholly to give notice of such electric fluid on said boat.

Appellant's minor son, Earl Caldwell, was 18 years of age, in good health, sound of mind and body, and earning the sum of \$50 per month, which was paid to the appellant, his father, the son not being able to take care of it, and the son being a member of appellant's family. While so bathing, without any knowledge of the negligent and careless acts of said Alley and his codefendants,

and of the location and existence of the wire aforesaid, which was then and there negligently and carelessly suffered and allowed by said defendants to be fully charged with electric current by the said Light & Heat Company, and without any notice whatever or warning, said decedent climbed upon said boat and placed his body upon the edge thereof, and, as he placed his body upon the edge thereof, came in contact with the wire aforesaid, and thereupon received a shock of such force and effect as to kill him. There is a prayer for damages in the sum of \$10,000.

[1] The appellees each contend that no question is presented on appeal with reference to the respective peremptory instruction, as no exception was taken to the giving thereof. It appears, however, by the record that the bill of exceptions containing such instructions, duly signed by the trial judge, was presented and filed within the time given for filing bills of exceptions. Without deciding whether such bill was included in the præcipe of the appellant on account of not being filed until after the præcipe was filed, we hold that there was a good-faith effort to comply with the rules of the court. Ignoring any technicalities, the case will be decided upon its merits.

[2, 3] In this case, if the evidence upon any issue was insufficient in law to sustain the verdict in favor of the plaintiff, it was not only proper, but it was the duty of the court to direct a verdict upon such issue against him. *Beaning v. So. Bend Electric Co.*, 45 Ind. App. 261, 90 N. E. 786; *Westfall v. Wait*, 165 Ind. 353, 73 N. E. 1089, 6 Ann. Cas. 788; *Borg v. Larson*, 60 Ind. App. 514, 111 N. E. 201; *Williams v. P. C. C. & St. L. Ry. Co.*, 120 N. E. 46. The case of *Beaning v. So. Bend Electric Co.*, supra, holds that if there is any evidence to sustain the verdict, no matter what its weight or character, nor how much it may apparently be overborne by more convincing evidence conflicting therewith, the decision of the issue must be submitted to the jury, citing *Penn. Co. v. McCormack*, 131 Ind. 250, 30 N. E. 27; *Jacobs v. Jolly*, 29 Ind. App. 25, 62 N. E. 1028. It is undisputed in the evidence that the appellee Light & Heat Company installed the motor upon the houseboat of the appellee Alley, and connected its electric wires therewith through which it was furnishing current to appellee Alley. It does not appear by the evidence, however, that the electric appliances, wires, etc., other than the motor that were upon the houseboat, were installed by said appellee Light & Heat Company. It does not appear by the evidence that the said appellee Light & Heat Company placed a wire around the edge of the boat, the contact with which resulted in the death of the appellant's decedent, and it appears by the undisputed evidence that said appellee had no knowledge whatever of the existence of

such wire. It is not alleged in the complaint that said appellee Light & Heat Company placed such wire around the edge of the boat, but to the contrary, it is averred that the said Alley placed, or caused to be placed, on and around the outer edge of the boat the wire which produced the injury and death of appellant's decedent, and that it could not have been seen by a person in the water near the boat, and that it was wrongfully and unlawfully placed for the sole purpose of having it charged with electricity in such a manner that when any person should touch the wire such person would receive an electric shock from the current conveyed by such wire, and that it was done by said Alley with malice aforethought, and with the intention to injure and maim any person who might come in contact with it. There is no averment in the complaint and no evidence as to how long such wires had been around the edge of the boat and used to carry an electric current. As far as appears by averment or proof, it may have been so placed immediately before the accident. It has been repeatedly held that where the furnisher of electricity supplies the same to the customer, first through its own wires, and then through the wires owned and maintained by such customer, and over which the furnisher had no supervision or control, and an injury results by reason of the negligent manner in which the customer's wires are equipped and maintained, the party who merely sells the current is not liable. *Princeton Light & Power Co. v. Ballard*, 59 Ind. App. 345, 109 N. E. 405; *Minneapolis General Electric Co. v. Cronon*, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816. The appellant contends that one installing an electric plant and supplying the current is charged with the duty of inspecting and discovering defects, and under this proposition states that the appellee Light & Heat Company furnished all the wire and material used in the boat, and installed it, but never inspected it. This statement is not borne out by the evidence. Authorities cited are: *Thomas v. Maysville Gas Co.*, 108 Ky. 224, 58 S. W. 153, 53 L. R. A. 147; *Lewis v. Bowling Green Gas Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Mitchell v. Raleigh Electric Co.*, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 308, 85 Am. St. Rep. 735; *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916. In the first three of these cases the defendant was furnishing its current to wires that were stretched over a street or highway, and in the last the defect was not in the wiring in the house, but outside, and resulted from uninsulated wires striking together, as the wind swung them. If these elements do not distinguish them, then they are certainly against the great weight of authority, and certainly do not state the law of Indiana, as decided in *Princeton Light Co. v. Ballard*, supra. There was no error in di-

recting the verdict as to the appellee Indianapolis Light & Heat Company.

[4, 5] The appellant contends that appellee city of Indianapolis by sections 8961 and 8729, Burns' R. S. 1914, had full power and control over Fall creek, and that appellee Light & Heat Company had no right upon the waters or boats upon such waters of said stream other than as granted or permitted by statute or the ordinance of the city. This argument applies, of course, with equal force to defendant Alley. It is apparent from reading the sections mentioned that they are public improvement sections, and can have no application to the facts in this case. The kind of supervision that appellant contends should have been exercised in this case is, by virtue of section 8964, Burns' R. S. 1914, which makes no mention of water courses, and gives no authority over them, except impliedly, when they are in public places. Defendant Alley occupied this stream by a lease from the owner, Horace McKay, and later by his heirs, of 23 acres of land covering both sides of the stream where the barge was located. Appellant says that the city in its control of the stream had established a bathing and swimming place at the point wherein the boat was suffered and permitted to float at its mooring, but there is no evidence of such an action on the part of the city. By the averments of the complaint, the injury was the result of the willful and malicious act of defendant Alley in placing the wire around the boat and connecting it with the current, but of this misconduct the appellee city had no notice whatever, and, it not being shown how long the wire had been so placed as aforesaid, it cannot be charged with constructive notice. Even if at the time of the injury it had jurisdiction of the stream for any purpose, it cannot be charged with an injury that resulted from a dangerous wire, the existence of which it had no notice. City of Evansville v. Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728, 68 Am. St. Rep. 218. There was no error in directing the verdict as to the appellee city of Indianapolis.

[6] Appellant complains that the court erred in refusing to require witness Lewis B. Mitchell to answer questions propounded to him, such witness having refused to answer for the reason that his disclosures might tend to incriminate him. At said time the witness was under joint indictment with defendant Alley, for the offense that resulted in the injury involved in this action. Appellant failed to make any statement of what he expected to prove by said witness, and we are therefore unable to say that such ruling of the court was harmful to appellant, even if erroneous. Jordan v. D'Heur, 71 Ind. 199; Hitz v. Warner, 47 Ind. App. 612, 93 N. E. 1005. We find no available error.

The judgment is affirmed.

(70 Ind. App. 264)

SPENCER COMMERCIAL CLUB v. BARTMESS et al. (No. 9888.)

(Appellate Court of Indiana, Division No. 2. May 28, 1919.)

1. **BANKRUPTCY** §341 — ALLOWANCE OF CLAIM—EFFECT.

The action of a referee in bankruptcy in the allowance of a claim is res judicata as to all who have been made parties to the proceedings in the bankruptcy court.

2. **BANKRUPTCY** §210 — ALLOWANCE OF CLAIM—EFFECT.

Upon the filing of a petition in bankruptcy followed by an adjudication, all property in the possession of the bankrupt of which he claims ownership passes into the custody of the bankruptcy court and becomes subject to its jurisdiction to determine adverse claims thereto, whether of title or liens.

3. **ESTOPPEL** §70(1) — FAILURE TO ASSESS TITLE TO LAND.

Where the officers of a commercial club had another convey land with knowledge that it had previously been conveyed to a different trustee, and for more than two years after bankruptcy of grantee failed to assert any claim to the property, though the bankruptcy court found valid a mortgage given by the grantee, the club was estopped from thereafter claiming property against the mortgagee.

4. **ESTOPPEL** §31—CONVEYANCE—INTEREST CONVEYED.

As the owner of real estate attesting a deed made by a person having no title, if such owner knows the contents of such deed, will, by attesting it, be estopped from setting up his own title against the grantee, the equitable interest in land owned by a commercial club will pass by a direct conveyance executed by its officers, notwithstanding the conveyance was ineffectual to carry the legal title.

Appeal from Circuit Court, Owen County; Robert W. Myers, Judge.

Action by Ulysses S. Bartmess against the Spencer Commercial Club, which cross-complained and brought in as defendants May Bartmess and others. From a judgment in favor of May Bartmess, the defendant appeals. Affirmed.

Inman H. Fowler, of Spencer, and Homer Elliott, of Martinsville, for appellant.

Hickam & Hickam, of Spencer, and Fessler, Elam & Young, of Indianapolis, for appellees.

McMAHAN, J. The appellee, Ulysses S. Bartmess, began this action by filing his complaint to quiet title to certain real estate in Owen county, Ind. The appellant filed a cross-complaint against the original plaintiff and a large number of other parties, including May Bartmess, wife of Ulysses S. Bartmess, wherein the appellant asked that the title to said real estate be quieted in it. The

cause, being at issue, was submitted to the court for trial. The court, at the request of the parties, found the facts specially, and stated its conclusions of law thereon.

The facts, as found by the court, are substantially as follows:

The appellant is a corporation organized for the purpose of procuring factories to locate and operate in the town of Spencer, and for that purpose purchased 40 acres of land adjoining the town and platted it into lots, which it sold; the proceeds being used to induce factories to locate and operate in said town.

Prior to September 28, 1910, the Spencer Co-operative Bottle Company was the owner of the land in controversy, upon which there was located a bottle factory, and, being insolvent, made an assignment for the benefit of its creditors and deeded said real estate and factory to John H. Smith as trustee, he being the president of the Spencer Commercial Club.

The appellant, in order to induce the appellee Ulysses S. Bartmess to purchase the real estate and bottle factory formerly owned by said bottle company and to operate said factory, entered into a written contract with said Bartmess wherein it agreed to, and did, convey to said Bartmess the title to 59 lots in appellant's said subdivision, and, said lots having been sold on contracts, assigned to said Bartmess the contracts of the purchasers for the unpaid purchase money for said 59 lots. The appellant also agreed to take charge of said sale contracts, collect the money due on them, and turn over to Bartmess \$7,000 thereof, with interest until paid as a bonus for purchasing, repairing, and operating the said factory. Bartmess agreed to execute deeds to the purchasers of the lots as the appellants turned over the purchase money to him. Bartmess borrowed \$7,000 from the Exchange Bank of Spencer and assigned said lot contract to the bank as collateral to secure his promissory note for \$7,000. Bartmess never paid anything on said note except \$350, which the bank collected on said contracts, and which it applied on said note. The appellant also agreed to give Bartmess its promissory note for \$15,000, secured by mortgage on certain other lots in said addition, said Bartmess agreeing to put said bottle factory in good repair and to operate it with an average of 12 shops, and employing approximately 100 men for not less than nine months a year for a period of three years. It was agreed that said Smith, as trustee of said bottle company should deed the said factory and real estate in controversy to some citizen of Spencer, who should hold the same pending performance of said contract by Bartmess, and, if he performed the contract, the plant was to be deeded to him, and, if he failed, it should be deeded to appellant.

Smith, as such trustee, obtained an order

from the Owen circuit court authorizing the sale of the real estate in controversy at a private sale, and he thereupon reported that he had sold the same to said Bartmess for \$15,000, which sale was approved, and by agreement between appellant and appellee Bartmess the deed was made to Temple G. Pierson as trustee. Said deed was reported to the court and entered in the order book of said court, but was not recorded in the recorder's office of said county. The appellant executed its note to said Bartmess for \$15,000, and he assigned said note to Smith as trustee in full payment of the purchase price of said real estate.

Said Bartmess began to operate said bottle factory in January, 1911, and continued to operate it until August 11, 1912, when he closed it, and no further business was done therein.

At a meeting of the board of directors of appellant in August, 1912, Bartmess requested that appellant make him a deed of the real estate in controversy, saying that his business was prosperous, but that he could not proceed until the plant was overhauled; that he meant to reorganize the business and erect a steel building; that he must raise money, but could not do so unless the title was in his name, so he could float an issue of stock or bonds; that, inasmuch as appellant had not collected on the lots, he ought not to be required and compelled to operate the plant three years before obtaining a deed. Appellant agreed to this, and a few days later, acting under orders of the board of directors of appellant, Homer Elliott, its secretary, prepared a deed for the property to Bartmess, and had said Smith, as trustee for the bottle company, execute the same, forgetting that Smith, as such trustee, had prior thereto made a deed to Pierson as before stated, and that he had made his final report and had been discharged. Bartmess, not knowing such facts or that the deed did not convey to him a perfect title, accepted said deed, recorded it September 23, 1912, and continued in possession of the property under the deed. No deed was ever executed by Pierson, and he still holds the legal title to the real estate as trustee for appellant and Ulysses S. Bartmess.

Bartmess never repaired said plant and did not resume operations, but soon after obtaining said deed made a voluntary assignment, and was afterwards, on petition of some of his creditors, adjudged a bankrupt; said Homer Elliott, the secretary of appellant, being elected as trustee of the bankrupt estate and qualified as such. That said Bartmess in September, 1912, and within a few days after securing the deed, executed a mortgage on said real estate to his wife, May Bartmess, to secure a note for \$5,000 that his wife had loaned him in 1910. That Mrs. Bartmess filed her claim on said note and mortgage with the referee in bankruptcy.

That said Elliott, as trustee, filed his answer to said claim, and also his petition, asking that it be held fraudulent and void, alleging that it was executed to obtain a preference and that it was for an antecedent debt. A trial was had on such claim, at which John H. Smith, president, and Homer Elliott, secretary, of appellant, were present and testified as witnesses for said Elliott in his effort to prevent the allowance of said claim, and aided and counseled with the attorneys for said Elliott in the defense to said claim. Mr. and Mrs. Bartmess were also present at such trial and testified. The referee found that the claim of Mrs. Bartmess should be allowed as a valid claim secured by said mortgage with interest from August 1, 1912, and a decree was entered accordingly. The appellees Hickam & Hickam and Elam & Fesler, having been employed as attorneys for Mr. and Mrs. Bartmess in said bankruptcy proceedings on October 23, 1913, took a note for \$1,000 from Bartmess and his wife; said note being also secured by a mortgage on the real estate in controversy. Bartmess was discharged as a bankrupt July 21, 1913, but, being a householder and entitled to an exemption of \$600, said real estate was set off to him subject to said mortgage, and his estate was settled as one with no assets.

The said note of \$7,000 given to the Exchange Bank was liquidated and discharged in said bankruptcy proceedings. The full possession of the real estate in controversy was turned over to Bartmess by said Elliott as trustee in bankruptcy in pursuance of an order of the court, and he has ever since had full control and possession over the same, all of which was done with the knowledge of and without objection on the part of appellant.

The court concluded as a matter of law: (1) That appellant's title to the real estate should be quieted as to all defendants except Mrs. Bartmess; and (2) that her mortgage was a valid and subsisting lien upon the real estate.

The errors assigned in this court are that the court erred in its conclusions of law.

The sole question for our determination relates to the validity of the mortgage given to the appellee May Bartmess. She is the only appellee who has filed a brief in this court, so, when we refer to the appellee, it will be understood that we refer to her.

The appellant insists that this mortgage was given to secure a pre-existing debt, and was therefore void as against appellant; while appellee insists that under the facts her mortgage is valid, that the proceedings in the bankruptcy court amount to an adjudication of the validity of her mortgage, and that the appellant's conduct has been such as to estop it from asserting title to the real estate in controversy.

Appellant contends that a mortgagee who takes a mortgage to secure a pre-existing

debt must at the time of taking the mortgage, in order to make it valid as against prior and superior equities, have paid a new and valuable consideration therefor, canceled or surrendered his old debt, or in some way placed himself in a worse condition than he was before the mortgage was given.

Appellee does not attempt to controvert this legal position, as contended for by appellant. She insists that the original contract between appellant and her husband was superseded by an agreement made in August, 1912, by the terms of which the appellant agreed to give her husband a deed; that the deed was prepared by the secretary of appellant and signed by John H. Smith, who was president of appellant, they both acting under the authority and direction of the board of directors of appellant; that this deed was intended to, and in equity did, pass all the interest of appellant; that it was effective for that purpose and constituted a complete transfer of the equitable title.

At the time this deed was executed the order book entries in the Owen circuit court in the receivership of the bottle company disclosed that Smith, as trustee, had sold the property to Bartmess for \$15,000; that Smith reported said sale to the court; that it was approved; and that a deed had been ordered. The deed, however, by agreement was made to Pierson, and not to Bartmess, but was never recorded in the recorder's office. It was the intention of the board of directors of appellant to convey the fee-simple title of the real estate in controversy to Ulysses S. Bartmess, and in order to carry out that intention said directors authorized and directed its secretary, Homer Elliott, to prepare a deed for that purpose, which he did, but, overlooking the fact that a deed had been made to Pierson as trustee, he named John H. Smith as grantor, instead of Pierson. The deed was properly signed by John H. Smith, acknowledged and delivered to Mr. Bartmess with the intention and belief of all the parties, including appellant, that it did in fact convey the title to said real estate to Ulysses S. Bartmess. After the deed was executed and recorded, the mortgage to appellee was executed, and when the proceedings in bankruptcy were pending all the right, title, and interest of Ulysses S. Bartmess in said real estate, including the possession, were in Homer Elliott, the trustee in bankruptcy. When the appellee filed her note and mortgage as a claim against said estate, Homer Elliott, who was the secretary of appellant and the trustee in bankruptcy, and who is one of appellant's attorneys in this appeal, resisted the allowance of appellee's claim. He and John H. Smith, president of appellant, the grantor in the deed to Bartmess and the cashier of the Exchange Bank, which was also a creditor of said bankrupt estate, were present at the trial of appellee's claim, testified as witnesses against her, and aided and coun-

seled with the attorneys for the trustee in bankruptcy, doing all in their power to have the claim of appellee disallowed. They were then contending that the real estate now in controversy belonged to the estate of Ulysses S. Bartmess, bankrupt, and that it should be sold by Homer Elliott as trustee to pay the debts of said Bartmess, a position entirely inconsistent with their present one.

[1] The facts as found by the court do not disclose whether the appellant was named as a creditor or interested party in the proceedings in bankruptcy. If appellant was a party to the proceedings in bankruptcy, our task would be easy, and our course clear, as it is universally held that the action of a referee in bankruptcy in the allowance of a claim is res adjudicata as to all who have been made parties to the proceedings in the bankruptcy court.

[2] Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt of which he claims ownership passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine all adverse or conflicting claims thereto, whether of title or liens. In *re Schermerhorn*, 145 Fed. 341, 76 C. C. A. 215. See, also, *In re Kellogg*, 121 Fed. 333, 57 C. C. A. 547.

[3] Ought the appellant, in view of all the facts and circumstances disclosed in this case, be permitted, after a delay of over two years, after it has stood by and with knowledge permitted the court and the public to deal with the property as belonging to Ulysses S. Bartmess, to now claim the property free and clear of a claim that was litigated in the bankrupt court and which was by that court found to be a valid lien on said real estate?

We would remind appellant that "he who keeps silent when duty commands him to speak shall not speak when duty commands him to keep silent." Appellant, by its act in having John H. Smith make the deed to Bartmess, represented that Smith had the power and authority to make such deed and to convey the title, and it ought in equity to make that representation true.

The rule of law is clear that, when one by his words or conduct causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own position, the former is precluded from averring a different state of things as existing. *Pickford v. Sears*, 6 Ad. & E. 469; *Stevens v. Dennett*, 51 N. H. 324.

[4] The appellant had an equitable interest in the real estate which it could have conveyed to Bartmess, and it is our judgment that whatever title it could have passed by deed did in equity pass by the deed from Smith, trustee, to Bartmess. As said

in *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347:

"We apprehend there can be but little doubt on this point, and we do not understand counsel as controverting the proposition that, if the true owner conveys the property by any name, the conveyance, as between the grantor and grantee, will transfer title."

See, also, *Middleton v. Findla*, 25 Cal. 76.

The owner of real estate attesting a deed made by a person having no title, if such owner knows the contents of such deed, will, by attesting it, be estopped from setting up his own title against the grantee and his privies. *Devlin on Real Estate*, § 1286a; *Equitable*, etc., Co. v. *Lewman*, 124 Ga. 190, 52 S. E. 599, 3 L. R. A. (N. S.) 879; *Wakefield v. Brown*, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671; *Miller v. Bingham*, 29 Vt. 82.

The appellant is in no position to claim that its equities are equal or superior to those of appellee. In fact, it secured all, if not more than, it was entitled to when the trial court found that its title should be quieted as to the claims of the appellees other than May Bartmess.

The court did not err in its conclusion of law.

Judgment affirmed.

(71 Ind. App. 632)

HARDY et al. v. SMITH et al. (No. 9893.)*

(Appellate Court of Indiana, Division No. 1
May 29, 1919.)

1. WILLS ⇐439—CONSTRUCTION—INTENTION OF TESTATOR.

In construing a will, the court must be guided by the testator's intention.

2. WILLS ⇐469—CONSTRUCTION—INTENTION OF TESTATOR—MEANING OF LANGUAGE.

In searching for the intention of the testator, every word and clause of the will must be considered, and, if possible, given effect.

3. WILLS ⇐449 — CONSTRUCTION AGAINST PARTIAL INTESATCY.

A construction resulting in a partial intestacy will be avoided, unless the language of the will is such as to compel it.

4. WILLS ⇐634(1)—CONSTRUCTION—CONTINGENT OR VESTED REMAINDER.

A remainder will not be construed to be contingent, if it can be construed to be vested.

5. WILLS ⇐634(15)—CONSTRUCTION—VESTED REMAINDER.

Under a will giving to testatrix's husband and brother life estates in certain land, and, subject thereto, devising such land and all realty owned at her death to a niece for life, or on her death prior to death of testatrix, or the death of the husband and brother prior to death of testatrix, then at niece's death, or the death of husband and brother, the fee sim-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Transfer denied.

ple to vest absolutely in two daughters of niece as tenants by the entirety, and where husband and brother predeceased testatrix, the daughters took a vested remainder in fee.

6. WILLS §=461—CONSTRUCTION—TRANSPPOSITION OF WORDS—"OR."

If from the wording of the will it is obviously necessary to carry out the intention of the testator, the word "or" will be construed as "and."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Or.]

Appeal from Circuit Court, Carroll County; James P. Wason, Judge.

Suit to quiet title by Wilson A. D. Hardy and another against Miranda Smith and others. Demurrer to complaint sustained, and judgment for defendants, and plaintiffs appeal. Affirmed.

L. D. Boyd and George W. Julien, both of Delphi, for appellants.

Wm. C. Smith and John H. Cartwright, both of Delphi, for appellees.

REMY, J. Mary A. Lamb by item 3 of her will devised to her husband, William R. Lamb, and her brother, Alexander Hardy, each a life estate in certain lands therein described. Item 4 of said will is as follows:

"Item 4. Subject to the provisions of item three, in favor of my husband and my brother, Alexander, I devise the said real estate described in item three and all the real estate of which I may die the owner, to my niece Miranda Smith of Kokomo, Indiana, for and during the term of her natural life, or in case of her death prior to my death, or the death of my husband and brother, then at her death, or the death of my husband and brother, the fee simple of all of said real estate shall vest absolutely in Lilly Smith and Mary P. Smith, daughters of said Miranda Smith, as tenants by the entirety the survivor to take the whole."

Appellants prosecuted this suit against appellees to quiet title to eight-tenths of the said real estate, and to construe said will. Appellees are the persons named as devisees in said item 4.

The complaint alleges that the said husband and brother died seven years prior to the death of testatrix; that appellants, among others, are the heirs at law of testatrix; that said testatrix died intestate as to the fee simple of the said lands; and that the fee simple of the undivided eight-tenths thereof is in appellants. Appellees' demurrer to the complaint for want of facts was sustained, and judgment was rendered for appellees upon the refusal of appellants to plead further. The action of the court in sustaining the demurrer is the only error assigned.

The controversy involves the construction

of item 4 of said will. It is contended by appellants that the devise to appellees Lilly Smith and Mary P. Smith was, by the terms of said item 4, contingent upon the death of devisee Miranda Smith prior to the death of the husband and brother of testatrix; and inasmuch as this contingency did not happen, and cannot now happen, this conditional devise failed, and that testatrix died intestate as to said real estate. On the other hand, appellees take the position that item 4 of the will must be construed as devising the fee simple of said real estate to appellees Lilly Smith and Mary P. Smith, their right of enjoyment being postponed until the termination of the life estates devised, and that as to said real estate testatrix died testate.

[1-4] In construing the provisions of a will, we must be guided by the testatrix's intention, and in search for such intention every word and clause of the will must be considered, and, if possible, given effect. *Fenstermaker v. Holman*, 153 Ind. 71, 62 N. E. 699. A construction resulting in a partial intestacy will be avoided, unless the language of the will is such as to compel such construction. *Keplinger v. Keplinger*, 185 Ind. 81, 113 N. E. 292. It is also a rule of construction that a remainder will not be construed to be contingent, if it can be construed to be vested. *Linscott v. Trowbridge*, 224 Mass. 108, 112 N. E. 956. See, also, *Aldred v. Sylvester*, 184 Ind. 542, 111 N. E. 914.

[5] A careful examination of the will, keeping in mind these rules of construction, leads to the conclusion that it was the intention of the testatrix to die testate as to all of her property, and that Lilly Smith and Mary P. Smith should take the fee of the real estate, subject only to the stipulated life estates. It is undisputed that item 3 gave to the husband of testatrix a life estate in said land in the event he outlived her; also a life estate in testatrix's brother during the years, if any, he outlived her husband. Item 4 provides:

"Subject to the provisions of item three. * * * I devise * * * all the real estate of which I may die the owner, to Miranda Smith for and during her natural life"

—thereby giving to said Miranda Smith a life estate, subject to the life estates mentioned in item 1. Then follows the clause upon which appellants base their contention, and which they claim amounts to a condition which has become impossible of performance, to wit:

"Or in case of her death prior to my death, or the death of my husband and brother."

What was testatrix's intention with reference to this clause? Plainly her purpose was merely to provide for the possibility of Miranda Smith dying before her life estate should vest, and to make it certain that Lilly

Smith and Mary P. Smith would take the fee in any event. In other words, testatrix did not want the vesting of the fee in remainder in Lilly Smith and Mary P. Smith to be dependent upon the vesting of a life estate in their mother. This construction is borne out by the clause which follows, which clause provides:

"Then at her death [the death of Miranda Smith], or the death of my husband and brother, the fee simple of all said real estate shall vest absolutely in Lilly Smith and Mary P. Smith," etc.

[8] It is apparent, from the context of the will, that testatrix improperly used the word "or," instead of the word "and." If we make the substitution, that part of the will would read:

"To my niece Miranda Smith of Kokomo, Indiana, for and during the term of her natural life, and in case of her death prior to my death, or the death of my husband or brother, then at her death, or the death of my husband and brother, the fee simple of all of said real estate shall vest absolutely in Lilly Smith and Mary P. Smith," etc.

—and there would be no uncertainty. The disjunctive "or" is not a technical word, and it is a well-known rule that if, from the wording of the will, it is obviously necessary to carry out the intention of the testator, the word "or" will be construed as "and." *Janney v. Sprigg*, 7 Gill (Md.) 197, 48 Am. Dec. 557, cases cited and note; 6 Words and Phrases, 5007.

We conclude that appellees Lilly Smith and Mary P. Smith took a vested remainder in fee in the real estate involved in this suit. The trial court correctly sustained appellee's demurrer to the complaint.

Judgment affirmed.

(70 Ind. App. 418)

HESS et al. v. J. R. WATKINS MEDICAL CO. (No. 9901.)

(Appellate Court of Indiana, Division No. 1. June 5, 1919.)

1. PRINCIPAL AND SURETY §6—"SURETY" DISTINGUISHED FROM "GUARANTOR."

A "surety" undertakes to do that which his principal is bound to do, in case the principal fails to comply with the contract, while a guarantor undertakes that the principal will do the things mentioned in the contract by the principal to be done, and, in case the principal fails to do so, that he, the guarantor, will pay damages sustained to the beneficiary from such failure of the principal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guarantor; Surety.]

2. PRINCIPAL AND SURETY §6, 86 — CONTRACT—CREATION OF RELATION—BREACH—LIABILITY.

An agreement by defendants, in consideration of \$1 paid by plaintiff and the execution of an agreement by plaintiff with F. to furnish to F. merchandise for resale, and to extend time of payment of an existing indebtedness, to guarantee payment of such sum and the price of the merchandise furnished, was a contract of suretyship, and not a guaranty, and defendants were liable without notice of default.

Appeal from Circuit Court, Marshall County; Smith N. Stevens, Judge.

Action by the J. R. Watkins Medical Company against Lewis J. Hess and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Harley A. Logan, of Plymouth, for appellants.

L. M. Lauer and John W. Kitch, both of Plymouth, and Tawney, Smith & Tawney, of Winona, Minn., for appellee.

ENLOE, J. This was an action by appellee against the appellants, founded upon a certain contract in writing entered into by the parties on the 2d day of December, 1912. It appears from the record that for some time prior to said date one H. D. Flora had been selling merchandise furnished to him by appellee, and for which he was, as shown by said agreement, indebted to appellee, on said date, in the sum of \$833.88; that said Flora was desirous of continuing the sale of such merchandise so theretofore furnished him by appellee, and on said date the said appellee and said Flora entered into a contract, by the terms of which said appellee agreed to furnish to said Flora such merchandise as it manufactured, or sold, at wholesale prices, until the 1st day of March, 1914, to be sold by said Flora within the limits of certain described territory; that such goods as should thereafter be furnished by appellee, and freight or express charges thereon, should be paid for by said Flora, as therein stipulated, unless the time of payment should be extended by appellee, which right it expressly reserved; that the time of payment of the then existing indebtedness of \$833.88 was extended, by the terms of said agreement, so that the same could be paid at any time during the existence of said contract then made. This contract was duly signed by the appellee and said Flora, and immediately following their signatures was the following:

"In consideration of one dollar in hand paid by the J. R. Watkins Medical Company, the receipt whereof is hereby acknowledged, and the execution of the foregoing agreement by said company, and the sale and delivery by it to the party of the second part of its medicine, extracts, and other articles, and the extension

of the time of payment of the amount due from him to said company as therein provided, we, the undersigned, do hereby jointly and severally guarantee full and prompt payment of said sum, and for said medicine, extracts, and other articles, and the prepaid freight and express thereon, at the time and place, and in the manner in said agreement provided. * * *

"S. J. Hess.
"L. G. Harley."

The complaint was in one paragraph, to which was attached as an exhibit, in its entirety, the aforementioned contract, and to this complaint the appellants first answered severally, in abatement, setting out in their answer, in full, that part of the aforesaid contract signed by them, and then alleging that said Flora did, at the time said contract was signed, and at the time the amounts named in said contract, which were guaranteed by these defendants, became due, and at the time this suit was commenced against these defendants, and still does, reside in the city of Kokomo, Ind.; that the appellee never brought suit against said Flora, or attempted to enforce this contract against the principal.

To this answer in abatement a demurrer was sustained, and appellants then answered in three paragraphs—the first, general denial; second, payment; and a third paragraph, which was in substance as follows:

"That the appellants guaranteed the payment of the said several amounts sued on in the complaint, and did not promise to pay the same as debtors, on the account sued on, and at the time and times the several amounts became due, the principal, Flora, was solvent, and no notice of the nonpayment of the principal debtor was given to these guarantors by the appellee, or other person, and that thereby these defendants, and each of them were precluded from saving themselves from liability on the guaranty, and said guarantors were thereby damaged and injured to the amount of their liability, by reason of the failure of such notice."

To this paragraph of answer a demurrer was sustained, and thereafter the cause was submitted to the court for trial, which made a general finding in favor of appellee, and that appellants were indebted to appellee in the sum of \$912, and rendered judgment accordingly.

The errors assigned are: Error in sustaining demurrer to answer in abatement; error in sustaining demurrer to third paragraph of answer; error in overruling appellant's motion for a new trial.

[1] The first and second assigned errors, for their answer, center upon the one question as to the character of the undertaking of appellants, as set forth in said contract. Were they strict guarantors, or were they sureties? A surety undertakes, by his contract, to do that which his principal is bound to do, in case the principal fails to comply

with his contract while a guarantor undertakes that the principal will do the things mentioned in the contract by him (the principal) to be done, and, in case the principal fails in his undertaking, that he (the guarantor) will pay whatever damages may be sustained by the beneficiary in the contract by reason of such failure on the part of such principal.

[2] In the case of *Nading v. McGregor*, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686, the court said:

"In a strict guaranty, the guarantor does not undertake to do the thing which his principal is bound to do; but his obligation is that the principal shall perform such act as he is bound to perform, or, in the event he fails, that the guarantor will pay such damages as may result from such failure. It is this feature which enables us to distinguish a strict or collateral guaranty from a direct undertaking or promise, so that, when an instrument of writing resolves itself into a promise or undertaking on the part of the person executing it to do a particular thing which another is bound to do, in the event such other person does not perform the act himself, it is said to be an original undertaking, and not a strict or collateral guaranty. In the latter class of contracts the undertaking is in the nature of a surety, and the person bound by it must take notice of the default of his principal."

In *Ward v. Wilson et al.*, 100 Ind. 52, 50 Am. Rep. 763, the court said:

"In like manner, where the stipulation is to pay the debt or perform the contract of another absolutely or at all events, whether entered into separately from the other or not, the same effect should, in all cases, be given to such contracts, and the obligor held liable, without notice of default. * * * No adequate reason occurs to us for stating it as a rule that a direct, unconditional agreement to pay for goods which may be delivered to a third person in the future, or the same kind of a contract to do any other thing which another has engaged to perform, may, by construction, be made conditional upon a notice of default of such third person, * * * and, if notice of future liability is to be relied on, it should be stipulated for in the writing, rather than that the courts should undertake to annex some condition of liability upon an absolute engagement."

In *Trustees of, etc., v. Gilliford et al.*, 139 Ind. 524, 38 N. E. 404, the court said:

"The answer states that the guarantors had no notice or knowledge of a large part of such sales. They had expressly guaranteed 'payment for all sales' which might be made by appellant to William A. Patton. It was their duty either to revoke that guaranty or see that William A. Patton continued to make payments for the goods purchased."

In *Closson v. Billman et al.*, 161 Ind. 610, 69 N. E. 449, the court said:

"Appellant was not a surety, although he joined with the principal obligor in the sign-

ing of the bond, because his undertaking was that his principal would perform the contract which was collateral to the bond. * * * Appellant was a guarantor, and as such covenanted that his principal would perform the main engagement, or that he [the guarantor] would answer in damages for the default."

Construing the contract in question in the light of the authorities, we hold that the contract in question in this suit was an original undertaking, in the nature of suretyship, and the court did not err in sustaining said demurrers.

Appellants in their motion for a new trial challenge the sufficiency of the evidence to sustain the decision of the court. Construing the contract of the parties as we have, there was ample evidence to sustain the court's decision and the same was not contrary to law.

Numerous errors in the admission of evidence and in the refusal to suppress the depositions have also been presented. We have carefully examined each and all of them which have been duly presented, and find no available error in the record.

The judgment is therefore affirmed.

(70 Ind. App. 459)

SHEEHAN CONST. CO. v. KUHN.
(No. 9789.)

(Appellate Court of Indiana, Division No. 1.
June 6, 1919.)

1. APPEAL AND ERROR ⇨1040(7)—HARMLESS ERROR—PLEADING.

Since by Burns' Ann. St. 1914, § 1101, all defenses, legal or equitable, in action to quiet title, may be made under general denial, error cannot be predicated on action of court in sustaining a demurrer, in an action to quiet title, to a paragraph of the answer; another paragraph of the answer containing a general denial.

2. TRIAL ⇨400(2)—CONCLUSIONS OF LAW—OBJECTIONS.

There was no error in overruling a motion to modify conclusions of law, there being no rule of practice authorizing such a motion; the appropriate remedy being by exception to the conclusions.

3. APPEAL AND ERROR ⇨293—FINDINGS OF TRIAL COURT.

Where there was no motion for a new trial, findings of the trial court must be taken as full, true, and complete

Appeal from Superior Court, Marion County; W. W. Thornton, Judge.

Action by August M. Kuhn against the Sheehan Construction Company. From a decree for plaintiff, defendant appeals. Affirmed.

Walker & Hollett and Ralph E. Jones, all of Indianapolis, for appellant.

David F. Smith, Samuel D. Miller, Frank C. Dalley, and Wm. H. Thompson, all of Indianapolis, for appellee.

ENLOE, J. Action to quiet title to certain real estate, brought by appellee against appellant. The complaint was in 12 paragraphs, to which appellant answered in 2 paragraphs: (1) General denial; and (2) setting forth facts claimed to be sufficient to show title in itself. Appellant also filed cross-complaint, wherein it asked to have its title quieted as against appellee. Appellee demurred to appellant's second paragraph of answer, and also filed answer in general denial to appellant's cross-complaint. The demurrer of appellee to said paragraph of answer was sustained. The cause was submitted to the court, which upon due request found the facts specially, and stated its conclusions of law thereon, favorably to the appellee, and judgment was rendered accordingly.

The errors assigned are: (1) Error in sustaining demurrer to appellant's second paragraph of answer. (2) Error in overruling appellant's motion to modify and restate conclusions of law numbered 1, 3, and 4. (3) Error in overruling appellant's motion to modify judgment. (4) Error in conclusion of law No. 3. (5) Error in conclusion of law No. 4.

[1] Since by our statute (section 1101, Burns' 1914) all defenses, legal or equitable, in actions of this character, may be made under the answer of general denial, error cannot be predicated on the action of the court in sustaining the demurrer to the second paragraph of appellant's answer, since such action of the court was harmless. *Gibbs et al. v. Potter*, 166 Ind. 471, 77 N. E. 942, 9 Ann. Cas. 481.

[2] The second assigned error challenges the action of the court in overruling appellant's motion to modify and restate the court's first, third, and fourth conclusions of law. In case of *Radabaugh v. Silvers*, 135 Ind. 605, 35 N. E. 694, the court said:

"There was no error in overruling the motion to modify the conclusions of law. We know of no rule of practice authorizing such a motion. * * * The appropriate remedy is by excepting to the conclusions of law, and not by a motion to modify; otherwise the statute could be practically nullified, which requires the exception to such conclusions to be taken at the time."

Appellant next complains of the action of the court in overruling its motion to modify the judgment theretofore rendered herein, by adjudging and decreeing that the appellant, Sheehan Construction Company, had and held a lien upon the lands in question, to the

extent and value of certain alleged improvement liens, acquired by it as holder of the assessment roll adopted and approved by the board of public works of the city of Indianapolis on the 24th day of June, 1905. There was no error in this ruling. Our statute (section 308f, Burns 1914) provides:

"The lien of all assessments for streets, sewers, sidewalks, ditches, and other public improvements shall cease and expire 5 years from the time the same and the several installments thereof are due and payable, as shown by the record creating and evidencing such lien."

[3] There was no motion for a new trial, and therefore, for the purposes of this case, the findings of the trial court must be taken as full, true, and complete, and there is no finding which would have warranted the court, under the provisions of the above statute, in rendering such a decree as the one requested by appellant.

The record in this case discloses that the appellant did not except to the court's fourth conclusion of law, that the appellee, August M. Kuhn, was entitled to a decree of the court quieting his title as against all the defendants to his complaint, including Sheehan Construction Company, to certain lots therein set forth and described.

None of the assigned errors are well taken, and the decree of the Marion superior court is therefore affirmed.

Decree affirmed.

(70 Ind. App. 472)

RESERVE LOAN LIFE INS. CO. v.
SUMNER. (No. 9905.)

(Appellate Court of Indiana, Division No. 1,
June 6, 1919.)

1. PLEADING \S 187, 354(1) — MOTION TO
STRIKE—DEMURRER—SCOPE.

If a pleading is a proper one to be filed and is timely filed, a motion to strike should not be sustained, and, if insufficient, it should be demurred to so that the pleader may have an opportunity to correct its faults.

2. INSURANCE \S 369—LIFE INSURANCE—SURRENDER OF POLICY—CONSENT OF BENEFICIARY.

The wife of insured named as a beneficiary in a life insurance policy is a necessary party to the voluntary surrender of the policy to the insurer after default.

3. INSURANCE \S 369—LIFE INSURANCE—ACTION FOR CASH SURRENDER VALUE—NECESSITY OF SURRENDER OF POLICY.

In view of Burns' St. 1914, \S 4622a, subd. 10, providing for extending of insurance upon default of premium payment or payment of cash surrender value upon insured's surrendering policy to company at its home office and the policy provision for payment of cash value upon default and surrender of the policy, insured's letter to insurer stating that he elected to pay

no further premiums, and desired payment of the policy's cash surrender value, without actual surrender of the policy, was insufficient.

4. APPEAL AND ERROR \S 761—BRIEF—FAILURE TO MENTION—INSTRUCTIONS TENDERED AND REFUSED—WAIVER OF ASSIGNMENT.

Where appellant failed to mention under points and authorities in its brief any of the instructions tendered by it and refused, it waived the error of the court, if any was committed.

5. INSURANCE \S 369—LIFE INSURANCE—ACTION FOR CASH SURRENDER VALUE.

Where an insurance policy provided for payment of cash surrender value to insured upon receipt of a written request, an instruction that the deposit of a written request in the post office, stamped and addressed to the insurer, was sufficient, was erroneous as altering or changing the contract.

6. EVIDENCE \S 179(2)—CONTENTS OF LETTER—ORAL TESTIMONY AFTER NOTICE TO PRODUCE.

It was not error for the court to permit the appellee to testify as to contents of a certain letter alleged to have been written by him, where the record shows that timely notice was served upon the appellant to produce the same.

Appeal from Circuit Court, Pike County;
John L. Bretz, Judge.

Action by Millard Filmore Sumner against the Reserve Loan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Judgment reversed, with directions to sustain defendant's motion for a new trial and defendant's demurrer to complaint.

Guilford A. Deitch and Frank G. West, both of Indianapolis, and D. D. Corn, of Petersburg, for appellant.

J. L. Sumner and Frank Ely, both of Petersburg, for appellee.

ENLOE, J. This was an action by appellee against appellant to recover the alleged cash surrender value of a policy of life insurance, issued by appellant company, upon the life of the appellee, and payable, in case of the death of the insured while said policy was in force, to Amanda Sumner, wife of the insured.

The complaint was in one paragraph, the material averments of which were, in substance, as follows:

That on the 8th day of July, 1911, the appellee entered into a contract of insurance with the appellant, by the terms whereof the appellant promised to pay to Amanda Sumner, wife of appellee the sum of \$5,000 in case of the death of appellee. That said contract and policy of insurance provided, among other things:

"That at any time after two annual premiums have been paid hereon, and within one month from date of default in payment of

any premium, the company will, within ninety days after receipt of written request by the insured, with a full and valid surrender of this policy and all claims hereunder, pay a cash surrender value as indicated in the table of guaranteed value (plus the value of the reserve, of any dividend addition) opposite the number of years for which annual premiums have been paid."

That appellee agreed to pay appellant for said contract and policy of insurance the sum of \$268.45 a year for each and every year said policy was in force, unless appellee elected to avail himself of said cash surrender value, at any premium paying time. That appellee paid appellant the annual premium due on said policy for the years 1911, 1912, and 1913. That on the 8th day of July, 1914, said contract of insurance and policy had a cash surrender value of \$225, as shown by the table of guaranteed values in said contract and policy of insurance. That within less than one month from and after July 8, 1914, appellee elected to cease paying further premiums on said policy, and elected to avail himself of the cash surrender value due to him on and by virtue of the terms of said policy on said date, to wit, said sum of \$225. "That within less than one month from said 8th day of July, 1914, the plaintiff, in writing, notified defendant that he had elected to pay no further premiums on said policy; that he wished and desired them to pay to him the cash surrender value then due on the policy, to wit, said \$225, and that he did not wish to carry said policy any longer; for said defendant to send to him said cash surrender value thereon, and to notify him, the plaintiff, what to do with said policy, and for defendant to consider said policy canceled." That appellant has refused to pay, etc., and that there has been an unreasonable delay, etc.

To this complaint appellant unsuccessfully demurred. It then filed its answer in five paragraphs: (1) General denial; (2) payment; (3) that the provision of the policy stipulating the manner in which the cash surrender value thereof might have been obtained had not been complied with, and that said policy had been continued in force as "extended" insurance, as required by statute (Acts 1909, p. 251); (4) the failure of appellee to comply with provision of policy relating to obtaining cash surrender value thereof and matter of estoppel; (5) averring that, although appellee did write a letter to appellant within 30 days after default in reference to the cash surrender value of said policy, he did not surrender said policy as required by law and by the terms of said policy, but abandoned said alleged election, and received from appellant full consideration for said policy in the form of extended insurance.

Upon motion of appellee, appellant's third, fourth, and fifth paragraphs of answer were stricken from the files, and reply in general denial by appellee to the second paragraph of answer closed the issues.

Upon the issues thus formed the cause was submitted to a jury for trial, which returned a verdict for appellee in the sum of \$279.86.

The errors assigned and relied upon for a reversal are: (1) Error in overruling demurrer to complaint; (2) error in sustaining motion to strike third paragraph of answer from the files; (3) error in sustaining motion to strike fourth and fifth paragraphs of answer from the files; (4) error in overruling motion for new trial.

While in the view we take of this case the second and third assigned errors are of no controlling influence, we will notice them.

[1] It has been held that a motion to strike a pleading from the files cannot perform the office of a demurrer. If a pleading is a proper pleading to be filed, and is timely filed, a motion to strike out the same should not be sustained. If such pleading is insufficient, it should be demurred to, so that the pleader may have an opportunity to correct the fault thereof. *Burke Ex'r v. Taylor*, 103 Ind. 399, 3 N. E. 129.

In *Mabin v. Webster*, 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199, it is said:

"The third paragraph of answer was an attempt to plead a rescission of the marriage contract. The question as to whether or not it is properly pleaded, so as to withstand a demurrer, is not before us. A motion to strike out admits the truth of all the facts well pleaded for the purpose of the motion, and the motion should not be sustained if the facts stated in the paragraph are relevant or pertinent to the question to which they are addressed, though not sufficient to withstand a demurrer."

The second and third assignments are well taken.

[2, 3] Section 4622a, subd. 10, Burns' 1914, provides:

"That in the event of the default of premium payment after premiums have been paid for not less than three years, the insured shall be entitled to the extended insurance shown in the table of values and options for the end of the last year for which full annual premiums shall have been paid: * * * Provided, that the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of extended insurance as aforesaid: and provided, further, that the company may defer payment for not more than six months after the application therefor is made. * * *

The above statute, enacted in 1909 (Acts 1909, p. 251), required of all Indiana life insurance companies that they insert the above condition in all policies thereafter

issued, and accordingly we find in the policy in suit the following:

"That at any time after two annual premiums have been paid hereon, and within one month from the date of default in payment of any premium, the company will, within ninety days after receipt of written request by the insured, with a full and valid surrender of this policy, and all claims hereunder, pay a cash surrender value as indicated in the table of guaranteed values (plus the value of the reserve on any dividend additions) opposite the number of years for which annual premiums have been paid." (Our italics.)

Under the provisions of the above-quoted statute, upon a default in payment of an annual premium by the insured, three annual payments having been made, two courses were opened to the insured under the terms of his policy, viz. he could avail himself of the provision for a "cash surrender," or he could have the extended insurance. The first came to him by his choosing it; the second came to him by force of the statute, in case he did not avail himself of his right to take the "cash surrender" value. To avail himself of the one required him, the insured, to act; while he would receive the benefit of the other without any act in that behalf on his part.

If the agreement as to the cash surrender value and canceling of said policy as contained in said policy was not in conflict with the statute above referred to, and appellee, by basing this suit thereon affirms its validity, then such agreement is the measure of the rights of the parties to this controversy. It is their contract, and the courts have no right to change or modify it, or ingraft other conditions or limitations thereon.

To avail himself of this privilege of obtaining the "cash surrender" value of the policy, the statute in question says, "The policy may be surrendered to the company at its home office within one month," and the contract upon which this suit was based provided, "After receipt of written request by the insured, with a full and valid surrender of this policy," etc.

It will also be noted that the wife of the insured, Amanda Sumner, was the beneficiary named in this policy of insurance, and under the law of this state, as declared in the case of *Indiana, etc., Life Ins. Co. v. McGinnis*, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192, the appellee herein had no power to cancel said policy of insurance by contract with appellant unless his wife, the named beneficiary, should voluntarily surrender said policy and her interest therein, and thereby permit the same to be canceled. In view of the law, as disclosed in the *McGinnis Case*, supra, the force, effect, and importance of the language of the policy "with a full and valid surrender of this policy"

becomes at once apparent. It was the vital thing to be done by the insured, so far as the protection of the company writing the policy was concerned.

Do the averments of the complaint measure up to this standard, and show that appellee did the things required of him? He alleges in his complaint that—

"The plaintiff in writing notified defendant that he had elected to pay no further premiums on said policy; that he wished and desired them to pay him the cash surrender value then due on the policy; * * * that he did not wish to carry said policy any longer; for said defendant to send to him the cash surrender value due thereon, and to notify him, the plaintiff, what to do with said policy, and for said defendant to consider said policy canceled."

This was not sufficient. This was not a "full and valid surrender of this policy and all claims herein" as required by the contract. The complaint therefore was insufficient, and the demurrer thereto should have been sustained.

[4] The appellant also complains of the action of the trial court in overruling its motion for a new trial.

The reasons assigned for a new trial in appellant's motion therefor are as follows: (1) That the verdict is not sustained by sufficient evidence; (2) that the verdict is contrary to law; (3) and (4) error in admitting certain evidence offered by appellee; (5) error in refusing to give certain instructions requested by appellant; and (6) error in giving certain instructions of the court's own motion.

Appellant, by its failure to mention under "points and authorities" in its brief any of the instructions tendered by it and refused, has waived the error of court, if any was committed in such refusal and said instructions will not therefore be considered.

Appellant complains of the third, fourth, and fifth instructions as given by the court, and we will notice them in their order.

The third instruction is erroneous. The latter part of said instruction, which is an attempted explanation of the preceding part of said instruction, is as follows:

"In other words, before he is entitled to surrender value of the policy, he must, by words or actions, make such a complete and definite surrender of the policy to defendant as that he has no further interest or claims against the defendant, by reason of the policy."

This instruction, in effect, told the jury that the contract or policy was not the measure of the respective rights and duties of the parties. Under this instruction the appellee could declare the policy canceled, and maintain thereafter, an action for the cash surrender value thereof, notwithstanding the interest of his wife, the named beneficiary, had in no way been affected by such declara-

tion of her husband, the appellee. The contract required a "*surrender of the policy and all claims herein*" (our italics), and this was the measure of appellee's duty in that behalf, if he would claim the cash for its surrender.

The fourth instruction given to the jury concluded as follows:

"* * * On the other hand, if he has shown by a preponderance of the evidence that within the time stated he *offered to surrender* (our italics), and that offer to surrender was subject to a suggestion of the defendant what to do with the policy, and they did not advise him, then I instruct you, if all of the other essential and material allegations have been made out by a preponderance of the evidence, he would be entitled to recover at your hands."

This instruction is subject to the same criticism as No. 3 above. It did not limit the right of appellee to those acquired under the terms of his contract.

[5] The fifth instruction given by the court is also erroneous. In it the jury were told, among other things:

"If you find by a preponderance of the evidence that such a letter as contended for, containing such statements as contended for, was sent by the plaintiff to the defendant insurance company, and that said letter was properly addressed, sealed, and stamped and placed in the United States mail, that would be all that would be required of this plaintiff to do in order to avail himself of that clause in the policy which authorizes a surrender value thereof. He is not required to show that the company actually received it, but he must show that he properly mailed and addressed a letter containing such statements to the defendant. If you find from a preponderance of the evidence heretofore referred to that the defendant company took no action, or made no answer thereto, then I instruct you in law that such statements in said letter, if true, were in law sufficient to constitute a surrender of the policy, and a request of the defendant company to pay to plaintiff the surrender value thereof."

This instruction was directed to the testimony of appellee, who had testified in substance:

That on August 5, 1914, he had written the appellant a letter stating that "I would forfeit my policy and take the cash value of it, and for them to notify me what to do with the policy." "I inclosed it in an envelope addressed to the company and put a two-cent stamp on it, and put it in the mail box, and never saw it afterwards."

The clause in the policy provided, "Upon receipt of written request," etc., but this instruction would turn this condition into one reading, "upon the mailing to us of written request," etc. In other words, the condition in the policy required actual notice in writing to appellant, while the instruction

would hold the appellant liable, if such notice were mailed to appellant, whether it in fact ever received such notice or not.

To hold the foregoing instruction correct would be in effect to hold that the courts have the power to alter and change the contract as made by the parties; to ingraft thereon terms and conditions which the parties did not have in mind and place therein. If courts could thus change the contract as made by the parties, then the making of contracts would be useless. Courts have no such authority. See *Fields v. United Brotherhood*, etc., 60 Ill. App. 258, and authorities there cited.

[6] Appellants also insist that the court committed error in permitting the appellee to testify as to the contents of a certain letter alleged to have been written by him, but under the showing made in this record we hold that the court did not err in permitting said witness to testify as to contents of said letters; notice having been timely served upon appellant to produce the same. Other assigned errors need not be noticed.

The judgment is reversed, with directions to the trial court to sustain appellant's motion for a new trial; also to sustain appellant's demurrer to the complaint, and for further proceedings not inconsistent herewith.

(70 Ind. App. 336)

McMILLAN et al. v. PLYMOUTH ELECTRIC LIGHT & POWER CO.
(No. 9827.)

(Appellate Court of Indiana, Division No. 1.
June 3, 1919.)

1. APPEAL AND ERROR ¶511(1, 2)—MATTERS REVIEWABLE — BILL OF EXCEPTIONS—FILING.

A bill of exceptions purporting to be embodied in transcript cannot be considered a part of the record, unless it appears from record by order book entry or by certificate of clerk of court that it was duly filed, and that such filing was made during the term at which the motion for new trial was overruled, or within time given beyond such term for that purpose.

2. APPEAL AND ERROR ¶553(2) — MATTERS REVIEWABLE—BILL OF EXCEPTIONS.

The longhand report of the evidence alone does not constitute a bill of exceptions, requiring the certificate of the trial judge to make it a completed bill.

3. APPEAL AND ERROR ¶511(1) — MATTERS REVIEWABLE—BILL OF EXCEPTIONS—FILING.

Certificate of clerk merely reciting that transcript contains "the longhand report of the evidence as filed in my office by K., court reporter of said court," is not sufficient to show that a bill of exceptions was filed.

4. APPEAL AND ERROR ¶511(1) — MATTERS REVIEWABLE—BILL OF EXCEPTIONS—FILING.

The filing of a bill of exceptions cannot be shown on appeal by the file mark of the clerk thereon alone.

5. APPEAL AND ERROR ¶607(2) — MATTERS REVIEWABLE—BILL OF EXCEPTIONS.

A written præcipe addressed to the clerk, "You are directed to make out a complete transcript of all the pleadings, entries, and orders made and entered of record in the above-entitled case," did not include a direction to include a bill of exceptions containing the evidence.

6. PLEADING ¶1—DEFINITION.

The pleadings in a case are the formal statements by the parties of their respective claims and defenses, and in the broadest sense only include proceedings from complaint until issue joined.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pleading.]

7. MOTIONS ¶46—"ORDER."

An "order" is a judgment or conclusion of the court on any motion or proceeding by which affirmative relief is granted or relief denied.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Order.]

8. COURTS ¶113—RECORDS—"ENTRY."

An "entry" as applied to judicial proceedings is a statement of a conclusion reached by the court, or an act done during the progress of a cause which is spread of record, and designed to furnish incontestable evidence of the matter stated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Entry.]

9. APPEAL AND ERROR ¶607(2)—MATTERS REVIEWABLE—RECORD.

Where a written præcipe for a transcript is filed calling for less than the entire record, only such papers and entries as are mentioned in such præcipe are properly part of the record on appeal.

10. EXCEPTIONS, BILL OF ¶20 — FORM — STATEMENT.

While it is not necessary that a bill of exceptions containing the evidence shall have any particular form of introduction, yet it should be preceded by a statement sufficient to identify it as a bill of exceptions.

11. APPEAL AND ERROR ¶696(1)—MATTERS REVIEWABLE—BILL OF EXCEPTIONS.

In order to have the evidence considered on appeal, the bill of exceptions must show that it contains all the evidence.

12. APPEAL AND ERROR ¶706(4) — MATTERS REVIEWABLE—ASSIGNMENTS OF ERROR.

Where the only error assigned is the action of the court in overruling a motion for a new trial, and the only grounds therefor alleged therein require a consideration of the evidence, which is not properly in the record, there is nothing presented for review.

Appeal from Circuit Court, Marshall County; Smith N. Stevens, Judge.

Action by Walter J. McMillan, administrator, etc., against the Plymouth Electric Light & Power Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Adam E. Wise, of Plymouth, and Gallagher & Messner, of Chicago, Ill., for appellant.

Harley A. Logan, of Plymouth, for appellee.

BATMAN, C. J. [1-4] This is an action by appellant against appellee to foreclose a mechanic's lien, in which a judgment was rendered in favor of the latter against the former. The sole error relied upon for reversal is the action of the court in overruling appellant's motion for a new trial, which is based solely on the grounds that the decision of the court is not sustained by sufficient evidence and is contrary to law. It thus appears that the only questions which appellant seeks to present by this appeal require a consideration of the evidence. Appellee asserts that the evidence is not in the record, and we will first direct our attention to a consideration of this contention, for if it is well taken there is nothing presented for our determination. An inspection of the transcript filed in this court discloses that there is embodied therein what purports to be a bill of exceptions containing the evidence, but it does not follow from this that such bill is a part of the record. Certain other facts must appear before it can be so considered. Among other things, it must appear that it was duly filed. *Hoover v. Weesner* (1896) 147 Ind. 510, 45 N. E. 650, 46 N. E. 905. Such filing must be shown either by an order book entry or by the certificate of the clerk of the trial court. *Howe v. White* (1903) 162 Ind. 74, 69 N. E. 684; *Graves v. Jenkins* (1914) 58 Ind. App. 500, 108 N. E. 531. It must also appear that such filing was made during the term at which the motion for a new trial was overruled, or within a time given beyond such term for that purpose. *Bennett v. Root Furn. Co.* (1911) 176 Ind. 606, 96 N. E. 708; *Home Stove Co. v. Bishop* (1918) 119 N. E. 152. In the instant case the record fails to show a compliance with any of these requirements. It appears that the judgment from which this appeal is taken was rendered at the May term of the Marshall circuit court in the year 1916. Appellant filed a motion for a new trial in due time, which was overruled at the following September term of said court. The record fails to show that the alleged bill of exceptions was filed during said term, or that any time was given appellant beyond the expiration thereof for such purpose. In fact the record does not show, by either of the recognized methods, that it was ever filed, there

being no order book entry to that effect in the transcript, and the clerk's certificate being silent in that regard. True, the clerk's certificate recites that the transcript contains "the longhand report of the evidence * * * as filed in my office by Francis Karn, court reporter of said court," but it makes no reference to the filing of any bill of exceptions. The longhand report of the evidence alone does not constitute a bill of exceptions. It requires the certificate of the trial judge to make it a completed bill. Hence a certificate, merely reciting that such longhand report was filed, is not sufficient to show that the bill of exceptions was filed. *Hoffman v. Isler* (1911) 49 Ind. App. 284, 97 N. E. 188; *Fairbanks v. Warrum* (1913) 56 Ind. App. 337, 104 N. E. 983, 1141. We note that certain file marks of the clerk of the trial court appear on the back of various pages of the alleged bill of exceptions containing the evidence, some bearing a date prior and some bearing a date subsequent to the day on which the trial judge attached his certificate thereto, but it is well settled that the filing of a bill of exceptions cannot be shown on appeal by the file mark of the clerk thereon alone. *Rector v. Druley* (1909) 172 Ind. 332, 88 N. E. 602. For the reasons stated we hold that the alleged bill of exceptions containing the evidence is not a part of the record.

[5-9] But aside from the question of filing, there is still another reason why such bill of exceptions cannot be considered as being a part of the record. It appears that the transcript in question was prepared in pursuance of a written *præcipe*, which, after entitling the cause, is addressed to the clerk of the trial court in the following words:

"You are directed to make out a complete transcript of all the pleadings, entries, and orders made and entered of record in the above-entitled cause."

It will be observed that this *præcipe* does not call for a transcript of the entire record, but for only such portions thereof as are properly designated as pleadings, orders, and entries. Pleadings in a cause are the formal statements by the parties of their respective claims and defenses. 21 R. C. L. 436; *Kilpatrick-Koch, etc., Co. v. Box*, 13 Utah, 494, 45 Pac. 629; *Paxton v. State*, 59 Neb. 460, 81 N. W. 383, 80 Am. St. Rep. 689. In its broadest sense, the word "pleadings" includes all proceedings from the complaint until issue is joined. 81 Cyc. 46; *Merrill v. Pepperdine* (1893) 9 Ind. App. 416, 36 N. E. 921. An order of court has been defined as a judgment or conclusion of the court on any motion or proceeding by which affirmative

relief is granted or relief is denied. 20 R. C. L. 512; 29 Cyc. 1514; *Fisher v. McKeemie*, 43 Okl. 577, 143 Pac. 850, Ann. Cas. 1917C, 1039, and note. The word entry, as applied to judicial proceedings, is a statement of a conclusion reached by the court, or an act done during the progress of a cause, which is spread of record, and designed to furnish incontestable evidence of the matter stated. 15 Cyc. 1055; 1 Black on Judgments, § 106. It thus appears that the language used in said *præcipe*, even under a liberal construction, does not fairly include a bill of exceptions containing the evidence. Under the well-settled rule that, where a written *præcipe* for a transcript is filed, calling for less than the entire record, only such papers and entries as are mentioned in said *præcipe* are properly a part of the record on appeal, we cannot consider the alleged bill of exceptions in determining any question which appellant has sought to present. *King v. Hoover* (1914) 57 Ind. App. 558, 105 N. E. 172.

[10, 11] Appellee has directed our attention to the fact that the alleged bill of exceptions is not preceded by an introductory statement as to what it purports to be, and that it fails to show that it contains all the evidence. In view of the conclusion we have already announced, it will suffice to say with reference to the first alleged defect that, while it is not necessary that a bill of exceptions containing the evidence shall have any particular form of introduction, yet it should be preceded by a statement sufficient to identify it as a bill of exceptions. *Huston v. Cosby* (1895) 14 Ind. App. 602, 41 N. E. 953; *Jenkins v. Wilson* (1894) 140 Ind. 544, 40 N. E. 39; *Knickerbocker Ice Co. v. Lewis* (1902) 160 Ind. 494, 67 N. E. 188. As to the second alleged defect, we need only say that it has been repeatedly held that, in order to have the evidence considered on appeal, the bill of exceptions in the record must show that it contains all the evidence. *Wagner v. Wagner* (1915) 183 Ind. 528, 109 N. E. 47.

[12] It is also contended that appellant's brief does not comply with the rules, but under the circumstances it will suffice to state that this contention in part is well taken. In view of the fact that the only error assigned is the action of the court in overruling the motion for a new trial, and that the only grounds therefor alleged therein require a consideration of the evidence, which we have held is not in the record, there is nothing presented for our consideration. *Shull v. Dunton* (1916) 62 Ind. App. 602, 113 N. E. 381; *Ft. Wayne, etc., Co. v. Kumb* (1917) 116 N. E. 309. Under these circumstances the judgment must be affirmed.

Judgment affirmed.

(71 Ind. App. 167)

NORDYKE & MARMON CO. et al. v. SWIFT
et al. (No. 10491).*(Appellate Court of Indiana, Division No. 1.
May 27, 1919.)**1. EVIDENCE** \S 389—PAROL—RESOLUTIONS—SCOPE.

The scope of a resolution passed by a fire board of a manufacturing corporation cannot be enlarged beyond what reasonably appears from its context, even by a member of the adopting body.

2. MASTER AND SERVANT \S 380—WORKMEN'S COMPENSATION ACT—DISOBEDIENCE OF ORDERS.

Where an employer acquiesced in the violation of an order, it was nullified, and a servant acting contrary thereto could not be said to have acted in disobedience of orders, so as to be guilty of willful misconduct under the Workmen's Compensation Act.

3. MASTER AND SERVANT \S 405(1) — WORKMEN'S COMPENSATION ACT—PROCEEDINGS BEFORE INDUSTRIAL BOARD.

In proceedings under the Workmen's Compensation Act, the Industrial Board is authorized to draw reasonable inferences from the facts established and from the circumstances shown by the evidence.

4. MASTER AND SERVANT \S 371—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

The words "accident arising out of and in the course of the employment," as used in the Workmen's Compensation Act, should be given a liberal construction.

5. MASTER AND SERVANT \S 373—WORKMEN'S COMPENSATION ACT—"ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

A janitor killed while attempting to obtain clean gasoline for cleaning floors came to his death by "accident arising out of and in the course of his employment" within the Workmen's Compensation Law, although he was deviating from the usual custom by preparing to use clean instead of dirty gasoline; it being assumed, in the absence of a contrary showing, that he was exercising reasonable discretion under the circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

6. MASTER AND SERVANT \S 371—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING IN THE "COURSE OF EMPLOYMENT."

An employé may be said to receive an injury by accident arising in the course of his employment, within the Workmen's Compensation Act, when it occurs within the period of the employment, at a place where he may reasonably be, and while he is doing something reasonably connected with his employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

7. MASTER AND SERVANT \S 373—WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING IN THE "COURSE OF EMPLOYMENT."

That an employé, in attempting to procure clean gasoline for cleaning floors, was disobeying an order to use dirty gasoline, has no bearing on the question whether the injury was one arising in the course of employment, within the Workmen's Compensation Act, bearing only on the question of willful misconduct.

Appeal from Industrial Board.

Proceedings by Grace E. Swift and others, under the Workmen's Compensation Act, to obtain compensation for the death of George E. Swift, deceased, opposed by the Nordyke & Marmon Company, the employer, and the Indiana Manufacturers' Reciprocal Association. There was an award, and the employer and the Reciprocal Association appeal. Award affirmed and increased.

Joseph W. Hutchinson, of Indianapolis, for appellants. White & Jones, of Indianapolis, for appellees.

BATMAN, C. J. The record in this case discloses that appellees are the widow and children of one George E. Swift, deceased, who met his death while in the employ of appellant Nordyke & Marmon Company. Appellees on September 28, 1918, filed with the Industrial Board of Indiana an application for the adjustment of their claim for compensation. Appellants appeared thereto and joined issues thereon. After a hearing and an award by a single member of said board, and a review thereof by the full board, a finding was made which contained, among others, the following facts: That on September 5, 1918, George E. Swift was in the employ of appellant company as a janitor foreman; that for several months prior to said date there were 35 or 40 employes of said company in the janitor force, who worked under the said George E. Swift, and were subject to his orders; that for the purpose of cleaning the floors, and especially the aisles, in the buildings of said company, the said force of janitors had been in the habit of using dirty gasoline, that is, gasoline that had been used for the purpose of cleaning machines; that on said date, while the said George E. Swift was preparing to procure clean gasoline, with which to clean the floors in the buildings of said company, by drawing the same from a tank containing 30,000 gallons, he took hold of an electric wire for the purpose of attaching it to a bucket with which to draw gasoline from said tank; that he accidentally took hold of a socket attached to said wire, thereby receiving an electric shock which caused his death on said date; that about the middle of July, 1918, some officer of the United States government had called the attention of said company to the fact that it was desirable to conserve the supply

of gasoline, and requested that its use be discontinued for all unnecessary purposes; that soon thereafter an organization in the plant of said company, known as the fire board, passed a resolution requesting a discontinuance of the promiscuous use of gasoline, and issued a written order to that effect, but the evidence does not show that the written order was ever called to the attention of the said George E. Swift; that said order was made for the purpose of conserving the supply of gasoline, and not as a safety measure; that the janitor force did not discontinue the use of gasoline for the purpose of cleaning the floors after the passage of said resolution by the fire board until after the death of the said George E. Swift, but the evidence does not show whether clean gasoline had ever been used by the said George E. Swift and the janitors working under him on any previous occasion. There is also a finding:

"That his [Swift's] attention was verbally called to the fact of the request of the federal government by at least two representatives of the defendant company, and one representative of the defendant company had suggested to him on one occasion that the use of gasoline for the purpose of cleaning the floors should be discontinued; * * * that the evidence does not show that the defendant company ever took any steps to require the discontinuance of its use for that purpose."

On the facts found the full board made an award in favor of appellees, from which this appeal is prosecuted.

[1-3] Appellants contend that the evidence is not sufficient to sustain that part of the finding quoted above. In support of this contention they cite the adoption of the resolution by the fire board, and the statements made to the decedent with reference thereto, by two other members of appellant company. O'Hara and Hardwick, whereby it is claimed that the decedent was directed to discontinue the use of gasoline in cleaning floors, instead of being given a mere suggestion in that regard. The evidence with reference to the adoption of the resolution by the fire board tends to show that it merely provided that the promiscuous use of gasoline should not continue; that it was adopted for the purpose of conserving gasoline in pursuance of a suggestion from the United States government, and not as a safety measure. There is no evidence that the use of gasoline for cleaning floors was mentioned therein, or that it was intended thereby to prohibit its use for such purpose. In fact, it would be reasonable to infer the contrary, in view of the fact that the gasoline used for such purpose was gasoline which had been previously used in cleaning machines, and had thereby become dirty. Under these circumstances it is not reasonable to presume that the conservation of such gasoline was covered, ei-

ther by the suggestion of the government, or the resolution of the Fire Board adopted in pursuance thereof. It appears from the evidence that after the adoption of said resolution the employees named above made certain statements to the decedent with reference thereto, and to the use of gasoline for cleaning floors. Any statement made by said O'Hara may be disregarded in this connection, as the uncontradicted evidence shows that he had no control over the decedent, or his work in cleaning the floors, and that the decedent was in no way bound by what he may have said about the use of gasoline for that purpose. As to the employé Hardwick the evidence shows that he was a member of the fire board, but this fact is not significant, as it is apparent that the scope of a resolution cannot be enlarged beyond what reasonably appears from its context, even by a member of adopting body. The evidence tends to show that this witness had only a divided supervision over the decedent, but whether his supervision included the work of cleaning floors does not appear. However, the Industrial Board may have believed, as the evidence tends to prove, that in what he said to the decedent about the use of gasoline he was only attempting to communicate to him the contents of the resolution adopted by the fire board, and did not intend thereby to give him an independent order with reference to the use of gasoline. But, even if it could be said that he had authority over the decedent, with respect to the use of gasoline in cleaning floors, and that his statements to him with reference thereto should be construed as an order in that regard, there is evidence of facts from which it may be reasonably inferred that appellant company knew that it was not being obeyed, and had acquiesced in its violation, which, under the law, would have the effect of nullifying the same. In determining what its finding should be, the Industrial Board had all the evidence before it, and was authorized to draw reasonable inferences from the facts established and the circumstances shown thereby. *Haskell & Barker Car Co. v. Brown* (Ind. App. 1917) 117 N. E. 555. It reached the conclusion stated above on the question under consideration, and on the facts and circumstances shown by the evidence we cannot say there was error in so doing.

[4] Appellants also contend that the finding of facts is not sufficient to sustain the award. They base this contention chiefly on the fact that the special finding shows that prior to the time the decedent was injured it has been the custom to use dirty gasoline in cleaning the floors; that on the occasion in question the decedent was preparing to draw clean gasoline from a large tank for that purpose; that in making said preparation he secured an electric wire, which he intended to attach to a bucket for the pur-

pose of drawing the gasoline from said tank; that the wire was charged, and he accidentally took hold of the socket, whereby he received an electric shock which caused his death. They insist that these facts, when taken in connection with the further finding that the evidence does not show whether or not the decedent, and the janitors working under him, had ever used clean gasoline on any previous occasion, disclose that the accident which caused the decedent's injuries did not arise out of and in the course of his employment, and hence the appellees are not entitled to an award. This court is committed to the doctrine that the words "by accident arising out of and in the course of the employment," as used in the Workmen's Compensation Act of this state (Laws 1915, c. 106), should be given a broad and liberal construction in order that the humane purpose for which it was enacted may be realized. *Holland, etc., Co. v. Shraluka* (Ind. App. 1917) 116 N. E. 330; *United Paper Board Co. v. Lewis* (Ind. App. 1917) 117 N. E. 276. It has been said that, in order for an accident to arise out of and in the course of the employment, it must result from a risk reasonably incident thereto; that the words "out of" refer to the cause of the accident, while the words "in the course of" to the time, place, and circumstances under which the accident takes place; that the former words are descriptive of the character or quality of the accident, while the latter words relate to the circumstances under which an accident of that character or quality takes place. A quotation containing this statement, in substance, was cited with approval in the case of *Haskell & Barker Car Co. v. Brown*, supra. The difficulty, however, does not arise so much from a determination of a proper definition of the clause under consideration, as it does from an application of the same to a given state of facts. In this connection it has been frequently said that each case must be determined from a consideration of its own facts and circumstances. *Inland Steel Co. v. Lambert* (Ind. App. 1917) 118 N. E. 162.

[5] Directing our attention to the facts disclosed by the finding in the instant case, it is obvious that, if the decedent had received his injuries while preparing to obtain dirty gasoline for use in cleaning the floors, in accordance with the custom in that regard, they would have been received by accident arising out of and in the course of his employment. The question now arises whether it must be held otherwise because the finding shows that he was preparing to obtain clean gasoline for such purpose, and also shows that there was no evidence as to whether he and the janitors working under him had ever used clean gasoline on previous occasions. The Industrial Board had held, in effect, that this question must be answered in the negative, and in our opinion it

reached the right conclusion. It is apparent that the decedent was preparing to procure clean gasoline for the purpose of performing work in the scope of his employment. True, it appears that he was deviating from the usual custom in that regard, by arranging to use clean instead of dirty gasoline, but that is not sufficient to force a conclusion that the accident resulting in his death did not arise out of and in the course of his employment, as it will be presumed, in the absence of a finding to the contrary, that a servant may use some discretion in the performance of the work assigned him. Indeed, the services of an employé, who must be directed as to the details of his work under all the varying circumstances that may arise, as a rule, would be undesirable, and in many instances of little value. Under the facts found in the instant case it should not be assumed that the decedent, in attempting to procure clean gasoline to carry on his work, did a wrongful act, or turned aside from his employment so as to place himself and his dependents outside of the protection of the law, but rather that he was exercising a reasonable discretion in the discharge of his duties under the existing circumstances. *Elk Grove, etc., v. Industrial, etc.*, 34 Cal. App. 589, 168 Pac. 392. In this connection it should be observed that the Workmen's Compensation Act of this state does not limit compensation to cases where an injury is received by an employé while he is performing his work in the usual and customary manner or in the way directed. It is a fair inference that, if the Legislature had intended to so limit the right to compensation, appropriate language would have been used to indicate such fact. We are therefore justified in refusing to give it such a narrow construction, and in holding that an employé who, in an honest attempt to discharge a duty assigned him, does an act incidental thereto not specifically directed, or departs from the usual methods of performing his work, does not thereby necessarily deprive himself or his dependents, of a right to compensation, if injured while so engaged. *State ex rel. v. District Court, etc.*, 129 Minn. 176, 151 N. W. 912.

[8, 7] An employé may be said to receive an injury by accident arising in the course of his employment within the meaning of the Workmen's Compensation Act of this state when it occurs within the period of the employment, at a place where the employé may reasonably be, and while he is doing something reasonably connected with the discharge of the duties of his employment. In *re Ayers* (Ind. App. 1918) 118 N. E. 386; *Granite, etc., Co. v. Willoughby* (Ind. App. 1919) 123 N. E. 194; *N. K. Fairbank Co. v. Industrial, etc.*, 285 Ill. 11, 120 N. E. 457. It will be observed that under this rule it is not necessary that an employé, in order to receive compensation if injured, shall be performing

his duties in obedience to some direction, or in accordance with some general rule or custom. It suffices if he be doing something reasonably connected therewith. Under this rule and the facts found, the procurement of clean gasoline with which to clean the floors, even if it had never been used for that purpose before, was clearly the performance of an act reasonably connected with such work. This would be true even if the facts disclosed, as appellants contend the evidence shows, that the decedent, in attempting to procure clean gasoline for such purpose, was disobeying an order theretofore given him in that regard, as the fact of such disobedience would bear on the question of willful misconduct rather than on the question under consideration. *National, etc., Co. v. Marr* (Ind. App. 1919) 121 N. E. 545.

Under the facts found, there are no sufficient grounds on which to base a conclusion that the decedent's injury and death were due to willful misconduct. For the reasons stated, we conclude that the finding of facts is sufficient to sustain the award.

Finding no error in the record, the award is affirmed, and, by virtue of the statute, the amount thereof is increased 5 per cent.

(226 N. Y. 231)

COMBES v. GEIBEL et al.

In re STATE INDUSTRIAL COMMISSION.

(Court of Appeals of New York. April 29, 1919.)

MASTER AND SERVANT §398—WORKMEN'S COMPENSATION ACT — NOTICE OF INJURY—EXCUSE FOR FAILURE TO GIVE.

State Industrial Commission's finding that failure to give notice of injury within the time required by Workmen's Compensation Law, § 18, did not prejudice the employer or insurance carrier cannot be sustained, where no reason was shown why notice could not have been given and award of compensation under section 16 will be reversed.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings under Workmen's Compensation Act by Maria E. Combes, opposed by Henry Geibel, employer, and Bakers Mutual Insurance Company of New York, insurance carrier. From an order of the Appellate Division affirming awards by the State Industrial Commission (173 N. Y. Supp. 903), the employer and insurance carrier appeal. Order reversed, awards annulled and claims dismissed.

Charles E. Scribner, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent State Industrial Commission.

CHASE, J. The industrial commission found that—

"On or about December 13, 1916, the day when Charles Combes sustained his injury, he * * * was employed as a stableman in the livery and boarding stable, operated by the employer."

Also that—

"Charles Combes in connection with the duties of his employment was rolling out certain cans containing manure, and while so doing he accidentally slipped on the ice and snow on the sidewalk, and one of these cans fell upon him and crushed his left hand on to the sidewalk. As the result of this crushing, an infection set in which necessitated the amputation of three fingers."

Also that—

"At the time of the said injury Charles Combes was 65 years of age, and was then suffering an acute dilatation of the heart. The injury which he sustained on or about December 13, 1916, and the consequent infection and amputation of the fingers lowered the vitality of the claimant and caused the aggravation and lighting up of other conditions which he suffered, as the result of which he died on February 3, 1917, of chronic interstitial nephritis and the complicating condition which generally accompanies this condition, namely, pulmonary oedema. The disability and death of Charles Combes were therefore caused by said accidental injury."

And also—

"Written notice of the injury to the claimant and of his death was not given to the employer, respectively, within 10 days after disability and 30 days after his death, but neither the insurance carrier nor the employer was prejudiced by such failure."

The findings were made as a part of the decision and two awards based thereon; one upon a claim for compensation for disability filed by the employé January 25, 1917, and the other upon a further claim for death benefits under the statute (Workmen's Compensation Law, § 16), filed March 28, 1917, by the employé's surviving wife. The decision of the commission was not unanimous. One of the commissioners dissented. An appeal was taken from the awards to the Appellate Division of the Supreme Court, where they were affirmed by a divided vote of the court. *Matter of Combes v. Geibel*, 173 N. Y. Supp. 903.

We will assume, without deciding, that there is some evidence to sustain the findings of an injury to the employé, and that his death was caused by such injury. We do not think that there is any evidence to

sustain the finding that "neither the insurance carrier nor the employer was prejudiced" by the failure to give the notices required by the statute.

The statute as it existed in 1916 and 1917 provided as follows:

"Sec. 18. *Notice of Injury*.—Notice of an injury for which compensation is payable under this chapter shall be given to the commission and to the employer within ten days after disability, and also in case of the death of the employé resulting from such injury, within thirty days after such death. Such notice may be given by any person claiming to be entitled to compensation, or by some one in his behalf. The notice shall be in writing. * * * The failure to give such notice, unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter." Workmen's Compensation Law (Cons. Laws, c. 67) § 18.

There was no reason why notices could not have been given in this case. No pretense was made of obeying the statute quoted. Not only did the claimants fail to give the notices as provided by the statute, but no written notice of the injury or death was given to any one at any time except the claim dated January 25, 1917, that we have mentioned, and a notice by letter to the employer from the employé's wife, saying that her husband had his fingers cut in his place, and that "he (the employé) had stated by a notary public that he was hurt," and in which letter she asked the employer to look after compensation. That letter must have been written after January 25, 1917. The employer testified that in response to that letter he went to see the employé, and was told by him or by his wife that he hurt his finger on a can while working in the stable. The employé died the next day.

While the employer knew that the employé had a sore finger, he testified without contradiction that he saw the finger when the employé first commenced working for him, either late in November or early in December, and that it was then red and swollen, and that to some extent it incapacitated the employé in his work. There is no evidence of a verbal notice of the injury having been given to the commission or the employer until after January 25, 1917, and immediately before the employé's death, and no evidence of knowledge, except as stated, on the part of either that the employé claimed to have been injured on December 13th, or at any time when employed at the stable.

The findings from which we have quoted, including the statement that neither the insurance carrier nor the employer was prejudiced by the failure to give the notices required by the statute, and the ruling of the

commissioners excusing the failure to give such notice "on the ground that such failure did not prejudice the employer or the insurance carrier," are not sustained by any evidence whatever.

This court in *Matter of Bloomfield v. November*, 219 N. Y. 374, 376, 114 N. E. 805, 806, say:

"The Legislature, however, has deemed it proper and essential under ordinary circumstances that a written notice of disability and claim should be promptly served so as to give an employer the opportunity to investigate the circumstances of the claim. This requirement ought not to be treated as a mere formality or be dispensed with as a matter of course whenever there has been a failure to serve such notice." *Matter of Bloomfield v. November*, 223 N. Y. 285, 119 N. E. 705; *Matter of Hynes v. Pullman Co.*, 223 N. Y. 342, 119 N. E. 706, Ann. Cas. 1918C, 1040.

The burden rests upon the claimant who has been guilty of the default to excuse the same. *Matter of Bloomfield v. November*, supra; *Matter of Hynes v. Pullman Co.*, supra.

If the employé was injured on December 13th, as he claims, by having his finger pinched by one of the cans that he was handling, it was a mere aggravation of a prior injury or inflamed condition of the same finger. He thereafter applied home remedies, and continued at his employment with some intermissions until December 26th, when he went to a physician. At that time the physician found that the employé was suffering from heart trouble, that he had Bright's disease, "which must have existed some time," and that the finger was in a gangrenous condition, and that the infection ran halfway up his forearm. Subsequently he amputated first one finger and later two more fingers. The amputations were successful, but his other troubles grew worse, and he died as stated.

If the notices had been given as required by the statute, or even if knowledge of the alleged injury had been obtained in some other way at or about the time it is claimed that the injury occurred, there would have been an opportunity not only for a prompt general investigation of the alleged circumstances of the accident but of the employé's story thereof and there could have been an examination of the injured finger, and such care and attention could have been given to it as to have prevented infection or, if infection was not so prevented, then the facts relating to it could have been obtained from which it could have been better determined whether the infection was the result of causes other than the alleged injury. There can be no reasonable doubt that without the statutory notices or proof of knowledge of the injury and claim, the employer and insurance carrier were prejudiced.

The order of the Appellate Division should

be reversed and the awards of the Industrial Commission annulled, and the claims dismissed, with costs in this court and in the Appellate Division payable by the Industrial Commission.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order reversed, etc.

(233 Mass. 119)

OLD COLONY TRUST CO. v. DI COLA.

(Supreme Judicial Court of Massachusetts. Norfolk. May 23, 1919.)

1. WITNESSES ⇨319 — CREDIBILITY — EVIDENCE.

On a will contest for fraud or undue influence, evidence was not admissible to affect the credibility of a beneficiary as a witness, where she had not testified when it was offered.

2. EVIDENCE ⇨226(4)—WILL CONTEST—ADMISSIONS.

On contest of a will for undue influence, testimony as to what a beneficiary had said as to the beginning of her illicit relations with testator, *held* inadmissible as an admission by her, as she could not thereby prejudice the rights of the other legatees; the issue being, not the validity of the bequest to her, but the validity of the whole will.

3. WILLS ⇨164(4)—UNDUE INFLUENCE—EVIDENCE.

On contest of a will for undue influence, testimony of a son of a beneficiary who had sustained illicit relations with testator as to the circumstances and surroundings of his aunt, with whom he was left in Italy when his mother came to America, if relevant, *held* open to exclusion by the trial judge, in the exercise of his discretion, on account of its remoteness.

4. WILLS ⇨164(4)—CONTEST—EVIDENCE.

On contest of a will for undue influence, testimony of the son of a beneficiary who had sustained illicit relations with testator as to the quarrels between testator and his mother, if relevant, *held* open to exclusion by the trial judge, in the exercise of his discretion, on account of its remoteness.

5. WILLS ⇨164(4)—UNDUE INFLUENCE—EVIDENCE.

On contest of a will for undue influence, the statements of the son of a beneficiary who had sustained illicit relations with testator, made to his mother's attorney in the action wherein she secured a divorce from her husband, *held* inadmissible, as not material to the issue on trial, together with testimony as to the son's efforts in securing the divorce.

6. EVIDENCE ⇨474(4), 537 — OPINION EVIDENCE—MENTAL CONDITION OF TESTATOR.

In Massachusetts, only the witnesses to the will, testator's family physician, and experts

of skill and experience in the knowledge and treatment of mental diseases are competent to give opinions of testator's mental condition, and the mere fact that a witness is a surgeon or physician does not qualify him.

7. EVIDENCE ⇨546—OPINION—MENTAL CONDITION OF TESTATOR — QUALIFICATION OF EXPERT.

Whether a witness has sufficient knowledge, learning, and experience to state his opinion as to testator's mental condition as an expert on mental diseases is largely for the discretion of the presiding judge.

8. EVIDENCE ⇨546 — OPINION EVIDENCE — MENTAL CONDITION OF TESTATOR—QUALIFICATION OF WITNESS.

Exclusion of opinion testimony of a medical witness as to testator's soundness of mind from the time he was shot until his death *held* within the discretion of the presiding judge, in determining whether the witness was qualified.

9. EVIDENCE ⇨471(14)—OPINION EVIDENCE — ACTS AND STATEMENTS OF TESTATOR.

Questions as to whether a witness who was not an expert heard testator say or do anything which indicated that he was not of sound mind *held* competent, as calling for acts and statements.

10. WILLS ⇨164(4) — UNDUE INFLUENCE — EVIDENCE—IMMATERIALITY.

On contest of a will for undue influence, testimony of a beneficiary with whom testator had sustained illicit relations as to whether the grounds of the divorce she secured from her husband were his desertion *held* properly excluded as having no bearing on the issue.

11. WILLS ⇨164(1) — UNDUE INFLUENCE — EVIDENCE—REMOVEDNESS.

On contest of a will for undue influence, testimony as to what occurred at testator's home six years before the time of trial *held* properly excluded as remote.

12. WITNESSES ⇨406—CONTRADICTION—TESTIMONY OF ATTORNEY.

On contest of a will for undue influence, testimony of the attorney, who acted in divorce proceedings for a beneficiary who had sustained illicit relations with testator, as to statements which tended to contradict her as a witness, was admissible.

13. WILLS ⇨55(10), 166(5)—UNDUE INFLUENCE OR UNSOUNDNESS OF MIND OR UNREASONABLENESS.

The jury may consider reasonableness of the will, but the mere fact that it is unreasonable in the opinion of the jury is insufficient to show it was the result of undue influence or unsoundness of mind.

14. TRIAL ⇨236(1) — INSTRUCTIONS—CREDIBILITY OF WITNESS.

On contest of a will for undue influence, instructions concerning the divorce libel of a beneficiary who had sustained illicit relations with testator, and her statements to her attorney in such action, as affecting her credibility, *held* proper.

Exceptions from Superior Court, Norfolk County; Franklin T. Hammond, Judge.

Proceeding for probate of the will of Gaspare Di Cola by the Old Colony Trust Company, executor, contested by Antonietta Di Cola. From a decree allowing the will, contestant appealed to the Supreme Judicial Court, which framed issues for trial by a jury in the superior court. There was a verdict for the will, and contestant excepts. Exceptions overruled.

This is an appeal from the decree of the probate court for the county of Norfolk allowing the will of Gaspare Di Cola, late of Brookline, in said county, and a trial was had before a jury in this court, lasting from February 13 to March 2, 1913, of the following issues framed by the Supreme Judicial Court:

First Issue. Was the instrument now propounded for probate as the last will of Gaspare Di Cola duly executed according to law? To which the jury answered "Yes."

Second Issue. Was Gaspare Di Cola of sound and disposing mind and memory at the time of the execution of the instrument which is now propounded for probate as his last will? To which the jury answered "Yes."

Third Issue. Was the instrument propounded for probate as the last will of said Gaspare Di Cola procured to be made by the fraud or undue influence of Antonio G. Tomasello, Joseph A. Tomasello, Antonino Marchetti, Wayland F. Dorothy, and the person described in the will as the wife, Antonina Di Cola (otherwise known as Antonina Bova) or any of them? To which the jury answered "No."

The proponent introduced the testimony of the three subscribing witnesses to the will, who were fellow countrymen and friends of many years standing of the testator, and at the close of their testimony offered the alleged will and rested.

(1) Antonio Tomasello, one of the subscribing witnesses, testified on direct examination:

That, on the night of the testator's death, the woman known as Mrs. Di Cola said she was worried because the lawyer did not come. She said, "My God, why he don't come; he might die." Then I said, "Signora, what you worry about?" "Don't you care if he die without a will, because she referred to why the notary didn't come to make the will." "Why he delay to come?" I said, "Don't you care because if Di Cola die without a will I think it is better for you because by the law you going to get one-third what he got. If he make a will of course I don't know he leave you that much." She said, "You don't know, I will be left in the middle of the street."

Q. Now, you said that you didn't know that they were not married to each other? A. I didn't know.

Q. How did you happen to say to Mrs. Di Cola if he dies without a will you will get one-third? A. Because I hear the Massachusetts law will give the wife one-third interest if a

man die without a will, and knowing at that time she was his wife it naturally come to me to advise her as the law of Massachusetts would be, what I heard.

On cross-examination, the same witness testified:

Q. You did tell her, "Why do you worry, why do you care; if he dies without a will you will be better off?" A. I did because she was crying on account of the delay of this lawyer who was to come in to make a will. I said, "Don't you care whether he make a will or not. You will be taken care of anyway."

Q. And it was then she clasped her head and said, "You don't know?" A. "You don't know, I will be left in the strada, on the street."

Q. Did she say anything as to when it was that Mr. Di Cola had said anything about sending for a notary or making his will? A. She don't say nothing to me.

Q. During the time that you were in the room with Mr. Di Cola, did you have any talk, yourself personally with Mr. Di Cola? A. Well, a little. I don't think I talked more than one or two words.

The same witness also testified on cross-examination, on being asked if he knew of any quarrels between Di Cola and his wife, so called:

A. After they moved to Brookline, after Mr. Di Cola had some business in New York also, and at the time when the fruit time, lemon time arrived he went to New York several times, and she was a crying in my son's house and saying that she was left all alone, she want to move some place else, and mentioned one of my houses, and he said, "No, you stay there and I pay for the company you want, but I don't want a bastard in my house." That is the word Mr. Di Cola used that time, "I pay for a maid or anybody that you want, but I don't want the bastard in my house." We don't know what they meant. They quieted down so they went peaceful.

The same witness on cross-examination further testified:

That two days after the death of the testator at the house on the day of the funeral, Mrs. Di Cola laid her hand on the witness' arm and said, "I want to tell you, you might think I bad woman, now you know I was not his wife." And then she began to give me the story about how she got to be intimate with this Mr. Di Cola. You want me to give all that story what I can remember?

Q. I will ask you to state that.

The court excluded the testimony and the appellant duly excepted to said exclusion. It appeared that the intimacy between the testator and the woman who called herself his wife began in the town in Sicily where they both lived more than 25 years ago.

(2) The appellant called and offered to show by one Antonino Bova, the son of the woman known as Mrs. Di Cola, the circumstances of the aunt with whom she left the witness in Italy. The court excluded the

testimony because it was among other reasons too remote (occurring over 24 years ago) and the appellant duly excepted.

(3) The same witness was asked by the appellant to state the substance of quarrelsome conversations between the testator and the witness' said mother which occurred, he would have testified, about 20 years or so ago. The court excluded the testimony because, among other reasons, it was too remote and the appellant duly excepted.

(4) The same witness was asked by the appellant:

Just before you left [for Baltimore] did you hear any talk with Di Cola about your leaving?
A. I heard a little discussion in the house.

Q. What was said?

Upon it being stated that this also was 20 years or so ago, the court excluded the question because, among other reasons, it was too remote and the appellant duly excepted.

(5) The said witness was asked:

How long did you live at the house [of the testator] the second time? A. The second time about three months.

Q. And during that time did you hear any quarrels between your mother and Mr. Di Cola?

The court excluded that question because, among other reasons, it was too remote and the appellant duly excepted, the time referred to being about 13 years before the time of the trial, the appellant offering to show that Mrs. Di Cola wanted the witness to live in the house and the testator wouldn't have him there and so she sent him away.

(6) The same witness, in answer to the question: "Do you remember the talk which was had just before you went to Baltimore again?" which talk occurred about the same time, namely, 13 years ago, answered: "Yes, I just remember a little bit of a row." The appellant offered to show by this witness that his mother wanted him to live in the house, but, because the testator would not allow it, she sent him to Baltimore. The court excluded this testimony because, among other reasons, it was too remote and the appellant duly excepted.

(7) The same witness was asked:

Did you talk with your mother before you were married? A. Yes, sir. Q. What was that talk?

The court excluded the question as too remote, among other reasons, being at least 12 years before the execution of the will, and the appellant duly excepted, offering to show that the witness' mother, the person described in the alleged will as "the wife, Antonina Di Cola," said, at that time, since she couldn't keep him in the house because of Di Cola's actions, and having been obliged to send him away twice since he was in Boston, and since he was living with that washlady where she

wanted him to marry so that he might have a woman who would keep him in the home. The mother picked out this woman whom he did marry and married him off to her, the mother spending some \$800 on it, the mother stating to him that she would like to do more but Di Cola objected to it. She had about \$2,000 in the bank in her name, and from that she had got \$800 that came from her money and not Di Cola's, and Di Cola did not know anything of that. The result of that conversation was he got married to this girl, whom the mother had picked out for him. The mother told him, when she objected to having him sent back to Baltimore, Di Cola became very angry and absolutely refused to have him in the house.

(8) The appellant offered to show by the same witness that he went to the office of George F. Moulton, Esq., from six to eight times in 1913 or 1914, and told Mr. Moulton of the illicit relationship existing between the testator and the mother of the witness, and that they must get married; that Mr. Moulton, in accordance with his instructions, sent for Mr. Di Cola and the mother of the witness and told them, not in the presence or hearing of this witness, what the witness had told him, and that as a result of the witness' efforts the divorce proceedings were started, being originated, not by the witness' mother, but by himself, and that, shortly before the testator was shot, the witness was informed that the testator and the witness' mother were to be married, and the witness then ceased further prosecution. The court excluded this evidence and the appellant duly excepted.

(9) Dr. Albert Ehrenfried, called as a witness by the appellant, testified in substance that he had been practicing since 1905, having received his medical education at Harvard Medical School and the Boston City Hospital; that he had been teaching at Harvard Medical School most of the time since his graduation and had been on the surgical staff as first assistant surgeon at the Children's Hospital; that he had had quite a good deal to do with surgical shock at the Boston City Hospital, and the cases of surgical shock coming in there are very frequent relatively, and during his experience at the City Hospital he had seen a goodly number; that he had seen cases of surgical shock in his ordinary surgeon experiences in the practice of surgery; that cases of other traumatic shock have been more frequent in the City Hospital, where severe accident cases have been brought in every day; that at the present time, and for eight or nine months previous, he had been inspector in the School of Military Surgeons being conducted under the auspices of the Harvard Medical School; that he had written two text-books on surgery, one entitled, "Surgical After Treatment" first published nine years ago, and the other one is a system of text-books of sur-

gical operations, of which two volumes had then been published.

Q. Are you a physician and surgeon? A. I am a surgeon.

Q. How long have you been practicing as a surgeon? A. Ever since my graduation from the Medical School in 1906.

Q. What has been the nature of your experience in the professional work that you have done? A. You mean surgical or otherwise?

Q. Yes, and also the nature and extent as you have practiced it? A. I have practiced nothing, practically nothing, but surgery since I graduated; been on the surgeon staff of the Boston City Hospital, first assistant surgeon for five years up to January 1st, surgeon at Boston Consumptive Hospital, junior assistant surgeon Children's Hospital and have been connected as a surgeon with other institutions.

Q. Any other experience beside that? A. I have seen cases of post-operative surgical shock in my ordinary experience in the practice of surgery.

Q. You say practically all your work has been surgery since you graduated from Medical School? A. Yes.

Q. Is that what you said? A. Yes; I could qualify that by saying City Hospital for about eight months of hospital training has work on the medical staff.

Q. These two cases comprise practically your whole experience? A. Yes, sir.

He then testified as follows:

Q. Will you state what surgical shock is? A. Surgical shock is exhibited first by complete relaxation of the patient, muscular relaxation. The skin becomes pale, cold, sweaty; the pulse becomes rapid, thready; the blood pressure falls; the body temperature falls; there is an inhibition of sensation; in other words, the patient does not feel. All his senses are dull; he does not complain; he does not feel pain; he may be irritated, and irritated repeatedly, without responding, unless the irritation is increased; his breathing becomes rapid and he presents an appearance of torpor. His eyes are dull, staring; his pupils are dilated, react slowly; all his reflexes are slow. He takes no interest in what is going on about him; his condition develops progressively into a condition of stupor, which becomes in the course of hours coma and death.

Q. Surgically what is the effect upon the brain? A. The effect on the brain is to create anemia or a lessened flow of blood to the brain, which of course has its evidence in a mental apathy and torpor and low reaction which the patient shows.

Q. Surgically what aspect does it take on the brain, I am talking about in case of shock? A. I don't know as it has any surgically. I don't know of any surgical effect on the brain apart from what I have described.

Q. Well, what mechanical effect has it upon the brain? A. It produces anemia of the brain in the sense of surgical.

Q. What effect has it on the numerous cells of the brain? A. It has been shown by studies that the cells degenerate, at least show signs of degenerative changes in shock.

Q. Now, what are these cells and what function is theirs? A. The brain cells, of course,

are the vital influence in the brain. The functioning part of the brain, of course, is the brain cell. The brain cells are connected by little fibers of association. The brain cell itself is the living part of the brain.

Q. You refer to both parts of the brain, the cerebellum and the cerebrum? A. Yes, sir.

Q. How is the presence of that interference with the brain cells manifested in the functions of the brain as to performance? A. Why, this condition, this reaction of the brain cell through surgical shock is manifested by all the things that I have described.

Q. Describe them again, please? A. Stupidity, torpor, relaxation, stimuli, lower temperature, lower blood pressure, increase of heart rate; all the other bodily evidences of shock arise automatically.

Q. Now the cause of surgical shock is what? A. In the brain and the centers of these things surgical shock as best described is the condition in which the vital energy of the brain discharges suddenly, rapidly, far more rapidly than the body can recuperate this energy. As a result of the injury there is a sudden discharge of this energy beyond the power of the body to recuperate. In cases that are not fatal the condition exists until the body can recuperate this vital energy; then the coma and other symptoms disappear.

Q. The exhaustion of the vital energies as the result of shock is that measured by the progress of the changes in the brain cells? A. It has been shown that the brain cells in shock show characteristic changes.

Q. What are those? A. Under the microscope the cell in a person dying from diseases in the ordinary way, the cells are plump in outline; and in cases of dying in shock these cells, instead of being plump, rounded, are shrunken and shriveled.

Q. At what point, following the cause, the primary cause, does that impairment or change take place in the cells? A. If we measure that by the reaction of the patient, I think it is fair to assume that the condition is initiated at once.

Q. Do those changes in the cell and attendant effects exist ever in other shock than a surgical shock, the distinctive surgical shock? A. Well, they would exist also in what is called psychic shock.

Q. Psychic shock? A. Some cases die of shock, even without any grave injury. For instance, a man that I have seen, a case, a man may be struck by an electric car and show no signs of injury of any kind, no bruises, and still has died of shock. We called that psychic.

Q. It is a form of surgical shock? A. Yes, sir.

Q. And the presence of this change in the cells, the exhausted condition of the cells, the shriveling up and the shrinking, occurs in that shock? A. It has been shown in psychic shock.

Q. So psychic shock classifies as surgical shock on account of the coincidence of that result? A. Rather than the fact it was initiated by trifling injury.

Q. It is merely the cause of the shock, a different cause, but the surgical shock is the same always? A. Yes.

Q. So when the word "shock" is used, or "surgical shock," either of them mean the same facts from the same or different causes? A. Yes, sir.

Q. Now, assuming that on September 20, 1916, about 10 o'clock at night, a man 50 years old, weighing about 179 pounds, was walking on Beacon street, Brookline, with a companion. He was shot from behind, five bullets entering his body, and that he collapsed to the sidewalk; that is, he fell. I mean by that he fell to a granolithic sidewalk, and afterwards had a contusion on his head in the left frontal region over the upper end of the eyebrow, causing hemorrhage in it and swelling of the tissues of an area nine-tenths of an inch wide and 1.3 inches long, and that he lay face down without making any motion or sound; assume that shortly he was approached and asked what was the matter with him, he had fainted and there was no response from him, that the injured man was then lifted to a sitting posture and the inquiry, "What is the matter? Did you faint?" was made of him and then afterwards in a low, weak voice he uttered the single word "shot"; assume that the injured man was entirely limp, his head falling forward on his chest and that he made no movement of his body or other apparent effort to speak, that he was lifted into an automobile, placed on the rear seat, where he slumped to such a position that he was lifted again and resealed in order to have the trunk and head more erect, that he was carried to the accident room of the Massachusetts General Hospital, arriving there about 10:45 p. m., he was placed upon a steam or shock table and thereafterwards died about 5 o'clock on the morning of September 31, 1916: Now, if you will assume the facts that I have enumerated to be established by the evidence and that the person was Gaspare Di Cola, and assume that these facts assumed by this question as established by the evidence should be found true by the jury, are you able to form an opinion as to whether or not his death was from surgical shock? A. Yes.

Q. What is your opinion? A. I think he died of surgical shock.

Q. Now, assuming that he died of surgical shock and that this jury should find the facts that I have assumed and the fact that he died from surgical shock to be true, are you able to form an opinion as to the soundness of the injured man's mind from the time after he was shot until he so died on the assumption that the jury find those assumptions to be true? A. Yes, sir.

The Court: It is unnecessary to remind you of the usual rule that opinions of the sanity of the testator, outside of the family physician and attesting witnesses, can only be given by experts in mental diseases.

Mr. Nason: I understand that to be the rule. It seems to me, your honor, this witness is qualified to pass upon the soundness of the mind of persons whose death has been effected because of surgical shock. He has been for many years exclusively practicing in surgery and a constant observer.

Mr. French: I pray your honor's judgment.

The Court: It is stated, isn't it, that his specialty is not diseases of the mind?

Mr. Nason: Not diseases of the mind generally, but surgical shock distinctly. Surgical shock has a direct attack upon the brain; that incident to that attack upon the brain these things are attendant and to be observed; the stupor, the constant and accompanying stupor until death, because if death does not result from the original cause it is not surgical shock, and

of course a post mortem would determine that on examination of the brain.

Mr. French: There is no evidence in this case that there was any stupor at all.

Mr. Nason: There is evidence, if your honor please, of stupor, torpor, in the very fact of the death's being due to surgical shock. It is in evidence that surgical shock was inevitable as attending upon it, this mechanical interference and disturbance of the brain cells; the function of the brain cells has principally to do with that that controls the mental operations and that in the innumerable instances in scientific works on surgery and the practice of the surgeon make it established that these effects upon a genuine surgical shock are existent; that is, the mind loses its power to order, to comprehend, to judge, to think; that the mind, however it may work in other directions, other reflexes, is no longer powerful to co-ordinate, to order, to reason, and in that sense is not sound; that this surgical shock has incident to it a pretty invariable attendant upon it, this mental result, so that a surgeon who exclusively practices as a surgeon, who is skilled and learned as a surgeon in the literature, clinics, in all respects, etc., all those are constantly before him, so that he becomes in regard to brain effects, mental action on this single line, no other (I don't offer him on any other of the almost innumerable lines upon which mental diseases are to be considered), but holding him exclusively to this surgical shock, he becomes highly qualified, perhaps he excels with his qualifications by comparison with the man who is purely and generally an expert on other mental diseases as well as this; that is to say, the ordinary mental expert could not have the amount of exclusive and direct and particular knowledge of the effects of surgical shock upon the mind. So I offer him as a valuable expert mentally upon the effect of surgical shock.

Q. Now, doctor, you have heard this discussion; now, I will ask you to state what knowledge and experience you have had in regard to diseases of the mind in connection with your practice in surgery? A. Part of my medical school training I took such courses in mental diseases as were effected, all the courses that were offered at the Harvard Medical School, in addition to practical work at the Boston Insane Hospital, clinics at Danvers, clinics at the School for the Feeble-Minded at Waverley. Since my graduation I have not attempted to treat any cases of mental disease. I have naturally, of course, come across such cases; I have occasionally seen mental cases that required or were thought to require surgical treatment for relief of the mental condition; I have also seen mental cases complicating surgical conditions.

The witness was then asked, "What is that opinion?" The court excluded the question on the ground that the witness was not sufficiently qualified to express an opinion and the appellant duly excepted.

The witness was then asked:

Assuming the following facts to be established by the evidence: Gaspare Di Cola was shot about 10 p. m., September 20, 1916, and died about 5:04 a. m., September 21, 1916, and assume that he died of surgical shock and assume that these facts assumed by this question to be

established by the evidence should be found true by the jury, what would be your opinion on the facts thus found true on the question of the soundness of mind of said Gaspare Di Cola between the time he was shot and his death?

The court excluded the question on the ground that the witness was not sufficiently qualified to express an opinion and the appellant duly excepted. This witness was allowed to testify as to surgical and physical effect on the brain as appears herein.

Wayland F. Dorothy, who drew the alleged will, and testified as a witness in behalf of the appellee, though not a subscribing witness, was asked in direct examination the question:

During your conversation with him, Mr. Di Cola, I mean, while you were in his presence, did you hear him say anything at all which indicated to you that he was not of sound mind?

The appellant duly objected.

The Court: He is asked the facts. Witness will answer if he saw anything. He is asked for facts, not opinions, which indicated to him that the testator was not of sound mind; it is understood that he is asked for facts and not opinions.

The court admitted the answer, "No, sir," and the appellant duly excepted thereto.

The witness was further asked:

Did he do anything which indicated to you he was not sound of mind? A. He did not.

To the admission of both these questions and answers the appellant duly objected and excepted.

The so-called wife of the testator, known as Mrs. Di Cola, called as a witness by the appellee, testified in substance that she had lived with the testator as his wife right along for 24 years.

On cross-examination, she was asked:

What was said by you and Di Cola in arranging for your wedding day? A. Di Cola said to me, "I will take you to New York and I will marry you."

Q. When did he say that? A. After the divorce.

Q. He never said that before the divorce, did he? A. He said to me before the divorce—he said to me, "I swear to God that I am going to marry you, and Di Cola is going to stand by you."

Q. How long before the divorce was it that he said that? A. All the time before the last two or three years before.

Q. By before do you mean before the proceedings for divorce were begun? A. Yes, sir.

Q. Did you understand that the grounds upon which you were going to get your divorce were the desertion of your husband, Bova Conti, of you?

(Question objected to by Mr. French.)

The Court: How is that material, Mr. Nason?

Mr. Nason: I understand the offer of this evidence about divorce was to show the mind and attitude of Di Cola and the witness, so that if

an attitude of mind or state of mind is to be established as a relevant fact in this case, to determine the mind of the testator at the time he made his will, what was the understanding and in the mind of the parties to it, entirely independently of whether she deserted her husband or he deserted her, but what her understanding, her mental attitude, was, and that is why I asked this.

The court excluded the question and the appellant duly excepted.

On cross-examination, she testified that she last lived in Boston about ten years ago and she was asked:

When you last lived in Boston, you and Mr. Di Cola together, you lived on Hanover street, didn't you? A. Yes, sir.

Q. And the place where you lived on Hanover street was opposite the station house, wasn't it? A. Yes, sir.

Q. Now, at that time and shortly before you moved to Brookline, did you not on one occasion scream in a loud voice for help and cry out, "Murder! Murder!" or some expression similar? A. No.

Q. Perhaps this will refresh your recollection: Do you recall an occasion when the police entered your house from the station house in response to outcries? A. No, I don't remember.

Q. Well, now, having that in mind at that time of 1913 or thereabouts, do you now recall the police going into your house in response to outcries? A. No; I don't recall it.

Q. Do you recall going on an automobile ride with a man not Mr. Di Cola? A. I didn't go with anybody.

Q. Do you recall Mr. Di Cola charging you with having been out since on an automobile ride with a man other than himself? A. No, sir.

Q. That is, she does not remember it. A. It is not so.

Q. Now, did Mr. Di Cola say to you that it was so at or about that time just before you moved to Brookline? A. No, sir; it is not so.

(13) Thomas W. O'Donnell, police sergeant of the city of Boston, called as a witness in rebuttal by the appellant, testified that five years prior to the death of the testator, when the testator was living with the so-called Mrs. Di Cola, opposite Station 1 on Hanover street, to which station the witness was at that time attached, his attention was called to the house. Concerning this, he specifically testified as follows:

Q. And how long have you been sergeant? A. Seven years, this coming June, I believe it is.

Q. Did you know them when they lived opposite Station 1? A. I did.

Q. During the time that they lived there, did you have occasion to go to the house? A. I did.

Q. When was it, about? A. I should say about six years ago.

He was then asked:

Tell us what happened when you got to the house and what you saw.

The court excluded the question and the appellant duly excepted, offering to show by

this witness that shortly before Mrs. Di Cola moved to Brookline from Hanover street and soon after they had come from Italy in 1913, Mrs. Di Cola, so called, was heard screaming and calling for the police. This witness was across the street in the police station. On looking out he saw a crowd of people in the street, and he rushed out and across the street up into the house where the Di Colas lived, and there saw Mrs. Di Cola screaming and Mr. Di Cola in the room in a nervous rage; that Mr. O'Donnell asked him what the trouble was. At that point Mrs. Di Cola had her hair down and dress all torn; that Mr. Di Cola, being asked what the trouble was, said he had told him that she should not go out on review with women; that she had gone out against his wishes, and that was the cause of the fight; that he took Mr. O'Donnell into another room and gave him the circumstances, and we offer to show that on a previous occasion other persons heard her holler and scream in the apartment, and that that was shortly before the same time, before they went to live in Brookline.

During the appellant's direct case, and before the so-called Mrs. Di Cola testified at all, the appellant called as a witness George W. Moulton, who drew Mrs. Di Cola's divorce libel and acted as her attorney in the trial of her divorce case, and offered to show by him the statements made by her to witness concerning testator's relations with her in connection with her libel for divorce against her lawful husband and the trial of said divorce case, together with her statements to the witness and the further testimony of the witness that the testator acted as her interpreter in court at the trial of her divorce libel, together with the statements contained in the divorce libel which the testator read to her in the presence of the witness and which she signed, all of which testimony, being the same as is stated in detail under the following exception, the court excluded and the appellant duly excepted.

After the alleged Mrs. Di Cola testified in behalf of the proponents that she had lived 24 years with the testator continuously, and on cross-examination further testified that she lived happily right along with him as his wife, with occasional disputes, the appellant in rebuttal again called the witness George W. Moulton, and the following evidence was offered in the absence of the jury:

That the woman known as Mrs. Di Cola came to the office of the witness with the testator for the purpose of obtaining a divorce from Mr. Bova Conti, and made there the following statements, to which also she testified at the hearing upon her divorce libel in the superior court for Norfolk county, at which time the testator acted as her interpreter:

She came to this country about 24 years ago with her husband and two children, Matthew

and Antonio, and went to the house of her brother in Pittsburg, at which home they stayed for several weeks until dissatisfaction was aroused as to whether or not her husband was making any effort to find work, and as a consequence of the dissatisfaction on her brother's part to supporting them all longer, Mr. Bova Conti went on the date alleged in the libel as the date of desertion to Baltimore, Md., where he had a brother in the fruit business, saying that he would find work there and then send for his wife and children. She testified further several weeks went by and she had heard nothing from her husband, received no contribution from him, and her brother volunteered to go to Baltimore to trace her husband. He reported when he returned that Mr. Bova Conti had been to Baltimore, had seen and talked with her brother there, that he had taken Antonio with him from Pittsburg to Baltimore, and that he had left Baltimore to go back to Italy. When she learned those facts from her brother on his return, she remained but a few weeks longer in his home, and then taking Matthew, the younger boy, came to Boston and became the housekeeper for Mr. Di Cola; that she had ever since that time to the time of the signing of the libel been employed by him as his housekeeper; that she had never heard directly or indirectly from Mr. Bova; had never received any contribution from him in any way; that the little boy had only lived a short time after she came to Boston from Pittsburg; that he died here in Boston and is buried here; that she had worked here and had done housework always in the service of Mr. Di Cola. In substance, as I recall it, that was her testimony in reference to the desertion. I would like to go back if I may, with reference to what transpired in my office. On this occasion of signing the libel November 24, 1914, I discussed with her quite at length the statements made by her son to me with reference to what his father had told him, namely, that she had deserted his father, and not that his father had deserted her. I told her the boy had told me his father had told him that his mother had left the home one day in the company of a man whose description, according to the neighbors' account compared with that of Mr. Di Cola; that Mr. Bova came home from his route, he was a fruit peddler, I think he said, and found the house deserted. The neighbors said she had gone out that afternoon in company with a man whom he described and whom he thought to be Mr. Di Cola. So the young man told me he thought his mother had deserted his father.

Q. What did you say, and what did she? A. I asked her if that was so. I said I have no knowledge of the facts; Tony has no knowledge of the facts, except his father has told him. She persisted, and said with tears running down her cheeks, "Don't believe Tony, he is worthless." The last time she was in his home they had words, he called her a "bum," and said, "No good boy will call his mother a bum. His father had told him, his father; he is worse than he; he is a drunkard; he is worthless; he is of no account; he has left me all these years, never supported me." That is as near as I can recall it the whole discussion.

The court excluded the testimony, except as hereinafter stated, and the appellant duly

excepted; the following discussion taking place:

The Court: What I had in mind was this: How is anything in that conversation which she had with Moulton competent, except the statement she made about being housekeeper for Mr. Di Cola?

Mr. French: Or, as she says now, she worked for him.

The Court: That is what she said about her past life. How is that competent?

Mr. Nason: To contradict anything she said in this case.

The Court: She has not said anything that this contradicts, that I can see.

Mr. French: No, sir.

Mr. Nason: Why, she has said that she was Mrs. Di Cola and she has gone about and lived as Mrs. Di Cola. What could be more contradictory?

Mr. French: In the first place, the narrative regarding her past life, that is the time between the date when she ceased work at the factory, and there were no details except to show what lack of education she had, nothing between that point and her meeting Mr. Di Cola in Boston; she getting there first and he coming shortly afterwards. There has been told something, but that is all, I understand her. And I spoke with great care, thinking your honor would exclude it, in the first place, because too remote, 20 or 25 years ago, and next because I did not think it had any bearing on this case.

The Court: She did not say that she was Mrs. Di Cola.

Mr. Nason: Is that a fact which could be founded on what she said and how she has held herself out in life?

Mr. French: She has not held herself out. She has allowed herself to be held out.

The Court: It strikes me now that that impression and I think have you got any other reasons? Try another one.

Mr. Nason: I suppose in reply to your honor it might not be quite discourtesy, but perhaps contumacy, if I said that I offered it for all the reasons that it may be offered for.

Mr. French: Which is equivalent to saying that there are no reasons.

Mr. Nason: That came from the Court.

The Court: I know what that means. It is a symptom that you cannot find anything more.

Mr. Nason: I had thought of one more. I think it is substantially apropos, but it is that it bears directly upon the relation in which they stood, Di Cola and—

The Court: You see it cannot do that. The only effect it can have is to affect the credibility.

Mr. Nason: Is not anything that transpired in connection with the testator a relevant fact for whatever its tendency may be and its influence upon him?

The Court: Within limits, and I have a right to define those limits, but I don't think they come within the limits.

Mr. Nason: That your honor expressed in some of the other offers what was deemed by your honor and was presented as an objection by the other side, it is too remote.

The Court: You can found arguments either way. But, at any rate, it is plain that what she said cannot be held to be an admission in this case. That is settled, so that all this evidence merely affects the credibility. Now, I think

that under the circumstances you may show, I understand Mr. French does not wish to take the chance of an exception on that, what she told Mr. Moulton at this interview in regard to her being for 20 years or so, I think he said, the housekeeper of Mr. Di Cola to contradict her and affect her credibility on her testimony on that point; also you may show what she said at the trial on that point, on the ground that it contradicts; and also you may show that the libel was read to her and she signed it. But the rest of it I will exclude.

Mr. Nason: And in the rest of it is this fact: That she asserted that she had been true to her marriage vows, and the contradiction that is permitted includes that.

The Court: Yes; that, in fact, is the only point I can see that the libel contradicts her on a vital and material point, because I shall tell the jury that, so far as the other statements go, they are not to be taken as evidence of the fact; and I shall also tell the jury as to that petition, if it is to be taken, it is to be taken as evidence of her credibility as to whether she had been true to her marriage vows.

Mr. Nason: That is, the credibility attaches to the last statement?

The Court: I shall say it is not to be taken as evidence of the fact, but as evidence affecting her testimony.

Mr. Nason: As I understand the distinction—

The Court: The distinction is so broad—

Mr. Nason: It is to affect her credibility because it is contradictory?

The Court: Because it may be found to be contradictory. The jury may find that it is contradictory.

Mr. Nason: That would depend on something prior to and outside the case.

The Court: That is already in. Her evidence is in the case.

Mr. Nason: That her statement is in the evidence, if they can find it?

The Court: Yes.

Mr. Nason: And for all other purposes your honor bars it out, excludes it, the libel and the testimony?

Mr. French: The libel and the testimony.

The Court: You don't want a mistrial of this long case.

Mr. Nason: We have not any such desire.

The Court: If you have any other considerations to suggest I will hear them.

Mr. Nason: I have suggested the other considerations, and we are not in accord with these; you rule us out on these and note our exception.

The court allowed the following testimony of said Moulton to be given to the jury, but limited it to affecting the credibility of the alleged Mrs. Di Cola, and made the same limitation upon the divorce libel signed by her; the contestant claiming that both the testimony and the libel were admissible for all purposes and duly excepting to such limitation.

Said witness then testified:

Q. (by Mr. Nason). State your name. A. George F. Moulton.

Q. Where do you live? A. Boston, Dorchester district.

Q. What is your occupation? A. I am attorney by profession and at the present time em-

ployed as trust officer of the Fidelity Trust Company, 148 State street, Boston.

Q. Were you at one time the attorney for Mrs. Bova Conti? A. I was.

Q. When? A. In November, 1914.

Q. The paper that lies before you, have you seen that before? A. I have.

Q. What is it? A. A libel for divorce brought by Antonina Bova Conti against her husband, Mariano Bova Conti, for divorce on the ground of his desertion of her.

Q. Did you see her sign her name to that libel? A. I did.

Q. Antonina Bova Conti? A. Yes.

(Signature shown to the jury and offered in evidence and marked Exhibit 41 and read to the jury by Mr. Nason.)

Q. Did you have any conversation with Mrs. Conti in regard to her relations with Mr. Di Cola? A. I did; yes, sir.

Q. State what was said with respect to that matter. A. She said that she had worked for him as his housekeeper for 20 years.

Q. That was said at the time of the drawing of that libel? A. It was; yes, sir.

Q. Was anything said further upon that point by her at that time? A. She related the circumstances of her coming to Boston and the cause for her leaving Pittsburg.

Mr. French: The witness does not understand the question.

Q. Upon the subject of her having been housekeeper for him for 20 years preceding the date of the libel? A. That she had worked and been paid for her services; that she had worked hard all those 20 years doing his housework.

Q. Yes. A. And that from some of her earnings she had helped from time to time her son Tony and his family, who were living in the North End. In substance, that is all.

Q. Was this case, or this libel that is before you, tried out in open court? A. It was; yes, sir.

Q. Were you present? A. I was.

Q. Was Mrs. Bova Conti present? A. She was; yes, sir.

Q. Did you hear her testify? A. I did.

Q. Were you there at the time she was sworn to testify? A. I was; yes, sir.

Q. And after the administration of the oath, did she testify? A. She did; yes, sir.

Q. What did she say in regard to that? A. She testified that she had worked for Mr. Di Cola as his housekeeper for 20, about 20, years; that ever since the time of the alleged desertion she had worked for him; she had received no contribution from her husband; that she had earned her livelihood by the services as Mr. Di Cola's housekeeper. That was all that she stated in court in reference to that.

Cross-examination:

Q. (by Mr. French). At the conversation to which you refer in your office, who was present beside Mrs. Di Cola or Mrs. Bova Conti? A. Mr. Di Cola was present.

Q. Anybody else? A. No, sir.

Q. And he heard what you said and he heard what she said? A. Yes.

Q. From time to time he acted as her interpreter, did he not? A. He did.

Q. You found that she spoke very broken English? A. Very broken English; yes, sir.

Q. Some of which you found it difficult at

least to understand? A. All that she said in English, as I recall it, I am satisfied that I understood.

Q. That is, you recognized the English words that she used? A. Yes.

Q. But it is true, is it not, that she found difficulty in expressing herself in English? A. Yes, sir.

Q. So much so that, when it came in court, her testimony was given through an interpreter? A. Yes, sir.

Q. And that interpreter was Gaspare Di Cola? A. It was.

Q. In other words, both in that conference with you and in the proceedings in court, he was in one way or another helping her to obtain this divorce? A. He was; yes, sir.

Q. There were other witnesses to testify? A. There were two others who testified.

Q. Were they Italian witnesses? A. They were Italian witnesses; yes, sir.

Q. And upon all the testimony in the case the divorce was granted? A. Yes, sir.

Q. And the prayer in the divorce that she be permitted to resume her maiden name of Antonina Re was also granted? A. It was; yes, sir.

Q. And a divorce nisi, so called, the preliminary decree, was issued on the 9th day of December, 1915, to the best of your recollection? A. The 9th of December, 1915.

Q. And it did not become an absolute divorce until June 10, 1916? A. That is correct.

Mr. Nason: I offer the decree in evidence, Exhibit 42.

The remarks of the presiding judge to the jury, referred to in the last paragraph of the opinion, follow:

Now, in regard to one minor matter. I stated to counsel that I should instruct you in regard to the effect of the evidence introduced, to wit, the statement in the divorce libel, the divorce libel itself, and the statement made by Mrs. Di Cola, the woman I have been calling Mrs. Di Cola, at the time she talked to the lawyer. That evidence I admitted, the divorce libel, not because anything that is said in the divorce libel is evidence of the fact that the thing said was true. That is to say, if you read in the divorce libel that she signed, that her husband deserted her at such and such a time, you are not to take that as evidence of the fact that he did desert her. The reason why that divorce libel is competent evidence in this case is because of the statement made in it that she had always been true to her marriage vows, and, as she had testified that she had been in the position of a wife to Mr. Di Cola for 25 years, it is evidence on the question of the credibility of her testimony. It is not evidence of the fact whether she had been or not faithful to her marriage vows, but it is evidence that at some other time, on some other occasion, she had said something which you might find to be inconsistent with her statement on the stand; and the same thing is true as to what she said to the lawyer about being his housekeeper, or about keeping house for him for 24 years. If you find that is inconsistent with the statement that she made on the stand, then it is not evidence that she was his housekeeper, but it is evidence which you may take into consideration, and give it such weight as you choose to give it, as to the cred-

ibility of her evidence as a witness on this case. That, I think, is all that I wish to say. Are there any questions? Are there any points on which counsel wish me to give further instructions? If they will attend here, I will hear them.

Joseph T. Zottoli, of Boston, for appellant.
Asa P. French, Samuel L. Bailen, and Frank Leyeroni, all of Boston, for appellee.

CARROLL, J. This is an appeal from a decree of the probate court allowing the will of Gaspere Di Cola. Issues were framed and the trial was in the superior court. The woman, Antonina Bova, described in his will as his wife and known as Mrs. Di Cola, kept house for him for several years. He bequeathed to her the furnishings of the home, jewelry and Italian government bonds. She was also to receive \$100 a month during her life, and in addition was given the use of a tenement in the testator's house in Brookline. The remainder of his estate was given to his brother.

The jury found that the will was executed according to law, that the testator was of sound and disposing mind and memory at the time of its execution, and that the will was not procured through fraud or undue influence.

We deal with the questions raised by this bill of exceptions in the order in which they are discussed by the appellant.

[1, 2] 1. One of the witnesses to the will, after testifying that on the day of the testator's funeral Mrs. Bova told him she was not Di Cola's wife, was asked what she said about the beginning of her relations with Di Cola, it appearing that the intimacy between them began in Sicily, where they both lived, more than 25 years before his death. It is argued that this evidence was admissible to affect the credibility of Mrs. Bova; but there is nothing in the record to show that when the evidence was offered Mrs. Bova had testified. It was not admissible as an admission made by her, for while she was one of the parties charged with unduly influencing the testator, and a beneficiary under the will, the issue before the jury was not the validity of the bequest to her, but the validity of the whole will, and one of the beneficiaries could not prejudice the rights of the other legatees by admissions indicating her fraud or undue influence in procuring the execution of the will. *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487, Ann. Cas. 1914C, 906; *McConnell v. Wildes*, 153 Mass. 487, 489, 26 N. E. 1114, and cases cited.

[3, 4] 2. The appellant offered to show by Antonino Bova, a son of Mrs. Bova, the circumstances and surroundings of his aunt with whom he was left in Italy 24 years before, when his mother came to this country. No offer of proof was made; and even if the condition in life of the aunt were rele-

vant, the occurrence was so remote that the judge in the exercise of his discretion might properly exclude it and his decision is not to be reversed unless it is clearly unfounded. The evidence of Bova relating to the quarrels between Di Cola and his mother was properly excluded for the same reason. *Johnson v. Foster*, 221 Mass. 248, 252, 108 N. E. 928; *Aldrich v. Aldrich*, supra; *Jenkins v. Weston*, 200 Mass. 488, 86 N. E. 955; *Batchelder v. Batchelder*, 139 Mass. 1, 29 N. E. 61.

[5] 3. Mrs. Bova secured a divorce from her husband which became absolute in June, 1916. After she had testified, her attorney, in the divorce proceedings was permitted to testify to certain statements made by her, solely for the purpose of contradicting her. The appellant excepted to the exclusion of the evidence of the son Antonino Bova, to the effect that he went to the attorney's office and complained of the relationship existing between the testator and his mother and that the divorce proceedings were the result of his efforts. The record does not show at what stage of the trial this evidence was offered. The statements of Bova to his mother's attorney were not admissible, and his efforts in securing the divorce were not material to the issue on trial.

[6-8] 4. The testator was shot on the evening of September 20, 1916. He was taken to the hospital where he arrived about 10:45 that night, and died about 5 o'clock on the morning following.

Dr. Albert Ehrenfried testified that he was a surgeon whose practice was confined to surgery from the time of his graduation; and although he had taken such courses in mental diseases as were offered at the medical school "in addition to practical work at the Boston Insane Hospital, clinics at Danvers Insane Asylum, and clinics at the School for Feeble-minded at Waverley," he had not attempted to treat any cases of mental disease. He gave his opinion that the testator died of surgical shock; and that surgical shock causes anæmia, mental apathy, torpor and dulled senses. He was not allowed to give his opinion of the testator's soundness of mind from the time he was shot until the time of his death. In this commonwealth, only the witnesses to the will, the testator's family physician, and experts of skill and experience in the knowledge and treatment of mental diseases, are competent to give their opinions of the testator's mental condition. *May v. Bradlee*, 127 Mass. 414, 421. See *Commonwealth v. Rich*, 14 Gray, 335; *Emerson v. Lowell Gaslight Co.*, 6 Allen, 146, 83 Am. Dec. 621.

The mere fact that a witness is a surgeon or a physician does not of itself qualify him as an expert in mental disease. It requires special skill and experience in the knowledge and treatment of such diseases to make

a physician or surgeon competent to give his opinion on the subject. *Boston Safe Deposit & Trust Co. v. Bacon*, 229 Mass. 585, 590, 118 N. E. 906, and cases cited. Whether a witness has sufficient knowledge, learning and experience to state his opinion must be left largely to the discretion of the presiding judge, *Union Glass Co. v. City of Somerville*, 228 Mass. 202, 117 N. E. 184; *Barker v. U. S. Fidelity & Guaranty Co.*, 228 Mass. 421, 117 N. E. 894; *Jordan v. Adams Gaslight Co.*, 231 Mass. 186, 189, 120 N. E. 654; and we cannot say that there was reversible error in refusing to allow him to express his opinion of Di Cola's soundness of mind.

[8] 5. Wayland F. Dorothy, who drew the will, though not a subscribing witness, was asked if he heard Di Cola say or do anything which indicated he was not of sound mind; he answered he did not, to which the appellant excepted. Dorothy was not asked his opinion, but to state the facts as he observed them; his attention was called to the acts and statements of Di Cola; the evidence was admissible. *Gorham v. Moore*, 197 Mass. 522, 84 N. E. 436, and cases cited.

[10-12] 6. Mrs. Bova testified that Di Cola, both before and after the divorce was granted, promised to marry her. She was then asked if the grounds of her divorce were the desertion of her husband. This evidence was properly excluded; it had no bearing on the issue before the jury. The testimony of

the police sergeant describing what occurred at the Di Cola home was also properly excluded; it had reference to an occurrence 6 years before the time of the trial, and was so remote that the judge could rightly refuse to admit it. *Jenkins v. Weston*, supra. There was no error in the manner in which the court dealt with the testimony of the attorney who acted for Mrs. Bova in the divorce proceedings; he was permitted to testify to her statements which tended to contradict her, and for this purpose the testimony was admissible; the additional evidence excluded was immaterial.

[13] 7. The appellant asked for certain instructions dealing with the effect of gross inequality in the disposition of the estate as evidence of fraud or unsoundness of mind. While the jury had a right to consider the reasonableness of the will, the mere fact that it was in the opinion of the jury unreasonable, was not of itself sufficient to show that it was the result of undue influence or unsoundness of mind. *Davenport v. Johnson*, 182 Mass. 266, 65 N. E. 392. The jury were fully and accurately instructed on this point.

[14] There was no error in what was said to the jury concerning the divorce libel and Mrs. Bova's statements to her attorney as affecting her credibility. We find no error in the conduct of the trial.

Exceptions overruled.

(188 Ind. 334)

CHICAGO, I. & L. RY. CO. v. PUBLIC SERVICE COMMISSION OF INDIANA. (No. 23493.)

(Supreme Court of Indiana. June 6, 1919.)

1. APPEAL AND ERROR ¶695(1)—BILL OF EXCEPTIONS — NECESSITY OF CONTAINING ALL THE EVIDENCE.

If a bill of exceptions purporting to contain the evidence discloses on its face that it does not contain all of the evidence given at the trial, then the evidence cannot be considered on appeal to determine whether it sustains the finding.

2. PUBLIC SERVICE COMMISSIONS ¶25—SETTING ASIDE ORDER OF COMMISSION—TRANSCRIPT OF PROCEEDINGS AS EVIDENCE—BILL OF EXCEPTIONS.

Under Acts 1913, p. 188, §§ 69, 70, any part of the transcript of the proceedings before the Public Service Commission filed with the clerk of the court which is not put in evidence at the trial of the action to set aside its order, cannot be considered as a part of the evidence heard at the trial, and should not be embodied in the bill of exceptions containing the evidence to be used on appeal.

Appeal from Circuit Court, Porter County; H. H. Loring, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 121 N. E. 276.

Crumpacker Bros., of Valparaiso, and Perry McCart and C. C. Hine, both of Chicago, Ill., for appellant.

Ele Stansbury, of Indianapolis, U. S. Lesh, of Huntington, S. H. Tolles, of Cleveland, Ohio, and F. J. Lewis Meyer, of South Bend, for appellee.

LAIRY, C. J. On petition for rehearing, appellee complains of the action of this court in basing its opinion on the evidence without discussing a preliminary question presented by the briefs which, if decided in favor of appellee, would have precluded a consideration of the evidence on appeal.

[1] In its brief in answer to the assignment of errors, appellee took the position that the bill of exceptions purporting to contain the evidence discloses on its face that it does not contain all of the evidence given at the trial. If appellee were correct in this position the court could not consider the evidence for the purpose of determining whether or not it sustained the finding. *McMurrin v. Hannum* (1916) 185 Ind. 326, 113 N. E. 238; *Wagner v. Wagner* (1915) 183 Ind. 528, 109 N. E. 47.

The matter thus presented was considered by the court but was not discussed in the opinion, it being assumed that a decision based on the evidence would imply that the preliminary question mentioned had been

decided adversely to appellee. It could hardly be assumed that a court would overlook a matter so vital to the decision rendered.

[2] The record shows that a transcript of the evidence taken before the Public Service Commission on the hearing was filed with the clerk of the court in which the action was brought in accordance with the provisions of section 69 of the act creating the commission. Acts 1913, p. 187. On the trial, parts of the evidence contained in the transcript so filed were offered and admitted in evidence, and the parts so introduced are embodied in the bill of exceptions as a part of the evidence. The transcript as a whole was not offered or read in evidence, and the parts not offered in evidence are not set out as a part of the evidence in the bill of exceptions.

Appellee takes the position that, in an action brought to set aside an order of the Public Service Commission, the evidence on which the order was based, as taken before the board, when filed with the clerk of the court in which the action is brought in accordance with section 69, supra, becomes a part of the evidence at the trial, and that the court trying the cause is required to consider all of the evidence contained in the transcript so filed, even though it is not offered in evidence at the trial. Appellee therefore insists that all the evidence contained in the transcript filed with the clerk should have been embodied in the bill of exceptions as a part of the evidence heard at the trial, and that a bill of exceptions containing only the parts offered and admitted in evidence at the trial is incomplete.

Section 70 of the act cited provides, that—

A "transcript copy of the evidence and proceedings, or any specific part thereof, on any investigation taken by the stenographer appointed by the commission, being certified under oath by such stenographer to be a true and correct transcript of all the testimony on the investigation of a particular witness, or of other specific part thereof, carefully prepared by him from his original notes, and to be a correct statement of the evidence and proceedings had on such investigations so purporting to be taken and transcribed, shall be received in evidence with the same effect as if such reporter were present and testified to the effect so certified."

It is apparent from the plain provisions of the act that the purpose of the Legislature in requiring the transcript to be filed with the clerk of the court in which the action to set aside the order is pending before the case is reached for trial was to make such transcript available to either party at the trial, so that the whole of any part of the evidence contained therein might be introduced at the trial, if authenticated in such a way as to make it admissible under the provisions of section 70 supra. There

is nothing in the act to indicate that the Legislature intended that the mere filing of the transcript with the clerk of the court should have the effect of making the evidence contained therein a part of the evidence at the trial. The position of appellee on this point is untenable.

At the 1913 session of the Legislature an act was passed amending section 6 of the act creating the Railroad Commission. Laws 1913, c. 306. This section as amended provides a method of procedure in cases to be brought by any carrier or other party dissatisfied with any final order made by the commission. This section provides that in all actions in the courts of this state authorized by this act the rules of evidence shall be the same as in the trial of civil cases as now provided by law, except as otherwise provided in this act. The act of which this section is a part makes no provision for the filing of any transcript of the proceedings of the commission on which an order is based with the clerk of the court in which an action is filed to suspend or set aside the order.

If the question were presented the court would be required to decide whether the provisions of sections 69, 70, and 81 of the Public Utilities Act apply to actions brought under the provisions of section 6 of the Railroad Commission Act as amended. The court does not hold, nor does it intend to intimate by anything said in this opinion, that the sections of the Public Utilities Act providing a method of procedure in actions to set aside orders of the commission regulating public utilities as defined in that act are to be applied to the proceedings brought under the provisions of amending section 6 of the Railroad Commission Act. The holding is that any part of the transcript of the proceedings before the commission which is not put in evidence at the trial in the ordinary way cannot be considered as a part of the evidence heard at the trial and should not be embodied in the bill of exceptions containing the evidence to be used on appeal.

Petition denied.

MYERS, J. I concur in the majority conclusion that the petition for a rehearing should be denied.

Briefly stated, this was an action by appellant, under section 6 of the Railroad Commission Act as amended in 1913 (Acts 1913, p. 820; § 5536, Burns 1914), against appellee to set aside an order made by appellee in a proceeding begun under section 1, cl. (1), Acts 1917, p. 118, in force March 1, 1917, before the Public Service Commission by the Chicago, Lake Shore & South Bend Railway Company against appellant. The act under which the present action was begun provides that—

"In all actions in the courts of this state authorized by this act, the rules of evidence shall

be the same as in the trial of civil cases, as now provided by law, excepting as otherwise provided in this act."

The phrase "as otherwise provided in this act" has no application to the question here involved. The original proceeding, as well as the instant case, was brought and proceeded to final judgment in accordance with the Railroad Commission Act as amended and supplemented and in force March 1, 1917. This latter act has no provision requiring the Public Service Commission to file a certified transcript of the proceedings had before it in actions brought under amended section 6 to suspend or set aside an order as is required by section 69 of the Public Service Commission Act, where actions are commenced against the commission under sections 78 to 86 of that act. Acts 1913, p. 167; § 10052q2, Burns 1914.

Appellee contends that the transcript furnished by the commission under the provisions of section 69 of the Public Service Commission Act, and filed with the clerk of the Laporte circuit court, where this action was originally brought, as a matter of law made it a part of the evidence in this case, and as only part of it is in the record as appears from the bill of exceptions, it necessarily follows that all of the evidence is not in the record, and this court is for that reason precluded from passing upon any question requiring a consideration of the evidence. The transcript of the evidence included in the bill of exceptions before us concludes with the statement "and this was all the evidence given in said cause," and the trial court certifies to the correctness of the bill. This bill imports absolute verity. It cannot be contradicted here except only by such contradiction as affirmatively appears from the bill itself. *Citizens' Street Railway Co. v. Heath*, 154 Ind. 363, 55 N. E. 744; *Hodgin v. Hodgin*, 175 Ind. 157, 93 N. E. 849; *Baltimore, etc., R. Co. v. Kleespies*, 39 Ind. App. 151-161, 76 N. E. 1015, 78 N. E. 252; *Whisler v. Whisler*, 162 Ind. 136, 67 N. E. 984, 70 N. E. 152.

Appellee insists that the bill of exceptions containing the evidence affirmatively shows that a part of the evidence is omitted therefrom. Its contention is based upon the following statement in the record:

"Mr. McCart (attorney for appellant): We have here, your honor, the record before the Public Service Commission of Indiana, which was filed by the Attorney General of Indiana, and I now offer it in evidence.

"The Court: Is there any objection?

"Mr. Meyer (attorney for appellee): No objection.

"Mr. McCart: I offer in that record, pages 1 to 5, inclusive, which is a petition by the South Shore for this connecting track."

Other pages were designated and offered in evidence, and on conclusion of these of-

ferred pages they were read in evidence and ordered by the court that they be admitted in evidence.

It is not contended that the bill of exceptions does not contain all of the evidence offered and read in evidence from the transcript of the original case before the Public Service Commission as well as all testimony or other evidence introduced at the trial of this cause. The fact that other evidence was offered, but not introduced or ordered made a part of the evidence in the cause, does not make it a part of the evidence in the case.

This not being an action commenced against the commission under the provisions of section 78 to 86 of the Public Service Commission Act approved March 4, 1918, nor was the order which is sought to be set aside made under any provision of that act, it follows that section 69, *supra*, has no application, and appellee's contention cannot be sustained, and the petition for a rehearing should be denied.

(70 Ind. App. 363)

NEHER v. KERR. (No. 9867.)

(Appellate Court of Indiana, Division No. 2.
June 4, 1919.)

1. ACCORD AND SATISFACTION \Leftrightarrow 10(1)—COM-
PROMISE AND SETTLEMENT \Leftrightarrow 6(2)—UNLIQ-
UIDATED CLAIMS—ACCEPTANCE OF CHECK IN
FULL.

Where, on arrival of logs, buyer called seller by telephone and refused to receive the logs because they were undersized and defective, and seller ordered buyer to unload logs, stating that he would make it all right with buyer, there was such unliquidated claim that the accepting and cashing by the seller of a check sent by the buyer in full payment of the claim operated as an accord and satisfaction.

2. ACCORD AND SATISFACTION \Leftrightarrow 11(1)—COM-
PROMISE AND SETTLEMENT \Leftrightarrow 5(2)—UNLIQ-
UIDATED CLAIMS—ACCEPTANCE OF CHECK IN
FULL.

Where there is a bona fide dispute as to the amount due and owing from one to the other on an unliquidated claim, and the debtor tenders a negotiable bank check for the amount which he claims is due in full payment and settlement, and the creditor accepts and cashes it without objection, there is a discharge of the account in full.

Appeal from Circuit Court, Hamilton County; Meade Vestal, Judge.

Action by Wesley Wade Kerr against Daniel I. Neher. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

James V. Kent and Thomas M. Ryan, both of Frankfort, and Shirts & Fertig, of Noblesville, for appellant.

Floyd G. Christian, Ralph H. Waltz, and Ira W. Christian, all of Noblesville, for appellee.

McMAHAN, J. The appellee brought this action against the appellant on quantum meruit to recover a balance of \$161.45, alleged to be due and owing for lumber sold to appellant. There was an answer of general denial, payment, and accord and satisfaction, trial by court, special finding of facts, conclusions of law, and judgment for appellee in sum of \$109.62.

[1] With the exception of some technical objections which the appellee urges as to the sufficiency of appellant's brief, there is but one question in this appeal, that is, Was there such an unliquidated and disputed claim existing between appellee and appellant at the time appellant tendered appellee a check in full payment of the claim that appellee's retention of this check amounted to an accord and satisfaction of the claim sued on in this action? Appellant's brief is in substantial compliance with the rules of this court.

The facts as found by the court are: That appellee offered to sell to appellant two carloads of sugar, walnut, poplar, and cherry logs at a certain price per hundred feet. The walnut logs were to be of not less than 12 inches in diameter, and to be free from defects. Appellant agreed to purchase the logs and to pay \$4.50 per hundred feet for the walnut logs, and \$3 for the cherry and poplar logs. Appellee loaded the logs on cars, and shipped them to appellant at Frankfort, Ind. When the logs arrived at Frankfort, appellant discovered that 25 per cent. of the walnut logs were under 12 inches in diameter; that the largest one was cut half in two, and that 25 per cent. of them were what is known as culls. Appellant, on seeing the logs, called appellee by telephone, and refused to receive them because they were undersized and defective. Appellee at this time ordered appellant to unload the logs, and stated that he, appellee, would make it all right with appellant. In June, 1914, appellant paid appellee by check \$161.45. This check was mailed to appellee inclosed in a letter, in which appellant notified appellee that said check was made out for the full amount and value of the logs, and that said check was tendered in full payment for said logs, and that appellant would refuse to pay any more for them. Appellee, being so notified, accepted said check, cashed the same before the commencement of this action, and without any further communication passing between appellant and appellee with reference thereto. There was at the time appellee accepted said check a bona fide dispute between appellant and appellee as to the value of said logs and the amount which should be paid therefor. The cash value of the logs was \$271.07, which includes 602 feet of sugar lumber which the court found was worth \$6.02. There is no finding as to what was to be paid for the sugar logs. Upon these facts

the court concluded that the law was with the appellee, that appellee should recover \$109.62, and judgment was rendered accordingly. The errors assigned are that the court erred in its conclusions of law.

[2] It is well settled that where there is a bona fide dispute between two parties as to the amount due and owing from one to the other on an unliquidated claim, and the debtor tenders a negotiable bank check for the amount which he claims is due, and tenders the same in full payment and settlement, and the creditor accepts and cashes the same without objection, it is a payment and a discharge of the account in full. *Wells v. Morrison*, 91 Ind. 51; *Neubacher v. Perry*, 57 Ind. App. 362, 103 N. E. 805; *American, etc., Co. v. Baker*, 55 Ind. App. 625, 104 N. E. 524; *Miller, etc., v. Lesinsky*, 202 S. W. 992; 1 R. C. L. 194.

Appellee contends that the claim sued on was liquidated, and that the acceptance and cashing of the check for an amount less than the full amount due does not amount to a satisfaction of the account, and cites *Jennings v. Durlinger*, 23 Ind. App. 673, 55 N. E. 979, and *Meyer v. Green*, 21 Ind. App. 138, 51 N. E. 942, 69 Am. St. Rep. 344, in support of this contention. The account sued on was not liquidated. An action on quantum meruit is always unliquidated. *Chicago, etc., Co. v. Clark*, 92 Fed. 988, 35 C. C. A. 120; *Nassoioy v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695.

Although the court found that the appellant was in the wrong as to the amount due the appellee, this fact has no bearing on the question raised by appellee's retention of the check. *Neubacher v. Perry*, supra.

The claim between the parties being unliquidated and there being a good-faith dispute concerning the amount due, the court erred in its conclusions of law.

The cause is reversed, with directions for the court to restate its conclusions of law in favor of appellant, and to render judgment in accordance therewith.

(71 Ind. App. 445)

LA FONTAINE LODGE, NO. 42, I. O. O. F.
v. EVISTON, County Auditor, et al.*
(No. 9893.)

(Appellate Court of Indiana, Division No. 2,
June 5, 1919.)

1. TAXATION §251—EXEMPTION—BURDEN OF PROOF.

The burden is upon one relying upon the exemption of property from taxation to show that the property comes within some class of property which the statute says is exempt.

2. TAXATION §245—EXEMPTION OF CEMETERIES—STATUTE.

The exemption of cemeteries from taxation given by Burns' Ann. St. 1914, §§ 4447, 10144,

were not intended to relieve from taxation any property that was or is used by the owners for the purpose of gain and profit.

3. TAXATION §245—EXEMPTION—"CEMETERY ASSOCIATION"—"CORPORATION."

Where a fraternal association bought a tract of land and caused it to be laid out and platted as a cemetery, set aside 25 per cent. of the proceeds derived from the sale of lot as a perpetual care and maintenance fund for the care and maintenance of the cemetery, and from the funds so set aside purchased real estate and erected a three-story brick building, setting aside all rents and profits derived from the building as a perpetual care and maintenance fund for the cemetery, the building erected is not exempt from taxation under Burns' Ann. St. 1914, § 4447, the words "cemetery association" and "such corporation" within such statute meaning cemetery associations or corporations incorporated under the laws of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corporations.]

4. TAXATION §241(1)—EXEMPTION—CHARITABLE PURPOSES.

Where a fraternal association bought a tract of land and caused it to be laid out and platted as a cemetery, and set aside 25 per cent. of the proceeds derived from a sale of the lot as a perpetual care and maintenance fund for the care and maintenance of the cemetery, and from such funds set aside purchased land and erected a three-story building, and set aside the rents and profits derived from the building as a perpetual care and maintenance fund for the cemetery, such building is not exempt from taxation as being set aside for charitable purposes under Burns' Ann. St. 1914, § 10144.

Appeal from Circuit Court, Huntington County; Nelson G. Hunter, Special Judge.

Action by La Fontaine Lodge, No. 42, I. O. O. F., against Ovid E. Eviston and Abner H. Shafer, Auditor and Treasurer, respectively, of Huntington County. Judgment for defendants, and plaintiff appeals. Affirmed.

Lesh & Lesh, of Huntington, for appellant.
Milo N. Feightner, Claude Cline, Bowers & Feightner, and Cline & Cline, all of Huntington, for appellees.

McMAHAN, J. This action was brought by the appellant against the appellees, Ovid E. Eviston and Abner H. Shafer, auditor and treasurer, respectively, of Huntington county, to enjoin the collection of taxes which have been assessed against certain property owned by the appellant.

A demurrer for want of facts was sustained, and appellant excepted, and, refusing to plead further, judgment was rendered against appellant, and it has assigned the action of the court in sustaining the demurrer as error.

The complaint, omitting the caption and signature, reads as follows:

"Comes now the plaintiff in the above-entitled cause and complains of the defendant, and for cause of complaint avers that it is a fraternal association organized under the laws of Indiana; that, pursuant to resolutions and proceedings duly passed and performed by its board of trustees, it organized of its own membership a cemetery association, and as such it acquired title to a large tract of land situated a short distance from the corporate limits of the city of Huntington in said county and state and caused said lands to be laid out and platted as a cemetery, in which cemetery burial lots are sold indiscriminately and without regard to fraternal connections of the applicants.

"Plaintiff further avers that, pursuant to appropriate proceedings taken by the appropriate officers of said association, a certain definite portion of the proceeds derived from the sale of lots in said cemetery, to wit, 25 per cent. thereof, has been set aside as a perpetual care fund, the income of which shall be used as a perpetual care and maintenance fund for the perpetual care and maintenance of said cemetery; that from the proceeds thus derived from the sale of lots and set aside as a perpetual care fund as aforesaid said association purchased the east one-third of lot 127 and the west one-third of lot 128 in the original plat of the town, now city, of Huntington, Ind., and upon said real estate it has erected a three-story brick building; that by the terms of the deed pursuant to which said property was purchased, as well as the proceedings of said association, all of the rents and profits derived from said property and building are set aside to be used as a perpetual care and maintenance fund for the care and maintenance of said cemetery; that said cemetery is suitably located for burial purposes, and is the common, public burial place at Huntington; that the plaintiff herein cannot derive any pecuniary benefit or profit from said property, nor can any of the rents or profit received therefrom be used for any purpose other than for the care and maintenance of said cemetery.

"Plaintiff further avers that the defendants herein have caused said property to be placed on tax duplicate and other tax records, and have caused them to be assessed for taxation; that they are demanding taxes thereon and threatening to sell the same for taxes unless the same is paid.

"Plaintiff further avers that said property is exempt from taxes under the laws of the state of Indiana, and the defendants are wrongfully, without authority of law, proceeding to expose it to illegal demands for taxes and threatening to sell the same unless said demands are paid; that the action of said officers in placing said property on the tax duplicate constitutes a cloud on the plaintiff's title.

"Wherefore plaintiff prays the court to enjoin the defendants from exposing said property to sale, or making any efforts to collect taxes on said property, and to quiet its title against any and all claims of the defendants, and for all further and proper relief in the premises."

The only question which we are called upon to decide is whether the said building

and the land upon which it stands are subject to taxation.

Appellant contends that the said property is exempt from taxation, and in support of this contention cites sections 4447 and 10144, Burns' R. S. 1914, which reads as follows:

Section 4447:

"That in all cases where cemeteries incorporated under the laws of this state upon such a basis that the corporation cannot derive any pecuniary benefit or profit therefrom; and in all cases where a cemetery association shall provide for setting aside a certain definite portion of the proceeds derived from the sale of lots as a perpetual care fund, the income from which shall be used as a perpetual care and maintenance fund, all the property and assets belonging to such corporation used exclusively for cemetery purposes shall be exempt from taxation for any purpose: And provided, that it shall be lawful for any person to provide a fund, either by gift, bequest or devise, which may be a perpetual fund, the income from which shall be used for the care and maintenance of any cemetery lot expressly described in the instrument creating the fund, and the fund so created shall be exempt from taxation for any purpose; and a trust may be created for the care, custody and control of such fund: Provided, that the real estate of any such corporation lying within any incorporated city or town shall not be exempt from liability for street improvements and sewer assessments, as now or may be hereafter provided by law."

Section 10144, cl. 5:

"The following property shall be exempt from taxation: * * * Every building used and set apart for educational, literary, scientific or charitable purposes by any institution, or by any individual or individuals, association or corporation, or used for the same purpose by any town, township, city or county, and the tract of land on which such building is situated; also the land purchased with the bona fide intention of erecting buildings for such use thereon, not exceeding forty acres; also the personal property, endowment funds and interest thereon belonging to any institution, town, township, city or county, and connected with, used or set apart for any of the purposes aforesaid."

Section 10144, cl. 6, exempts every cemetery from taxation.

Section 1, art. 10, of the Constitution directs the Legislature to provide for a uniform and equal rate of assessment and taxation for all property, excepting only such as is used for "municipal, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

[1, 2] As said by this court in *Oak Hill Cemetery Co. v. Wells*, 38 Ind. App. 479, 78 N. E. 350:

"As appellant is relying upon the exemption of its property from taxation, the burden was upon it to show that its property came within some class of property which the statute says is exempt."

The exemptions given by the statutes were not intended to relieve from taxation any

property that was or is used by the owners for the purpose of gain and profit.

[3] The appellant's first contention is that the property in question is exempt under the provision of said section 4447 which provides that, where cemetery associations shall set aside a definite portion of the proceeds derived from the sale of lots as a perpetual care fund, the income of which shall be used as a perpetual care and maintenance fund, all the property and assets belonging to such corporation used exclusively for cemetery purposes shall be exempt from taxation.

The appellant is neither a "cemetery association" nor a "corporation" organized under the laws of the state for the purpose of owning and maintaining a cemetery. It is, as alleged in the complaint, a "fraternal association," and as such bought a large tract of land which it caused to be laid out and platted as a cemetery 25 per cent. of the proceeds derived from the sale of lots being set aside as a perpetual care and maintenance fund for the care and maintenance of said cemetery. From the funds so set aside the appellant purchased the real estate in controversy and erected thereon a three-story brick building, and by some kind of proceedings appellant set aside all the rents and profits derived from the said building as a perpetual care and maintenance fund for said cemetery.

Said section 4447 is the first and only section of an act amending section 1 of "An act exempting from taxation the property of cemeteries organized under the laws of the state, upon a basis which prevents the corporation from deriving therefrom pecuniary benefit or profit." Acts 1895, p. 18.

In construing section 4447 we must keep the title of the act in mind, and when that is done it is clear that, when the Legislature used the words "cemetery association" and "such corporation," it meant cemetery associations or corporations incorporated as such under the laws of this state. That part of said section under which appellant is claiming exemption from taxation would read as follows:

"In all cases where a cemetery association, incorporated under the laws of this state, shall provide for the setting aside of a certain definite portion of the proceeds derived from the sale of lots as a perpetual care fund, the income of which shall be used as a perpetual care and maintenance fund, all the property and assets of such cemetery corporation used exclusively for cemetery purposes shall be exempt from taxation."

We hold that the property in question is not exempt from taxation under section 4447.

[4] Appellant next contends that the property in question has been set apart for charitable purposes, and that it is therefore ex-

empt from taxation under section 10144, hereinbefore set out.

This contention is not supported by principle or authority. Our judgment is that the property in question is not set aside for charitable purposes and that it is subject to taxation.

There was no error in sustaining the demurrer to the complaint.

Judgment affirmed.

(70 Ind. App. 342)

ORR et al. v. STATE. (No. 10448.)

(Appellate Court of Indiana, Division No. 2.
May 27, 1919.)

1. INFANTS \Rightarrow 16—"DEPENDENT CHILD."

A child is not a "dependent child," within the meaning of Burns' Ann. St. 1914, § 1642, although both parents have left her, where a grandparent has always sheltered, clothed, and nourished her, and desires to do so in the future.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Dependent Child.]

2. INFANTS \Rightarrow 16—"NEGLECTED CHILD."

A child who has been abandoned by its parents, and who has been taken by grandparents into their home and treated with great affection as a member of the family, cannot be said to be a "neglected child," within the meaning of Burns' Ann. St. 1914, § 1643, defining a neglected child to be one who has not proper parental care or guardianship.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Neglected Child.]

3. INFANTS \Rightarrow 16—CUSTODY OF CHILDREN—PROVINCE OF COURTS.

It is not the province of the courts to determine generally what conditions or exigencies will warrant the state in seizing the children of its citizens and making them wards of the state, such being a legislative function, which cannot be delegated to the courts.

4. INFANTS \Rightarrow 16—NEGLECTED AND DEPENDENT CHILDREN—PROCEEDINGS.

A proceeding under Acts 1907, c. 41, relating to neglected children, should not be prosecuted in the name of the state; Acts 1903, c. 237, and Acts 1905, c. 145, as amended by Acts 1917, c. 111, relating to juvenile offenders and juvenile delinquents, not being applicable.

5. INFANTS \Rightarrow 16—DEPENDENT CHILDREN—ENVIRONMENT.

Action of the court in declaring one "a dependent and neglected child" within the meaning of Burns' Ann. St. 1914, §§ 1642, 1643, on the ground that the child's environment was bad, cannot be sustained, where court immediately recommitted the child to the home from which it was taken; it appearing that the real controversy was between the child's grandparents and the child's mother, the mother having threatened to take the child from the home of the grandparents.

6. INFANTS §16—CUSTODY.

Burns' Ann. St. 1914, § 1643, relating to dependent and neglected children, cannot be used alone for the purpose of deciding a controversy between mother and grandparent as to who should have custody of a child.

7. PARENT AND CHILD §2(2) — CUSTODY — RIGHTS OF PARENT.

Under Burns' Ann. St. 1914, § 3063, a grandparent is not entitled to the custody of a child as against a parent, unless a strong case is made against the parent.

8. INFANTS §16—DEPENDENT AND NEGLECTED CHILDREN—ABANDONMENT.

In a proceeding under Burns 1914, §§ 1642, 1643, to have one declared a dependent or neglected child, a mother who left home on account of abnormal sexual demands of an insane husband held not to have abandoned or deserted the child.

Appeal from Circuit Court, Howard County; Wm. C. Overton, Judge.

Proceeding by the State against Villa Kathryn Orr and others. Judgment for the state, and defendant, by her mother, Kathryn Ellen Orr, appeals. Reversed.

On August 24, 1918, one Julia Sumption, the probation officer of Howard county, filed in the circuit court an affidavit which is the basis of this proceedings. The following is the substance of her affidavit:

"Villa Catherine Orr is a female child under 17 years of age; the father of said child is Harry B. Orr, who is domiciled and is a resident in Howard county; the mother of said child is Catherine E. Orr, who is domiciled and is a resident in Pittsburgh, Pa.; said child is a dependent and neglected child, within the meaning of the statute in such cases made and provided, in that her environment is such as to warrant the state, in the interest of said child, in assuming her guardianship, and she should be made a public ward by order of said court."

On the same day said probation officer filed in said court her statement, denominated "report." This report discloses that said child was three years of age on March 2, 1918; that her health is good; that her father's name is Harry Blaine Orr, and his address 1501 N. Kennedy, Kokomo, Ind.; that her mother's name is Kathryn Ellen Orr, whose address is unknown. Said report continues:

"Kathryn Ellen Orr, the mother of Villa Kathryn, deserted her and took up her residence in another state about a year ago. The father, Harry Blaine Orr, also neglected her; and, as the family has always made its home with the parents of Mr. Orr, the care of the children fell upon them. Leroy S. Orr and Mary E. Orr, grandparents of Villa Kathryn, are anxious to adopt her; and since I find that she is a dependent and neglected child, and their home altogether satisfactory, I recommend that she be made a ward of the court of Howard county until adopted."

On the same day, the child and her father being present in court, the mother being absent, the matter was submitted, and the court made the following record:

"That the defendant was born March 1, 1915; that the environment of the defendant is such as to warrant the state of Indiana, in the interest of said defendant, in assuming her guardianship, and she is therefore made a public ward and a ward of the juvenile court; and it is ordered that the probation officer of this court place said child in the care and custody of Leroy Orr and Mary E. Orr, her grandparents, at 1501 N. Kennedy street, Kokomo, Ind., until the further order of the court."

On September 24, 1918, the mother of said child appeared in court and moved to set aside the submission, which motion was sustained. The cause was immediately resubmitted, and thereupon the court made the following record:

"The court having heard the evidence, and being well advised in the premises, finds that the defendant is a dependent and neglected child, and that her environments are such as to warrant the state in assuming her guardianship, and she is hereby made a ward of the juvenile court. And it is ordered that the probation officer place said child in the care and custody of Leroy Orr and Mary E. Orr, her grandparents, who live at 1501 N. Kennedy street, Kokomo, Ind., until the further order of the court."

The mother then filed a bond and took a term-time appeal, which she is prosecuting in the name of her child.

On October 19, 1918, presumably pursuant to section 1635, Burns 1914, the trial court filed its special finding of facts. This document is voluminous, and consists of 15 consecutively numbered items. So much of the substance thereof as is essential to an understanding of our decision is as follows:

"Harry Orr and Kathryn Orr were intermarried in August, 1906, and are the parents of three children, of whom Villa Kathryn Orr is the youngest, she being three years of age. Leroy S. Orr and Mary Orr are the parents of Harry Orr. Continuously since their marriage, and until August 15, 1917, the parents of these children made their home with his father, Leroy S. Orr.

"Shortly after the marriage of said Harry Orr and Kathryn Orr he suffered a nervous breakdown. He spent some time in the West for his health, and returned to the home of his parents, where his family had remained. About April 7, 1917, said Harry Orr was adjudged a person of unsound mind, and was committed to the Central Hospital for the Insane at Indianapolis, Ind., where he remained as an inmate until August 10, 1917, at which time he was paroled, not as cured, but as safe to be at large. When he was permitted to leave said hospital, he returned to the home of his parents, where he continues to reside.

"All said children were born in the home of said Harry Orr's parents, where they have lived until the present time. Said Harry Orr has

not been able to furnish suitable support and maintenance for his wife and children, and his parents have furnished what he thus lacked, except that said Kathryn Ellen Orr worked a few weeks and earned some money. Said Harry Orr and wife have no property.

"The grandparents at all times have treated their daughter-in-law and her children with uniform kindness, have helped to care for them at all times, and sometimes have cared for them entirely.

"A short time after the marriage of said Harry Orr and Kathryn Ellen Orr they commenced having disputes and quarrels, and they continued to have them until their separation, on August 15, 1918. As soon as said Harry Orr returned from said hospital he and his wife resumed their quarrels, and she declared her intention of leaving. Just before August 15, 1917, she received a telegram that her mother at Pittsburgh, Pa., was sick. At her request said Leroy S. Orr furnished her the money to go to her mother. Her mother recovered in three or four weeks; but said Kathryn Ellen Orr sent for her clothes, and since then has made her home with her said mother. Prior to leaving, said Kathryn Ellen Orr, knowing the physical and mental condition of her husband, did not make, or try to make, any arrangements for the care and support of her children, but left them with their said grandparents. She has not since contributed to their support, except that she sent some Christmas presents to her husband for them, and he returned the presents to her.

"Ever since said June 15, 1917, said Kathryn Ellen Orr has made her home with her mother and her brother at Pittsburgh, Pa., and she is engaged at work there which takes her away from home every day. Her mother is 63 years of age and has no property. Her brother is 35 years of age, unmarried, and has no property except he may have a little money. Her mother and brother are willing to receive her children into their home.

"Before said Kathryn Ellen Orr left her husband she corresponded with other men and was guilty of unfaithfulness to him, and she is not a suitable person to have the care and custody of her said children.

"Ever since a short time after the marriage said Harry Orr has been and still is nervous, irritable, suspicious, and mentally and physically unsound. He is now able to work at times, and at times he has bad spells, at which times he is unable to work and is hard to get along with, and has been unfaithful to his wife, and he is an unfit person to have the care and custody of his said children. A strong attachment exists between said children and their grandparents.

"Said Leroy S. Orr and his wife do not have much property; but they have good health, and are suitable and proper persons to have the care, custody, and management of said children. All said children have been, and still are, dependent upon said grandparents for support. Their surroundings and the condition and conduct of their parents have been such as to warrant the court in making them, and each of them, wards of the court. The defendant Villa Kathryn Orr is a neglected and dependent child under 12 years of age.

"Said grandparents had these proceedings brought for the reason that said Kathryn Ellen Orr had threatened to take said children, and said grandparents desired to gain such

legal control of said children as would enable them to keep said children together, and raise, care for, and control them, and they have thought that they might adopt them as their own children."

Don P. Strode and Barnabas C. Moon, both of Kokomo, for appellant.

Ele Stansbury, of Indianapolis, and John B. Joyce, of Kokomo, for the State.

DAUSMAN, J. [1] By section 1642, Burns 1914, the Legislature has defined a dependent child as follows:

"The words 'dependent child' * * * shall mean any boy under the age of sixteen years, or any girl under the age of seventeen years, who is dependent upon the public for support, or who is destitute, homeless or abandoned."

There is no evidence tending to prove that Villa Kathryn Orr is a dependent child as defined by said statute. Indeed, the special finding of facts conclusively shows that she is not a dependent child. She has never been a charge upon the public. She has never been destitute, homeless, or abandoned. During her entire life she has been in the home of her grandfather, where all concerned lived together as a common family. In that home she has been sheltered, clothed, and nourished, and (excepting the last year) has had what is generally regarded as the greatest blessing to a little child, a mother's care; and evidently the trial court is strongly of the opinion that the grandfather's home is the best place for her now. Under these circumstances, the action of that court in adjudging her to be a dependent child is wholly unwarranted.

By section 1643, Burns 1914, the Legislature has defined a neglected child as follows:

"The words 'neglected child' * * * shall mean any boy under the age of sixteen years or any girl under the age of seventeen years, (1) who has not proper parental care or guardianship; (2) or who habitually begs or receives alms; (3) or who is found living in any house of ill-fame, or with any vicious or disreputable persons; (4) or who is employed in any saloon; (5) or whose home by reason of neglect, cruelty or depravity on the part of its parent or parents, guardian or other person in whose care it may be, is an unfit place for such child; (6) or whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship."

[2] With respect to clause 1 of this section of the statute, it might be contended that, since the father is insane and the mother away, the child is without proper parental care. But that contention is excluded by the undisputed evidence and the facts found by the court. The child was left by the mother in the custody of its grandparents, who have so great affection for the little girl that they desire to keep her even to the exclusion of the mother, and the grandpar-

ents are suitable persons to be intrusted with the child's care. It is not unusual for grandparents to take into their home grandchildren whose parents have been rendered unable through misfortune to provide for them. When a grandfather takes his grandchild into his home and treats it as a member of his own family, the relation between them becomes akin to that of parent and child. He is said then to stand to the child in the relation of *loco parentis*, and the doctrine of *loco parentis* has long been known to the law. 20 R. C. L. 593. Under the circumstances of the case at bar there can hardly be a difference of opinion on the proposition that the child does not come within clause 1 of the statute under consideration.

The uncontroverted evidence, together with the action of the trial court, precludes any contention that the child comes within clause 2, 3, 4, or 5, and here is not even a suggestion to that effect.

[3] It will be observed that the first five clauses of said section 1643 are specific; but the last is general. "Environment" is a word of broad significance. Just what the Legislature intended by this last clause we do not know. We assume, however, that it did not intend thereby to confer unlimited authority on the courts to determine arbitrarily and generally what sort of environment will justify the state in assuming control of infants. It is not the province of the courts to determine generally what conditions or exigencies will warrant the state in seizing the children of its citizens. To determine and declare the general policy of the state on this subject is a legislative function, which cannot be delegated to the courts.

[4] The courts are frequently required to determine who shall have the custody of a child, as between adverse claimants thereto, in divorce and habeas corpus cases; but such cases must be distinguished from cases arising under the statute now under consideration. Acts 1907, p. 59. And this act must not be confounded with the act of March 10, 1903, or the act of March 6, 1905, amended in 1917. See Acts 1903, p. 516; Acts 1905, p. 440; Acts 1917, p. 341. The act of March 10, 1903, relates exclusively to children of the class commonly known as juvenile offenders; the act of March 6, 1905, as amended in 1917, relates exclusively to children of the class commonly known as juvenile delinquents; and neither of said acts has any application whatever to the case at bar.

Evidently the three legislative enactments to which we have just referred have been confused by the trial court and by all others concerned in the prosecution of the case at bar. The cause is entitled "The State of Indiana v. Villa Kathryn Orr." The attorney who prosecuted the proceeding is designated in the bill of exceptions "Attorney for the State of Indiana" and "Counsel for the State," and he has indorsed his approv-

al on the bill. It does not appear by what authority the state was made a party to this proceeding, or by what authority said attorney appeared on behalf of the state, or by whom he was employed. Why was the three-year old child made the defendant? Surely this baby is not a criminal, or a juvenile offender, or a delinquent child. If the proceeding be regarded as distinctively an action by the state of Indiana against the child, it is certainly unique. It appears from the record that the child was brought into court without the issuance of any writ, and the trial proceeded with no one to represent the helpless child defendant. The father was present at the first hearing, but every one concerned knew him to be insane. The grandfather was present at that hearing, but he is the person who instigated the proceeding.

A lawyer who knows the meaning and value of constitutional limitations should be quick to perceive the element of tyranny involved; and any man who has grown up under the protection of the federal and state Constitutions, and who is imbued with American ideas of civil liberty, and endowed with a sense of fairness, even though he be not a lawyer, should intuitively know the danger of such unrestrained exercise of power.

Section 3 of the Act applicable herein provides that "the Judge of the juvenile court in any county shall hear every case brought by any person, or by the board of children's guardians, concerning a dependent child or a neglected child." Section 6 provides that "neither the board of children's guardians, nor any other person bringing a case of a dependent, or a neglected child before the court under the provisions of this act, shall be liable for the payment of any court costs." These provisions of the statute indicate clearly that the Legislature did not intend that the state should prosecute the proceeding.

The complaint was filed by one Julia Sumption; but it is clear that the grandfather is the real party in interest, and that the contest is between him and the mother of the child. He is seeking to bring about a situation which in his opinion will enable him to adopt the child without notice to the mother, thereby avoiding any resistance which she might otherwise make to the adoption. But the relation of parent and child cannot be severed arbitrarily without notice to the parent. See *Van Walters v. Board*, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431; *Wilkinson v. Board*, 158 Ind. 1, 62 N. E. 481. When the proceeding was instituted the mother was temporarily in Pennsylvania. Her address was known to the grandfather, and, if not known to the "attorney for the state," he could readily have obtained it. But no effort was made to notify her, and she knew nothing of the proceeding until two weeks after the first hearing, when she received a letter from a neighbor informing her what

had been done with her child. Thereupon she returned, and is making an effort to protect her natural and lawful right.

The complaint charges that the child is a dependent and neglected child, in that her environment is such as to warrant the state, in the interest of the child, in assuming her guardianship; and, in order to gain possession of the child, the trial court has done the only thing it could do with any hope of success, viz. adjudged the child to be "a dependent and neglected child," within the meaning of clause 6 of section 1643.

[5, 6] The action of the trial court is strangely contradictory. Evidently the trial court was of the opinion that the home in which the child was living was "altogether satisfactory," for he immediately recommitted the child to that home. If the trial court had found that the grandfather's home was not a suitable place for the child, and that the child's environment was bad because of the constant presence of its unfortunate, but insane, father, we could understand that the court was endeavoring to promote the welfare of the child. But as the record stands, it is too clear for any difference of opinion that the controversy in reality is between the child's grandfather and its mother. The law provides ways by which such controversies may be properly presented and determined, but the statutes under which the proceeding was ostensibly brought cannot be used for that purpose.

[7] The grandparents are to be commended for their kindness in assisting their unfortunate son and his family. But their affection for the child cannot be permitted to prevail as against the mother, unless a strong case be made against the mother. The relation of parent and child is not created by the law of the state. It is a natural relation, and in all civilized countries it is regarded as sacred. *Gilmore v. Kitson*, 165 Ind. 402, 74 N. E. 1083; 12 R. C. L. 1105 et seq.

The policy of the state, as declared by the Legislature, is that the father shall have the custody of his infant children if he be a suitable person. But if the father be not living, or if he has abandoned his children, or if he be under disability, or if he be an unfit person to have the custody of his infant children, then the mother succeeds to the right of custody if she be a suitable person. Section 3065, Burns 1914. In the case at bar the father is insane, and that fact entitled the mother to assert her claim to the custody of her child.

We are impelled by a sense of duty to say that a gross injustice has been done this mother. In item 8 of its special finding the court says that prior to leaving the home of her husband's parents she knew the physical and mental condition of her husband, and did not make, or try to make, any arrangements for the care and support of her chil-

dren. The uncontroverted evidence shows that statement to be unwarranted. The mother is 31 years of age. Her husband told her she could not remain in the family and that she would have to leave. She discussed the matter with his father, who thereupon gave her money to pay her transportation to Pittsburgh, and advised her to go. In the presence of his parents, her husband accused her of improper conduct with men, and also made that charge concerning her to the neighbors. He addressed her in profane and offensive language. He made unconscionable demands upon her. He arrived home from the insane asylum on Friday, and she went away on the following Wednesday. While absent she corresponded with her husband, and also exchanged letters with his mother at least every two weeks and sometimes every week. Her mother-in-law wrote her to take a nice long visit and not hurry about coming home, and at the trial testified that in her judgment it was best that she remain away. While at Pittsburgh she lived with her mother and brother. Her mother is 63 years of age. Her brother is 35 years of age, unmarried, and a reporter for a newspaper. When her mother recovered from her sickness, she obtained employment in a dry goods store, where she has worked continuously since. At Christmas time she sent clothing to the children, which her husband returned. Some time in the following June she returned to Kokomo to visit her children, and remained about two weeks, during which time she went occasionally to the Orr home, but stayed most of the time with the neighbors. When she was about to return to Pittsburgh she desired to take the children with her to her mother's home, but Grandfather Orr said, "No; you can't have them; I have had legal advice on that matter." He further testified: "I was vexed with her because she threatened to take the children away, and she knew I was attached to them. We were in constant fear that she would take the children away from us."

[8] Under such circumstances it cannot be said that the mother abandoned or deserted her children or that she made no effort to provide a place for them. Neither can it be said that she deserted her husband. His disposition and propensities are such that no intelligent and conscientious woman could live with him as a wife without completely sacrificing her sense of duty and propriety. The continued submission by a woman of normal sensibilities to the abnormal demands of an insane husband would destroy the last vestige of her self-respect and extinguish every human quality. We are of the opinion that her course was the wise one to pursue.

In the tenth item of the finding the trial court makes the statement that the mother of this child, before she left her husband, corresponded with men other than her husband, and was guilty of unfaithfulness to

him. This statement is very obscure, and is subject to various interpretations, but it is evident that the trial court intended it to be construed in a way detrimental to her. The fragment of a letter which had been partly burned was introduced in evidence. This fragment does not bear the name of any person, and so much of the document has been destroyed that no rational mind can legitimately draw the conclusion therefrom that she corresponded promiscuously with "other men." From the evidence in the record on this point it is impossible for any fair-minded person to draw any inference inconsistent with the presumption of her innocence. If by "unfaithfulness" the trial court intended to insinuate that she was guilty of adultery, that insinuation is utterly groundless. Several neighbors testified to her good character, and their testimony was not questioned. We cannot permit these findings to stand. The good name of a mother is precious not only to herself, but also to her children; and, if it is to be smirched by a court record, that record must rest on something substantial.

The proceedings herein have been very irregular, but no one has questioned the right of the mother to prosecute this appeal. There is no evidence to support the action of the court in adjudging Villa Kathryn Orr to be a dependent or a neglected child.

Judgment reversed.

(70 Ind. App. 435)

McCLEN et al. v. LEHKER et al.
(No. 9892.)

(Appellate Court of Indiana, Division No. 2.
June 5, 1919.)

1. APPEAL AND ERROR ⇨518(1) — RECORD —
PARAGRAPHS OF COMPLAINT NOT CERTIFIED
—CHANGE OF VENUE.

Paragraphs of a complaint which were not authenticated upon change of venue by the clerk of the court in which the action was originally brought, are not in the record for consideration upon appeal.

2. WILLS ⇨608(1) — CONSTRUCTION — RULE IN
SHELLEY'S CASE.

Where a will uses the word "heirs" in its ordinary legal sense, a fee is vested in the first taker under the rule in Shelley's Case.

3. WILLS ⇨506(4) — CONSTRUCTION — "HEIRS"
— CHILDREN.

The word "heirs" in a will cannot be construed to mean children, unless it very clearly appears that it was used in that sense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs.]

4. WILLS ⇨439 — CONSTRUCTION — INTENTION
OF TESTATOR — CONTRAVENTION OF LAW.

The court should ascertain and carry out testator's intention whenever it can be done

without overthrowing well-established principles of law.

5. WILLS ⇨608(5) — CONSTRUCTION — RULE IN
SHELLEY'S CASE.

Where testator devised land to a son "to be held by him during his natural life only, then to his legal heirs," with a provision that he should not dispose of it, but at his death, it should belong to his legal heirs during their life, the son took the fee under the rule in Shelley's Case.

Appeal from Superior Court, St. Joseph County; Geo. Ford, Judge.

Action by John F. McClen and others against Frank C. Lecker and others. Judgment for defendants, and plaintiffs appeal. Judgment affirmed.

Darrow & Rowley, of La Porte, and McInernys, Yeagley & McVicker, of South Bend, for appellants.

H. W. Sallwasser, W. A. McVey, and H. B. McLane, all of La Porte, for appellees.

McMAHAN, J. This action was commenced by the appellants in the La Porte superior court. The complaint was in three paragraphs. Appellees' motions to strike out parts of the second and third paragraphs were sustained, as were also demurrers to each paragraph. An amended second paragraph of complaint was filed, and then on motion of appellants the cause was venued to the St. Joseph superior court.

[1] An amended first paragraph of complaint was filed in the St. Joseph superior court. The 1, 2, 3, 4, 7, and 8 assignments of error relate to the action of the court in sustaining the motions and demurrers addressed to the second and third paragraphs of complaint. Appellees insist that these paragraphs of complaint, both of which were filed in the La Porte superior court, are not in the record, and that said assignments present no questions for our determination. Neither of said paragraphs of complaint was certified to nor authenticated by the clerk of the La Porte superior court on change of venue. The record in this case is identical with the record in Consolidated Stone Co. v. Staggs, 164 Ind. 331, 73 N. E. 695, and on the authority of that case we are forced to hold that the second and third paragraphs of the amended complaint are not in the record.

The amended first paragraph of complaint alleges that John McClen died testate, the owner in fee of the real estate in controversy; that the last will and testament of said McClen was admitted to probate in the circuit court of La Porte county in March, 1889; that item 2 of said will reads as follows:

"Second. I give, devise and bequeath to my beloved wife, Susannah McClen, and my beloved son, Schuyler F. McClen, all the personal

property and real estate I may be seized at the time of my death, to share equal and alike, my son's share to be held by him during his natural life only, then to his legal heirs and no part of the following real estate to be disposed by him [we omit description]. It is my will and intention that my son shall not dispose of any of the above-described real estate, but at his death shall belong to his legal heirs during their life."

It is also alleged that at the date of the execution of said will there were living three children of said Schuyler F. McClen, namely John F., Anna, and Jesse McClen; that there were afterwards born to him a daughter, Elizabeth, and a son, Chester William; that the said children are the sole and only legal heirs of said Schuyler F. McClen, who died intestate in March, 1915; that they are the persons referred to in the said will as the legal heirs of Schuyler F. McClen, and are such heirs, and as such are the owners under the provisions of said will as tenants in common of the undivided one-half of the real estate described, each being the owner of a one-tenth interest therein. That Susannah McClen died intestate in March, 1894, the owner of the real estate so devised to her; that Schuyler F. McClen was the sole and only heir of Susannah, and as such inherited from her the share of said lands devised to her by said will; that in April, 1895, said Schuyler F. McClen made a deed of conveyance to George H. Service, describing all of said lands, and that under the said deed to George H. Service the appellee Lehker, by mesne conveyance, is claiming the title to the whole of said real estate; that in 1907 said Lehker executed a mortgage thereon to Hart L. Weaver, who has since died, and that the appellees other than Lehker are the executors of the last will and testament of Hart L. Weaver, and are claiming to hold a mortgage lien upon all of said real estate, and asking that the title to one-half of said real estate be quieted in appellants, and for partition.

The appellee Lehker filed a separate demurrer to this amended paragraph of complaint, and the other appellees filed a joint demurrer to it. Both of these demurrers were sustained, and appellants excepted, and, refusing to plead further, judgment was rendered accordingly, and against them.

The fifth and sixth assignments of errors challenge the ruling of the court in sustaining the demurrers to the amended first paragraph of complaint.

[2] The only question presented by these assignments is, Did Schuyler F. McClen take an estate for life in an undivided one-half of his father's real estate under item 2 of the will, hereinbefore set out? Does the rule in Shelley's Case, 1 Coke, 88, apply? If so, the cause must be affirmed; otherwise it must be reversed.

Appellants contend that the language used

in the will shows that the intention of the testator was to give to his son Schuyler a life estate and the remainder over to the children of the son; that the words "legal heirs" in the expression "then to his legal heirs" means the children of Schuyler F. McClen born in lawful wedlock.

[3] Where a deed or will uses the word "heirs" and uses it in its ordinary legal sense, a fee is vested in the first taker. This is the effect and force of the rule in Shelley's Case, and that rule entered into our law as a rule of property, and in all cases when it is applicable we must enforce it. The word "heirs" when used in a deed or will is one of great power, and its force and effect is not overcome or impaired by the mere use of negative or restraining words. Fearne declares that the "most positive direction" will not defeat the operation of the rule in Shelley's Case. 2 Fearne Remainders, § 435. While this statement may be too strong under the doctrine of some of the later cases, it is certain that the mere use of negative words cannot restrain or impair the force of the word "heirs." While it is true that the word "heirs" may mean children, it is also true that this meaning cannot be assigned to the word unless it very clearly appears that it was used in that sense. Ridgeway v. Lanphear, 99 Ind. 251.

Lord Redesdale, in Jesson v. Wright, 2 Bligh, 1, 56, said:

"The rule is that the technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise."

Lord Denman said:

"Technical words or words of known legal import must have their legal effect even though the testator used inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense." Doe v. Gallini, 5 Barn. and Adol. 621.

"Conjecture, doubt, or even equilibrium of apparent intention will not suffice." 2 Red. Will, 2 Ed. 67.

Superadded words which merely describe or specify the incidents of the estate created by such a word of limitation as "heirs" do not cut down the interest of the devisee. Shimer v. Mann, 99 Ind. 190, 50 Am. Rep. 82.

The Supreme Court in Allen v. Craft, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425, said:

"We have no doubt that a clause creating an estate in fee may be so modified by other clauses as to cut down the estate to one for life, but to have this effect the modifying clauses must be as clear and decisive as that which creates the estate. * * * Strong as is the word 'heirs,' it may be read to mean children, if the context decisively shows that it was employed in that sense by the testator. * * * But there must

be no doubt as to the intention of the testator to affix to the word 'heirs,' a meaning different from that assigned it by law."

In construing a will we should keep in mind that the first taker is the object of the testator's bounty. The will involved in this appeal cannot be compared with those involved in *Granger v. Granger*, 147 Ind. 95, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190, and *Conger v. Lowe*, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165, cited by appellant.

[4, 5] Appellants insist that the rule of *Shelley's Case* does not apply for the reason that there are two distinct devises, one to the son Schuyler for life and another to the "legal heirs" of Schuyler.

Appellants say that we must ascertain the intention of the testator, and that this intention must rule and control in carrying out his will, even though the words used by the testator had a different meaning technically than that which was intended by the testator.

However prominent a place in the construction of wills the intention of a testator may have, such intention can never change the law or take the place of the legal formalities required by law. The court, in construing a will, should aim to ascertain the intention of the testator and to carry out that intention whenever it can be done without overthrowing a well-established principle of law. But "even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of any of its essential legal attributes." *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659. See, also, *Teal v. Richardson*, 160 Ind. 119, 66 N. E. 435; *Waters v. Lyon*, 141 Ind. 170, 40 N. E. 662; *Lee v. Lee*, 45 Ind. App. 645, 91 N. E. 507; *Burton v. Carnahan*, 38 Ind. App. 612, 78 N. E. 682; *Chamberlain v. Runkle*, 28 Ind. App. 599, 63 N. E. 486.

As said by the court in *Siceloff v. Redman's Adm'r*, 26 Ind. 251, 262:

"It would seem apparent that the testator intended that the heirs should take directly from him, as purchasers, and not by descent from the ancestor; yet, by the technical meaning applied to the word 'heirs,' under the rule in *Shelley's Case*, this apparent intention is denominated a presumed intent, and is not allowed to control the technical meaning of the word 'heirs,' or, in other words, despite the apparent intent of the testator, the rule gives the fee to the ancestor."

As said by the Supreme Court in *Biggs v. McCarty*, 86 Ind. 352, 44 Am. Rep. 320:

"It is not always the presumed or actual intention of the testator, but, as contradistinguished therefrom, his legal intention, that must be enforced. The application of the rule in *Shelley's Case* sometimes unquestionably defeats the intention and actual purposes of the testator, yet the rule has been so long adhered to in Indiana that it must be regarded as the law here until changed by the Legislature."

In *Jordan v. Adams*, 5 Gray Cases on Property, 99, the court said:

"When once the donor has used the terms 'heirs' or 'heirs of the body' as following on an estate of freehold, no inference of intention, however irresistible, no declaration of it, however explicit, will have the slightest effect. The fatal words once used, the law fastens upon them and attaches to them its own meaning and effect as to the estate created by them, and rejects as inconsistent with the main purpose, which it inexorably and despotically fixes on the donor, all the provisions of the will which would be incompatible with an estate of inheritance, and which tend to show that no such estate was intended to be created, although all the while it may be as clear as the sun at noon-day that by such a construction the intention of the testator is violated in every particular."

A careful study of the Indiana cases discloses that the rule in *Shelley's Case* has been applied in the following cases: *McCray v. Lipp*, 35 Ind. 116; *Andrews v. Spurlin*, 35 Ind. 262; *Gonsales v. Barton*, 45 Ind. 295; *Smith v. McCormick*, 46 Ind. 135; *King v. Rea*, 56 Ind. 1; *Fletcher v. Fletcher*, 88 Ind. 418; *Shimer v. Mann*, 99 Ind. 190, 50 Am. Rep. 82; *Hochstedler v. Hochstedler*, 108 Ind. 506, 9 N. E. 467; *Allen v. Craft*, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425; *Taney v. Fahndley*, 126 Ind. 88, 25 N. E. 882; *Lane v. Utz*, 130 Ind. 235, 29 N. E. 772; *Reddick v. Lord*, 131 Ind. 336, 30 N. E. 1085; *Perkins v. McConnell*, 136 Ind. 384, 36 N. E. 121; *Waters v. Lyon*, 141 Ind. 170, 40 N. E. 662; *Bonner v. Bonner*, 28 Ind. App. 147, 62 N. E. 497; *Chamberlain v. Runkle*, 28 Ind. App. 599, 63 N. E. 486; *Teal v. Richardson*, 160 Ind. 119, 66 N. E. 435; *Lamb v. Medesker*, 35 Ind. App. 662, 74 N. E. 1012; *Burton v. Carnahan*, 38 Ind. App. 612, 78 N. E. 682; *Lee v. Lee*, 45 Ind. App. 645, 91 N. E. 507; *Newhaus v. Brennan*, 49 Ind. App. 654, 97 N. E. 938; *Gibson v. Brown*, 62 Ind. App. 460, 110 N. E. 716, 112 N. E. 894.

The court refused to apply the rule in the following cases for the reason that the facts involved did not invoke its application: *Sorden v. Gatewood*, 1 Ind. 107; *Doe v. Jackman*, 5 Ind. 283; *Small v. Howland*, 14 Ind. 592; *Hull v. Beals*, 23 Ind. 25; *Siceloff v. Redman's Adm'r*, 26 Ind. 251; *Prior v. Quackenbush*, 29 Ind. 475; *Nelson v. Davis*, 35 Ind. 474; *Owen v. Cooper*, 46 Ind. 524; *Helm v. Frisbie*, 59 Ind. 526; *Locke v. Barbour*, 62 Ind. 577; *Stilwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240; *McMahan v. Newcomer*, 82 Ind. 565; *Biggs v. McCarty*, 86 Ind. 352, 44 Am. Rep. 320; *Ridgeway v. Lanphear*, 99 Ind. 251; *Fountain Coal Co. v. Beckleheimer*, 102 Ind. 76, 1 N. E. 202, 52 Am. Rep. 645; *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167; *Millett v. Ford*, 109 Ind. 159, 8 N. E. 917; *Conger v. Lowe*, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165; *Jackson v. Jackson*, 127 Ind. 346, 26 N. E. 897; *Earnhart v. Earnhart*,

127 Ind. 397, 26 N. E. 895, 22 Am. St. Rep. 652; *Burns v. Weesner*, 134 Ind. 442, 34 N. E. 10; *McIlhinny v. McIlhinny*, 137 Ind. 411, 37 N. E. 147, 24 L. R. A. 489, 45 Am. St. Rep. 186; *Granger v. Granger*, 147 Ind. 95, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190; *Adams v. Merrill*, 45 Ind. App. 315, 85 N. E. 114, 87 N. E. 36.

It is argued that the use of the word "only" in the phrase, "to be held by him during his natural life only" means nothing else than a life estate, not more than a life estate. This would doubtless be true were it not followed by the words "then to his legal heirs." See *Burton v. Carnahan*, supra, where the clause in the will was "to be by her held during her natural life and no longer." The rule in *Shelley's Case* has become so firmly established as a rule of property in this state that when a testator makes use of the technical words "heirs" or "heirs of his body," he is conclusively presumed to have used them in their technical sense, unless it clearly and unequivocally appears otherwise.

We hold that under the will of John McClen, Schuyler F. McClen took a fee in one-half of the real estate in controversy, and that there was no error in sustaining the demurrer to the first paragraph of the amended complaint.

Judgment affirmed.

(74 Ind. App. 106)

PITTSBURGH, C. & ST. L. RY. CO. v. WILLIAMSON et al. (No. 10232.)*

(Appellate Court of Indiana, Division No. 2. May 27, 1919.)

1. VENUE ⇨72—MOTION FOR CHANGE OF VENUE—SUSPENSION OF ACTION.

When a motion for a change of venue from a county has been filed, it is proper for the court to suspend action on such motion until after the issues are closed.

2. COURTS ⇨476—CONFLICT WITH PENDING ACTION—DISSOLUTION OF TEMPORARY INJUNCTION.

Where judge of Grant superior court knew dehors the record that an action for an injunction tended to interfere with a drainage proceeding then pending in Grant circuit court, it was his duty to dissolve the temporary restraining order, either before or after the applications for a change of venue and for a change of judge were filed.

3. APPEAL AND ERROR ⇨286—NECESSITY OF MOTION FOR NEW TRIAL—CHANGE OF VENUE OR JUDGE.

The action of the court in dissolving a restraining order, pending plaintiff's applications for a change of venue and for a change of judge, if erroneous, cannot be presented except as a cause for a new trial.

4. DRAINS ⇨57—PERSON AGGRIEVED — RELIEF.

Contractors constructing a catch-basin in a ditch proceeding were under the directions and control of the circuit court in which proceeding was commenced, and any landowner who felt aggrieved might apply to that court for relief.

5. DRAINS ⇨47—ORDER FOR CONSTRUCTION OF DITCH—CONTEMPT.

In view of *Burns' Ann. St. 1914*, § 6147, providing that the commissioner appointed to construct a drain shall be under the control and direction of the court and shall obey such directions, a remonstrant could have had commissioner and contractor cited for contempt for disobeying the court's order for the construction of the ditch.

6. DRAINS ⇨40—CONSTRUCTION OF DITCH—RELIEF TO REMONSTRANT—JURISDICTION.

Where proceedings were commenced in Grant circuit court for reconstruction of public ditch, and plaintiff railroad filed remonstrance, and ditch was ordered established, and report of commissioners, approved by court, required construction of catch-basin on plaintiff's right of way, that court had ample power to afford all relief to which remonstrant was entitled, such as enjoining construction of catch-basin, and neither the Grant superior court nor Wabash circuit court, to which a change of venue was sought, had jurisdiction in the cause.

Appeal from Circuit Court, Wabash County; Nelson G. Hunter, Judge.

Action for injunction by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company against George Williamson and others. Demurrer to paragraph of answer to supplemental complaint overruled, and action dismissed, and plaintiff excepts and appeals. Affirmed.

G. E. Ross, of Logansport, for appellant. St. John, Charles & Gemmill, of Marion, and Switzer & Bent, of Wabash, for appellees.

McMAHAN, J. This action was commenced in the Grant superior court to enjoin the appellees from constructing a catch-basin upon appellant's right of way. A temporary restraining order was granted, and before the day set for a hearing on the application for a temporary injunction appellant filed an affidavit for a change of venue from the county, and also one for a change of judge. The court, without ruling upon either of said applications, and over the objection of appellant, made an entry dissolving the temporary restraining order, and then sustained the motion for a change of venue, and sent the cause to the Wabash circuit court. After the temporary restraining order was dissolved, the appellees constructed the catch-basin and appellant filed a supplemental complaint asking for a mandatory injunction requiring that appellees remove the

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Transfer denied.

catch-basin. Appellant filed a motion in the Wabash circuit court for an order to require the appellees to show cause why they should not be cited for contempt. This motion was overruled, and exception saved. The appellees filed an answer of general denial to both the complaint and supplemental complaint. A second paragraph of answer was also filed to the supplemental complaint and alleged that proceedings had been commenced in the Grant circuit court for the reconstruction of a certain public ditch; that appellant appeared and filed a remonstrance in said ditch proceedings; that such further proceedings were had in such matter as resulted in said ditch being ordered established, and that the report of the commissioners in said proceedings as approved by the court required the construction of the catch-basin at the point where it had been constructed; that appellee Murphy was the drainage commissioner appointed by the court to construct said ditch, and that the other appellees were contractors to whom the contract for the construction of said ditch had been left; that after the temporary restraining order had been dissolved they proceeded to and did construct the catch-basin mentioned in the supplemental complaint in accordance with the plans and specifications for said ditch; that the said ditch including the said catch-basin had been fully completed and had been reported to and approved by the Grant circuit court. Appellant's demurrer to the second paragraph of the answer to the supplemental complaint was overruled and exception saved.

The cause was submitted to the court for trial, and, after hearing the evidence, the court, on the motion of appellees, dismissed the cause for want of jurisdiction, to which appellant excepted. Judgment was rendered dismissing the cause and against appellant for costs. The evidence is in the record by a bill of exceptions.

The appellant's assignments of error 1, 2, 3, 4, and 5 relate to the action of the Grant superior court in dissolving the temporary restraining order pending the applications for change of judge and for change of venue from the county; 6 relates to the overruling of the motion to require appellees to show cause; 7 to the overruling of the demurrer to the second paragraph of answers to supplemental complaint; 8 and 9 are that the court erred in sustaining the motion to dismiss and in dismissing the cause.

[1-3] Appellant complains of the action of the Grant superior court in retaining jurisdiction and dissolving the temporary restraining order after the affidavits had been filed for a change of judge and for a change of venue from the county. It is the contention of the appellant that, after the applications were filed, the Grant superior court had no power to do any act except to order

the change, and that it was error to dissolve the restraining order pending said applications. It has been held that, when a motion for a change of venue from the county has been filed, it is proper for the court to suspend action of such motion until after the issues are closed. *Galey v. Mason*, 174 Ind. 158, 91 N. E. 561, Ann. Cas. 1912C, 1290. The judge may have known deors the record that this was an action tending to interfere with an action then pending in the Grant circuit court, and, if so, it was his duty to dissolve the temporary restraining order either before or after the applications for the changes were filed. The action of the court, if erroneous, cannot be presented except as a cause for a new trial. *Scanlin v. Stewart*, 138 Ind. 574, 37 N. E. 401, 38 N. E. 401.

The appellant contends that the Wabash circuit court erred in dismissing the cause.

The facts, as shown by the evidence, are substantially as follows: The catch-basin, the construction of which appellant was seeking to enjoin, was the outlet and terminus of a public drain known as the reconstruction of the Marsh ditch, which had been established and ordered constructed by the circuit court of Grant county, under the supervision of the appellee Murphy, drainage commissioner. The appellees Williamson & Williamson were the contractors who had been awarded the contract to construct said drain according to the plans and specifications therefor, and were proceeding to put in the catch-basin at the point where they claimed it was required by the report and the plans and specifications of the drainage commissioners as approved by the court. Said drainage proceeding was pending when the complaint in this action was filed and was still pending when the court dismissed this cause. The appellant was a party to said drainage proceeding. There was a conflict as to whether the appellees were constructing the catch-basin at the point where the report of the drainage commissioners required it to be constructed. The appellees claimed that it was being so constructed, while the appellant contended that it was being constructed at a different place.

[4] The appellees in constructing the catch-basin were under the direction and control of the Grant circuit court, and any landowner who felt aggrieved might apply to that court for relief. *Racer v. State*, 131 Ind. 393, 31 N. E. 81.

[5] Section 6147, Burns 1914, provides that the commissioner appointed to construct a drain "shall at all times be under the control and direction of the court, and shall obey such directions." If the construction commissioner and the contractors were not doing the work according to the plans and specifications, the appellant could have had them cited for contempt for disobeying the order

made by the court for the construction of the ditch. *Racer v. State*, supra.

The trial court, after hearing the evidence, dismissed the cause on the theory that no court except the Grant circuit court had jurisdiction to hear and determine the matter.

[8] The case of *Karr v. Board*, etc., 170 Ind. 571, 85 N. E. 1, is decisive of the question involved. The court there had under consideration the question as to whether an injunction could be maintained in the Putnam circuit court to prevent the removal of a bridge by a drainage commissioner, who was acting under appointment of the Morgan circuit court. The drain had been ordered established by the Morgan circuit court and extended into Putnam county. The court in that case said:

"There can be no doubt of the right of the Morgan circuit court to order and to complete the construction of a drain extending into Putnam county. * * * Section 7 of the Acts of 1895, concerning drainage, * * * provides that the drainage commissioner shall at all times be under the control and direction of the court, and shall obey its directions. * * * It may further be said that both the commissioner and the contractor are agencies or arms of the court, and it is a necessary incident of the authority to construct drains that both shall be under the jurisdiction, and subject to contempt for a disobedience, of the ad interim orders of the court or of the judge thereof in vacation. See *Racer v. Wingate* (1894) 138 Ind. 114, 119 [36 N. E. 538]. It is against the policy of the law to permit a situation to arise wherein there may be an unseemly conflict of jurisdiction between courts of equal rank in the determination of the question as to the extent or proper exercise of the authority of the court which first assumed jurisdiction over the subject-matter (*Scott v. Runner* [1896] 146 Ind. 12 [44 N. E. 755] 58 Am. St. Rep. 345), and, besides, it is inequitable that in a drainage proceeding, wherein jurisdiction may be extended over all persons by supplemental petition (section 5629, Burns' 1901 [Acts 1885, p. 129, § 8]; Section 6148, Burns 1908 [Acts 1907, p. 508, § 8]; *Osborn v. Maxinkuckee*, etc., Co. [1900] 154 Ind. 101 [56 N. E. 33]), a landowner should be permitted to arrest the proceedings by injunction in another court, while refusing to submit himself to the jurisdiction of the court which not only has authority over the construction of the drain, but which has power to make all orders which are mete in the premises. There is no question concerning the right of any party whose lands are affected by a drainage proceeding (using the expression in the sense in which the statute uses it) to file a petition therein to be made a party during the progress of the work (*Zumbro v. Parnin* [1895] 141 Ind. 430 [40 N. E. 1085]; *Cambria Iron Co. v. Union Trust Co.* [1900] 154 Ind. 291 [55 N. E. 745, 56 N. E. 665] 48 L. R. A. 41); and, upon the filing of such petition, it is the right and duty of the court or judge to protect such landowner's interest as the circumstances may require. This brings him within the jurisdiction of the court, and, as it affords

adequate means of relief, the remedy by injunction in another county is precluded."

See, also, *Studabaker v. Studabaker*, 153 Ind. 89, 51 N. E. 933; *Marchant v. Olson*, 184 Ind. 17, 110 N. E. 200; *Coleman v. Callon*, 184 Ind. 204, 110 N. E. 979; *High Ex. Legal Rem.* 782.

Our judgment is that the Grant circuit court had ample power to afford all the relief to which appellant was entitled without coming in conflict with any other court of equal power, and that neither the Grant superior court nor the Wabash circuit court had jurisdiction in this cause, and that the latter court committed no error in dismissing the complaint. This being true, no available errors are presented by the other assignment of errors.

Judgment affirmed.

(70 Ind. App. 444)

WARTELL v. PETERS HOTEL CO.
(No. 9881.)

(Appellate Court of Indiana, Division No. 2,
June 5, 1919.)

1. TIME — 10(1) — COMPUTATION — DAYS — RECORDING OF CHATTEL MORTGAGE.

Although Burns' Ann. St. 1914, § 1350, providing that the time in which an act is to be done as herein provided shall be computed by excluding the first day and including the last, which shall be excluded if it be Sunday, is applicable only to proceedings in civil cases, as stated by its title, yet by previous decisions the rule therein stated has become the law as to other matters, and is applicable to chattel mortgages, so that one executed November 12th and recorded November 23d was recorded within the 10 days required by statute, the 22d being Sunday.

2. ACKNOWLEDGMENT — 29 — SUFFICIENCY — NAMES OF PARTIES — STATE AND COUNTY — PLACE OF NOTARIAL APPOINTMENT.

A certificate of acknowledgment of a chattel mortgage is not sufficient to justify recording the instrument where, in addition to its bad form and failure to state the names of the parties acknowledging, it fails to state whether they acknowledged before the officer or to give the state and county in which it was acknowledged or in which the notary had his appointment.

Appeal from Circuit Court, Adams County; David E. Smith, Judge.

Action by the Peters Hotel Company against Benjamin Wartell. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

Albert E. Thomas and Howard L. Townsend, both of Ft. Wayne, for appellant.

Charles M. Niezer, Louis F. Crosby, and James P. Murphy, all of Ft. Wayne, for appellee.

NICHOLS, P. J. This was an action by the appellee against the appellant for trover and conversion, commenced in the Allen circuit court and thereafter venued to the Adams circuit court. The appellee claims title to an automobile by virtue of a chattel mortgage bearing date of November 12, 1914, which was not recorded until November 23, 1914, November 22d being Sunday. The appellant claims title to said automobile by virtue of bill of sale without possession, bearing date of October 21, 1914. Both the chattel mortgage and bill of sale were executed by one Jacobs, who was the owner of said automobile. The complaint was in two paragraphs, the first of which was answered by a general denial. There was a demurrer to the second paragraph which was overruled, to which ruling the appellant excepted and then filed his answer in general denial to the second paragraph and a special paragraph of answer to both paragraphs of complaint. To this special paragraph of answer the appellee replied with a general denial. There were special findings of fact by the court, and a conclusion of law and judgment against the appellant for \$163.40. Appellant excepted to the conclusion of law and judgment of the court, and after motion for a new trial which was overruled, to which ruling the appellant excepted, he now prosecutes this appeal.

The errors relied upon for reversal are: (1) Overruling appellant's demurrer to second paragraph of complaint; (2) error in the conclusion of law upon the special findings of fact.

The questions for consideration in this opinion are: (1) Was the chattel mortgage executed by Jacobs to the appellee on the 12th day of November, 1914, and recorded November 23, 1914, recorded in time? (2) Was the acknowledgement of said chattel mortgage a sufficient compliance with section 3982, Burns' R. S. 1914? These questions are presented both by the appellant's demurrer to the second paragraph of complaint and the court's ruling thereon, and by the court's conclusion of law on the special findings.

[1, 2] It appears by the special findings of fact, which contain the substantial averments of the second paragraph of complaint, that on November 12, 1914, one Jacobs was indebted to the appellee in the sum of \$146.97, and to secure payment of said sum he executed to appellee a chattel mortgage by the terms of which he conveyed the automobile involved to the appellee. The chattel mortgage is in the usual form of such instruments and is signed by said Jacobs and by said appellee. After these signatures appears the following:

"Sworn and subscribed to this 12th day of November, 1914.

"[Seal.] Jno. H. Immel, Notary Public.

"My commission expires November 13, 1917."

123 N.E.—31

The 22d day of November, 1914, was the first day of the week, commonly called Sunday. On the 23d day of November, 1914, at 8 o'clock, a. m., the appellee filed his chattel mortgage with the recorder of Allen county for record, and the same was accepted and recorded in volume 34, page 208, of the Chattel Mortgage Records of Allen county, Indiana. If said chattel mortgage was sufficiently acknowledged, and if it was recorded in time under the statute, the judgment of the lower court should be affirmed: But if said chattel mortgage was not sufficiently acknowledged, or if it was not recorded in time under the statute, then the judgment of the lower court should be reversed.

In Miscellaneous Provisions of the Code, section 1350, Burns' R. S. 1914, provides that—

"The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday it shall be excluded."

The case of *Towell v. Hollweg*, 81 Ind. 154, was a case involving the question as to whether a chattel mortgage had been recorded in time. In that case the court, after quoting the above section, and in speaking of the statute requiring chattel mortgages to be recorded in 10 days after their execution, concludes that, in the computation of 10 days' time in which a chattel mortgage should be recorded, "as this rule has been established in all cases provided for in the Code, it should be made uniform in all cases, except where otherwise expressly provided for." This case is cited and quoted with approval in the case of *Matthews, etc., Live Stock Ins. Co. v. Moore*, 58 Ind. App. 240, 244, 108 N. E. 155, which case adopts the statutory method in computing time of notice of assessments by mutual insurance companies. In the case of *Benson v. Adams*, 69 Ind. 353, 35 Am. Rep. 220, which involved the question of computing the time when a bill of exchange is due, the court after quoting said section, which was then section 787, R. S. 1876, says: "This, we believe, is the uniform rule of computing time on a bill of exchange." In the case of *Vogel v. State ex rel. Lamb*, 107 Ind. 374, 378, 8 N. E. 164, 166, referring to said section the court says: "The above section of the statute evidently has reference to matters properly falling within the Code of Civil Procedure and not to matters in no way connected therewith, although some of the cases seem to give it a broader application. See *Towell v. Hollweg*, 81 Ind. 154." It is apparent that this statement is a correct construction of the section involved, which at that time was section 849 of "An act concerning proceedings in civil cases." Acts 1881, p. 240. In the case of *Williams v. State*, 5 Ind. 235, an execution was dated March 3, 1843, and was returned March 4, 1844, the preceding day

being Sunday. It was held that the year expired on the 3d day of March, 1844, but that being Sunday the execution was returnable by the statute on the following Monday. In the case of *State ex rel. McCoy v. Thorn*, section 787, *supra*, was held to apply to the filing of a bill of exceptions. In *Catterling v. City of Frankfort* said section was referred to, and was held to apply to the notice given by the common council of said city of its intention to petition the board of commissioners for the annexation of certain territory adjacent to said city. This case quotes with approval *Towell v. Hollweg*, *supra*. In the case of *Backer v. Pyne*, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231, certain real estate involved was sold June 9, 1888, and the money was paid to the clerk and the right of redemption was asserted June 10, 1889. It was held that the 9th of June fell on Sunday and the redemption was well made on the Monday following, provided the redemption on Sunday would have been effective. The court says that where the last day for redemption is Sunday it may be made on the next day, citing said section as authority. This case says: "Our decisions have applied the rule to all cases affecting matters of statutory procedure." The case of *Flynn v. Taylor*, 145 Ind. 533, 44 N. E. 546, refers to said section and applies it in the computation of time in which a remonstrance may be filed in the application for a liquor license. The case of *Lee v. Shull*, 172 Ind. 309, 88 N. E. 521, makes the same application of said section as the case of *Flynn v. Taylor*, *supra*. The case of *Ardery v. Dunn*, 181 Ind. 225, 104 N. E. 299, applies said section as the rule in computing the time within which the superintendent and engineer in charge of highway construction on completion of the same should each file his sworn statement with the auditor of the county. It seems to us that in harmony with the case of *Vogel v. State ex rel. Lamb*, *supra*, we must hold that said section can only be applied to proceedings in civil cases, as the title of this act clearly states.

But though some of the foregoing decisions are based on the statute, while others, though referring to it, seem to reach their conclusions independent thereof, they are in harmony in approving as a method of computation of time the statutory methods exemplified by said section, and in harmony therewith have decided, when the question was involved, that the time in which an act is to be done shall be computed by excluding the first day and including the last, but if the last day is Sunday it shall be excluded. This line of decisions has been maintained for so long a time as to establish the aforesaid method of computation as the rule of law of this state, regardless of the statute. We hold that, independent of the statute, under the law of this state, the chattel mortgage, had it

been entitled to record, was recorded in time. But the certificate of acknowledgment is not sufficient to justify the record of the instrument. In addition to its bad form and its failure to state the names of the parties acknowledging, and whether they acknowledged before the officer, for which we criticize it, it fails to give the state and county in which it was acknowledged, and the state and county in which the notary had his appointment. The case of *Cooper v. Smith*, 75 Mich. 247, 252, 42 N. W. 815, is directly in point. See, also, *Guyer v. Union Trust Co.*, 55 Ind. App. 472, 104 N. E. 82. The instrument with such a defective acknowledgment was not entitled to record, and hence is without force except as between the parties.

The judgment is reversed, with instructions to the trial court to sustain the demurrer to the second paragraph of the complaint, and for further proceedings in harmony with this opinion.

(71 Ind. App. 103)

PITTSBURGH, C. C. & ST. L. RY. CO. v. BOYS. (No. 9790.)*

(Appellate Court of Indiana, Division No. 2. June 3, 1919.)

1. CARRIERS \S 314(5)—INJURY TO PASSENGER ALIGHTING FROM MOVING TRAIN—NEGLECT—PLEADING.

In an action for injury sustained by a passenger in stepping from a moving train at a flag station, complaint alleging that injuries were caused by negligence of defendant company in not stopping said train as it had scheduled and agreed to do, and on account of the company through its brakeman leading plaintiff to believe that train had come to a full stop, showed negligence on the part of the company.

2. CARRIERS \S 314(6)—INJURY TO PASSENGER ALIGHTING FROM MOVING TRAIN—COMPLAINT SHOWING CONTRIBUTORY NEGLIGENCE.

In action for injury sustained by a passenger in stepping from a moving train at a station where the train was scheduled to stop on flag, facts pleaded in second paragraph of complaint held to show such negligence of plaintiff as to preclude recovery.

3. CARRIERS \S 347(11)—INJURY TO PASSENGER ALIGHTING FROM MOVING TRAIN—CONTRIBUTORY NEGLIGENCE.

It is not negligence per se for a passenger to alight from a moving train.

4. JUDGMENT \S 263(1)—MOTION IN ARREST—CONDITIONS PRECEDENT—RAISING QUESTION BY DEMURRER.

Where defendant did not present question whether first paragraph of plaintiff's complaint showed that plaintiff was negligent, which was the proximate cause of the injury, the right to raise the question by motion in arrest of judgment is denied by *Burns' Ann. St. 1914, § 844*, and there was no error in overruling motion.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied.

5. CARRIERS ⇨271—GIVING NOTICE TO CONDUCTOR OF DESTINATION—DUTY OF PASSENGER.

The general rule is that, in the absence of a rule of the carrier known to the passenger requiring the passenger for a flag station to notify the conductor before arrival at the stipulated destination, no such notice need be given.

6. CARRIERS ⇨271—DESTINATION OF PASSENGER—NOTICE TO CARRIER.

In the absence of a rule of the company requiring the passenger for a flag station to notify conductor of ticket's stipulated destination so known or promulgated as to bind the passenger, the ticket sold by the carrier to the passenger is conclusive notice to the former of the fact of the passenger's destination.

Appeal from Superior Court, Grant County; Robt. M. Van Atta, Judge.

Action by Clifford C. Boys against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Verdict and judgment for plaintiff, and defendant appeals. Reversed, with instructions.

G. E. Ross, of Logansport, for appellant.

E. H. Graves, of Upland, and G. A. Henry, of Marion, for appellee.

McMAHAN, J. The appellee's complaint is in two paragraphs. In the first it is alleged that appellant is a corporation engaged in the operation of a railroad passing through Gas City and Upland; that appellee purchased a ticket from appellant's agent at Gas City entitling him to be carried from Gas City to Upland; that he took passage upon a train leaving Gas City at 2:17 a. m. scheduled and advertised to stop at Upland on flag to take on and discharge passengers. It is then averred:

"That, as said train approached the station at Upland, it began to slow down, and that he, the plaintiff, believing that it would come to a full stop, as it was scheduled and advertised and as the defendant company had agreed, went to the front end of the car in which he was riding, and the brakeman on said train being then and there in the employ of this defendant company said to this plaintiff, 'Do you get off here?' and, being answered in the affirmative, the said brakeman opened the door of said car and said, 'All right,' and it being in the nighttime and dark, and there being no light at said station, and this plaintiff, being led to believe that said train had come to a full stop, and relying on what had been told him by the said brakeman and the promise of said defendant company, stepped from said car, but on account of said defendant company not bringing said train to a full stop, as it had agreed and as this plaintiff was led to believe and did believe, said plaintiff was thrown on the brick walk along the side of defendant's tracks, his head, face, and ear were cut, scratched, and bruised, his shoulder and back were cut, scratched, bruised, and sprained, and he was rendered unconscious. * * * Plaintiff further avers that all of the injuries herein complained of were caused by

the negligence of this defendant company in not stopping said train as it had scheduled, advertised, and agreed to do and on account of the said company, through the said brakeman, leading him, the plaintiff, to believe that said train had come to a full stop, and that he, the plaintiff, was wholly without fault. Wherefore," etc.

The second paragraph, after alleging that appellant is a corporation engaged in the operation of a railroad, the purchase of a ticket by appellee, and the taking passage as alleged in the first paragraph, alleges:

That "as said train approached said town of Upland it began to slow down, and the plaintiff, believing that it would come to a full stop, as it was so scheduled and advertised by defendant to do, left his seat in said train and went forward to the front end of the car in which he was riding, and that an employé of said defendant, the brakeman upon said train, said to this plaintiff, 'Do you get off here?' and, upon the plaintiff answering in the affirmative, said brakeman opened the door of said car and said to the plaintiff, 'All right.' Said plaintiff avers that it was in the nighttime, and that there were no lights displayed at said station, and that it was dark at the point where passengers were accustomed to alight from trains at said station, and this plaintiff being led to believe from the said remarks and action of said brakeman that said train would come to a full stop went upon the platform and steps of said car for the purpose of alighting therefrom, but he says that said train did not come to a stop at said station of Upland, as he had a right to believe that it would, but, after slowing down the speed of the train as aforesaid, said defendant, through its employé, began to increase the speed of said train, and this plaintiff, seeing that he would be carried thus past his station, and while said train was running slowly and not to exceed five miles per hour, stepped therefrom to the platform of said station, and it being dark, and being unable to see his way, said plaintiff, by the motion of said train, was thrown violently upon the said platform, which was of brick, and fell thereon with great force, and by reason of said fall" was injured, the alleged injuries being set out in detail.

It is also alleged that the said injuries were occasioned through the negligence of the appellant in the careless and negligent operation of the train and in not bringing it to a full stop at Upland.

Appellant filed a demurrer to each paragraph of complaint, which was overruled, and exception saved.

There was a trial by jury, verdict, and judgment for appellee. The jury was required to and did answer a number of interrogatories which they returned with their general verdict.

The errors relied on for reversal are the overruling of the demurrer to each paragraph of complaint, the overruling of a motion in arrest of judgment and the overruling of the motion for a new trial.

[1] The only objection made to the first

paragraph of complaint is that no facts are alleged to show that appellant was guilty of any negligence. We cannot agree with appellant. This paragraph clearly shows negligence on the part of appellant. All other objections to this paragraph are waived. There was therefore no error in overruling the demurrer to it.

[2] The appellant next insists that the facts alleged in the second paragraph of complaint show, among other things, that the appellee was himself guilty of negligence which was the proximate cause of his injury.

According to the averments of this paragraph of complaint, as the train approached the town of Upland it began to slow down, and plaintiff, believing that it would come to a full stop, left his seat and went to the front end of the car in which he was riding, when the brakeman on the car asked him if he got off there, and on receiving an affirmative answer opened the door of the car and said, "All right;" that it was about 2:30 a. m.; that the said night was dark; that no lights were displayed at the station; that appellee was led to believe from the remarks and action of the brakeman that the train would stop, and that he went upon the platform and the steps of the car for the purpose of alighting; that the train did not stop; that its speed was increased, and that appellee, believing that he would be carried past the station, and while the train was running not more than five miles an hour, stepped off the train to the platform of the station at a time when it was so dark that he could not see his way, and that by the motion of the train was thrown violently upon the brick platform with sufficient force to severely injure him and to render him unconscious.

[3] Do these facts show negligence on the part of appellee which was the proximate cause of his injury? The law is well settled in this state that it is not negligence per se for a passenger to alight from a moving train. The circumstances and conditions under which he acts must all be considered. Each case must be determined on its own facts. *Pittsburgh, etc., Ry. Co. v. Miller*, 33 Ind. App. 128, 70 N. E. 1006; *Harris v. Pittsburgh, etc., Ry. Co.*, 32 Ind. App. 600, 70 N. E. 407; *Louisville, etc., R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443.

If the facts pleaded show that the appellee was at fault in leaving the train as he did, and that he thereby contributed to his injury, then the demurrer should have been sustained. The pleading discloses that the plaintiff voluntarily left the train while it was in motion. The only excuse he gives for so doing is that he saw the speed of the train was being increased, and that he would be carried past the station where he wished to get off the train. He does not allege that anything was said or done by any of the

employés of appellant that induced him to alight. The only thing the employés did, according to his complaint, was to lead him to believe that the train would stop. The conversation with the brakeman, which he says caused him to so believe, took place when he left his seat and went to the front end of the car in which he was riding, when the brakeman asked, "Do you get off here?" and, being answered in the affirmative, opened the door and said, "All right." This all took place while appellee was yet in the car, just before or at the time that the brakeman opened the door. The act of the brakeman in opening the door and saying, "All right," cannot be construed as an invitation for appellee to alight before the train came to a standstill. The most appellee claims is that he, being thereby led to believe "that the train would come to a full stop, went upon the platform and steps of the car for the purpose of alighting therefrom," as we understand him to mean, when the train should come to a full stop. Nothing else was said or done by the brakeman. The appellee, without anything more being said or done, walked out of the car down the steps, and alighted from a moving train in the nighttime when it was so dark that he could not see his way. The appellee knew the train had not stopped, he knew the speed was being increased, and, believing he would be carried past his station, stepped off.

There is but one conclusion to be drawn from the facts pleaded. The appellee was guilty of such negligence as will preclude a recovery. The demurrer to the second paragraph of complaint should have been sustained. *Pittsburgh, etc., R. Co. v. Miller*, supra.

As said in the case just cited, the facts differentiate this case from those in which the train is not stopped a sufficient time to allow the passenger to leave it from those in which he is invited or directed by the trainmen to alight, and also from those in which the passenger's action is influenced by his tender age or other incapacity.

This paragraph of complaint is very like the first paragraph of complaint in *Jeffersonville, etc., R. Co. v. Swift*, 26 Ind. 459, which the court held bad, saying:

"It admits that the plaintiff voluntarily leaped from the cars while they were in motion—running at the rate of one-third their usual rate of speed—and by reason thereof received the injuries complained of, and the only excuse alleged for this extremely imprudent and perilous act is that the train was being run past Amity, where he wished to leave it, and where it was the duty of the conductor to stop the train and let him off. These facts, however, do not afford a justification of so rash an act as that of leaping from the train when in motion. *Jeffersonville Railroad Company v. Hendricks*, Adm'r, ante [26 Ind.] p. 228. Admitting that those having charge of the train, in negligent

disregard of their duty, were running it past the station, and that they did not intend to stop there, still the paragraph shows that the injury to the plaintiff was the immediate result of his own imprudent and rash conduct; and there is no principle of the law more clearly settled, or more universally recognized by all the courts, than that in suits for such injuries, though the defendant may have been guilty of negligence, yet, if the plaintiff's own want of reasonable care and caution directly contributed in producing the injury, he cannot recover."

In *Reibel v. Cincinnati, etc., Ry. Co.*, 114 Ind. 476, 17 N. E. 107, the complaint was held insufficient, the court saying:

"The general rule is that passengers who are injured while attempting to get upon or off a railroad train while it is in motion cannot recover for their injuries. * * * To this general rule some exceptions have been recognized, one of which is where the passenger is either ordered or invited by the company or its agents to get on or off, notwithstanding the motion of the train. *Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26 [13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144]; *Lake Shore, etc., R. Co. v. Pinchin*, 112 Ind. 592 [13 N. E. 677]; *Evansville, etc., R. R. Co. v. Duncan*, 28 Ind. 441 [92 Am. Dec. 322]. But a passenger must not attempt either to get onto or off a train while it is in motion, if it be obviously dangerous to make the attempt, although he may have been advised, or even ordered, to do so by the servants of the company. 2 Wood, *Railway Law*, 1127. Such an attempt is at the peril of the passenger, when he is a person of ordinary intelligence and not acting under constraint. While it is the plain duty of a railroad company to stop its train at the place of a passenger's destination long enough to permit him to get off with safety, the fact that a train is about to pass such place of destination without stopping does not justify the passenger in incurring any serious risk by jumping from the train. In such a contingency the passenger's remedy is against the company for carrying him past his place of destination."

In *England v. Boston, etc., R. Co.*, 153 Mass. 490, 27 N. E. 1, the court said:

"The plaintiff acted on the belief that the train had stopped when it had not stopped, and this mistake was due to her own omission to use reasonable care. The fact that it was dark where she attempted to alight rendered more caution not less necessary on her part. To step off of the train where it was * * * 'so dark that a person couldn't see where he or she was going,' under circumstances that did not amount to an invitation on the part of the defendant to do so, or an assurance that it was safe to do so, and where no necessity existed for doing it, was of itself a contributory act of carelessness on the part of the plaintiff."

And in the case of *East Tennessee, etc., R. Co. v. Holmes*, 97 Ala. 832, 337, 12 South. 286, 288, the court said:

"He made the leap, of his own accord, at great peril to his life and limb, because, as it would seem, he did not desire to be carried be-

yond his destination. He thus took the risk of his own reckless venture, and the defendant ought not to be made to pay for it. There was not even the excuse of necessity for his having done so. * * * No one has the right to leap from a moving train, because he is being carried beyond his destination, with the expectation of claiming from the railroad company damages for any injury he may sustain. His duty is to remain aboard, and demand redress for the injury that may have been done to him."

See, also, *Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477.

[4] The next assignment of error is that the court erred in overruling the motion in arrest of judgment; the contention of appellant being that both paragraphs of the complaint show that appellee was guilty of contributory negligence which was the proximate cause of his injury. It is a sufficient answer to this objection to say that the appellant did not present this question by the demurrer addressed to the first paragraph of complaint, and, not having done so, the right to raise the question by a motion in arrest of judgment is denied by section 344, Burns 1914. There was no error in overruling the motion in arrest of judgment.

Appellant also contends that the court erred in giving certain instructions to the jury. Instruction No. 3 given at the request of appellee is as follows:

"I instruct you that there is no legal obligation upon a passenger upon a regular railroad passenger train to notify the conductor of such train of his point of destination. The railroad company by the sale of a ticket to such a passenger already knows his destination, and the conductor of its train is but the servant of such company, and is bound by its knowledge. So in this case, if you believe from the evidence that the plaintiff bought a ticket for the town of Upland, Ind., of the defendant's agent at Gas City, and with said ticket went upon a passenger train of the defendant for transportation to said town, I then instruct you it was the duty of the conductor of said train and of the other of defendant's employes and servants upon said train to know the destination of said plaintiff and to stop said train at said town of Upland a reasonable length of time to allow the plaintiff to alight therefrom."

Appellant insists that this instruction is erroneous because it is not applicable to the evidence or relevant to the issues, is misleading, and invades the province of the jury. The contention of appellant is that it is the duty of a person going upon a train to make known to the conductor or person in charge of the train his destination, especially if his destination is a flag station where the train does not stop regularly.

In *Chattanooga, etc., R. Co. v. Lyon*, 89 Ga. 16, 15 S. E. 24, 15 L. R. A. 857, 32 Am. St. Rep. 72, it was held that, when a railroad company sells a ticket to a flag station at which its trains do not stop unless sig-

naled to do so for the purpose of receiving passengers or when there are on board passengers for such station, it is ordinarily the duty of the conductor to ascertain from the passenger before reaching such station that such is the passenger's destination and to stop the train there for the purpose of allowing the passenger to leave the train. This rule, under special circumstances, is subject to exceptions. The Supreme Court of Georgia in the case last cited said:

"The holder of a ticket has, ordinarily the right to assume, when he buys it, that the company will safely land him at his destination. Accordingly he has the right to presume that the conductor will call for his ticket before reaching the station specified, and thus obtain notice * * * that he desires to stop at such station. * * * There may be circumstances under which a passenger for a flag station is carried beyond his destination when it would not be fair or just to attribute the fact to the company's negligence. In a recent Texas case, *Gulf, etc., Co. v. Ryan* [Tex. App.] 18 S. W. 886, it appeared that the defendant in error bought a ticket to a flag station, knowing it was such, and that trains did not stop there 'unless some request was made upon the conductor to do so.' It would seem that he bought the ticket with the knowledge that he must notify the conductor of his destination, and, failing to do so, it was held that he was not entitled to recover. Aside from instances like this, there may be other occasions, * * * when the conductor will be prevented, without fault on his part, from ascertaining in time the desire of the passenger to stop at a flag station, or when, under the circumstances, it is manifestly the duty of the passenger to see to it that the conductor has the necessary information. In cases of doubt as to who should take the initiative, the question may very properly be left to the jury."

[5, 6] The general rule is that, in the absence of a rule of the carrier, known to the passenger, requiring the passenger for a flag station to notify the conductor of the train of their ticket-stipulated destination before arrival thereat, there is no primary obligation on such ticket passenger to notify the conductor of such passenger's destination. In the absence of such a rule, so known or promulgated as to bind the passenger, the ticket sold by the carrier to the passenger is conclusive notice to the carrier of the fact of such passenger's destination. *Louisville, etc., R. Co. v. Fuqua*, 187 Ala.

464, 65 South. 396, 52 L. R. A. (N. S.) 668; *San Antonio, etc., Co. v. Dykes* (Tex. Civ. App.) 45 S. W. 758; *Missouri, etc., Co. v. Glass*, 46 Tex. Civ. App. 126, 102 S. W. 447; *Chattanooga, etc., R. Co. v. Lyon*, supra; *Louisville, etc., R. Co. v. Seale*, 172 Ala. 480, 55 South. 237; *Ft. Smith, etc., R. Co. v. Ford*, 34 Okl. 575, 126 Pac. 745, 41 L. R. A. (N. S.) 745.

We are aware of the fact that there are cases where a different rule has been announced, but, as a rule, there were facts sufficient in each instance to distinguish such cases from the one now under consideration, such as a rule requiring the passenger to notify the conductor, knowledge on the part of the passenger that the train would not stop unless the conductor was notified, etc. *Rock Island, etc., R. Co. v. Stevens*, 84 Ark. 436, 105 S. W. 1082, 108 S. W. 517, 16 L. R. A. (N. S.) 1132. We find no error in the giving of the instructions.

The judgment must be reversed, however, on account of the error in overruling the demurrer to the second paragraph of complaint.

Judgment reversed, with instructions to sustain demurrer to the second paragraph of the complaint and for further proceedings not inconsistent with this opinion.

(70 Ind. App. 713)

BOARD OF COM'RS OF MADISON COUNTY v. BOLAND et al. (No. 9908.)

(Appellate Court of Indiana. June 5, 1919.)

Appeal from Superior Court, Delaware County; Robert M. Van Atta, Judge.

Action between the Board of Commissioners of Madison County and Daniel L. Boland and others. Judgment in favor of the latter, and the former appeals. Appeal dismissed.

Walter Vermillion, of Anderson, for appellant. Leffler, Ball & Needham, of Muncie, and Bagot & Free, of Anderson, for appellees.

PER CURIAM. Appellant's brief in this case is in substantially the same condition as was the brief in the cause of *Palmer v. Beall*, 60 Ind. App. 208, 110 N. E. 218, and the brief in the cause of *Curry v. City of Evansville*, 56 Ind. App. 143, 104 N. E. 978.

On authority of those cases, this appeal is dismissed.

(226 N. Y. 224)

ORTHEY v. BOWDEN.

(Court of Appeals of New York. April 22, 1919.)

1. MORTGAGES ⇨264 — RIGHTS OF MORTGAGEE AGAINST REMOTE ASSIGNEES.

A mortgagee, induced by fraud to assign the mortgage, has no remedy against a subsequent bona fide assignee thereof for value.

2. APPEAL AND ERROR ⇨1094(3)—FINDINGS—CONCLUSIVENESS.

Findings by the Special Term, unanimously affirmed by the Appellate Division, are binding upon the Court of Appeals.

3. MORTGAGES ⇨264 — FORECLOSURE—BONA FIDE HOLDER—FRAUD OF HOLDING TRUSTEES.

Where trustees of an estate had obtained a mortgage from the mortgagee through the fraud of one of such trustees, they were not bona fide holders of the mortgage for value, and could not have foreclosed the mortgage as against the defrauded mortgagee.

4. MORTGAGES ⇨264—OBTAINING MORTGAGE BY FRAUD—PURCHASE BY ESTATE—DEFECTS.

Where plaintiff, as substitute trustee of a decedent's estate, took over a mortgage secured from the mortgagee by the fraud of his predecessors, plaintiff held the mortgage subject to all its defects and imperfections and all equities existing in behalf of the defrauded mortgagee as against the assignment to the estate, which paid out no money therefor, and parted with nothing save possibly its right to make trustees account further.

5. MORTGAGES ⇨264—ASSIGNMENT—CONSIDERATION.

The release of two trustees of an estate by judicial settlement of their accounts did not act as a valid consideration, as the acceptance of the mortgage for moneys due the estate from its trustees, who procured the mortgage from mortgagee through the fraud of one of them, where none of the estate's money went into the mortgage.

6. VENDOR AND PURCHASER ⇨237—CONSIDERATION—PRECEDENT DEBT—PRIOR EQUITIES.

The mere existence of a precedent debt is not sufficient consideration to support a conveyance as against prior equities, even when it is accepted in absolute payment and satisfaction of the antecedent debt.

7. APPEAL AND ERROR ⇨1085 — UNANIMOUS AFFIRMANCE — EVIDENCE OF FINDING — TRIAL—EXCEPTIONS.

While a unanimous affirmance of the findings of the Special Term by the Appellate Term forecloses the Court of Appeals from examining the record to see whether there is evidence to sustain a finding, yet exceptions during the trial may be passed upon.

8. EXECUTORS AND ADMINISTRATORS ⇨513 (1)—ACCOUNTING AND SUGROGATE'S DECREE AS EVIDENCE.

In an action to foreclose a mortgage defended on the ground that it was obtained from

the mortgagee by the fraud of the plaintiff estate's trustee, the accounting and surrogate's decree showing its assignment to the estate by such former trustee for trustee's debt, was no evidence that estate money had been invested by such trustee in the mortgage.

9. MORTGAGES ⇨264 — FORECLOSURE—CONSIDERATION—INDEBTEDNESS.

Where the trustee of an estate personally obtained mortgage from mortgagee by fraud, his transfer of the mortgage to the estate in payment of his personal indebtedness would not constitute a consideration from the estate.

10. MORTGAGES ⇨264—FORECLOSURE—BURDEN OF PROOF—BONA FIDE PURCHASER.

In an action by a substituted trustee of an estate to foreclose a mortgage fraudulently secured from mortgagee by his predecessor, where it appeared that mortgagee received nothing from the assignment, the burden was upon the estate as holder to show by competent evidence that the mortgage had been taken without notice and for value.

11. EVIDENCE ⇨318(1)—HEARSAY—TRUSTEES' ACCOUNT.

In action by substituted trustee of an estate to foreclose a mortgage obtained by his predecessors from the mortgagee through fraud, the statement in the account rendered by such former trustees that they had invested some of the money of the estate in the bond and mortgage was a self-serving declaration, not binding upon mortgagee, who was not a party to the accounting proceedings, and as to mortgagee was mere hearsay.

Hiscock, C. J., and Hogan, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Herman W. Orthey, as substituted trustee under the last will and testament of Frederick Westphal, deceased, against Appolonia Bowden, defendant. From a judgment of the Appellate Division, Second Department (177 App. Div. 928, 163 N. Y. Supp. 1125), affirming a judgment of the Special Term in favor of the plaintiff, the defendant appeals. Judgment reversed, and new trial granted.

The action is to foreclose a mortgage, the defense of the defendant, Appolonia Bowden, the mortgagee, being that an assignment from her of the mortgage was obtained by fraud, and that the plaintiff is not a holder for value.

James G. Purdy, of Brooklyn, for appellant.

L. E. Rogers and John M. Zurn, both of Brooklyn, for respondent.

CRANE, J. [1,2] Appolonia Bowden was induced by her son-in-law, Julius Scharmann, through fraud to make an assignment of the mortgage in question to him. She has no remedy against a bona fide holder thereof

for value. The question presented by this appeal is whether upon the findings of the trial court which have been unanimously affirmed the plaintiff appears to be a holder for value.

Prior to August 1, 1905, Appolonia Bowden was the owner of premises at the northwest corner of Bogart and Cook streets, Brooklyn, N. Y. She conveyed the same to Abraham Bogan and Isaac Nishman, taking back a purchase-money mortgage dated on that day for \$10,000. Without her knowledge or consent her son-in-law, Julius Scharmann, who conducted the transactions, had the mortgage made to himself as a joint mortgagee with her.

Through false and fraudulent representations Julius Scharmann on the 2d day of April, 1906, obtained from Appolonia Bowden an assignment of this mortgage to himself, Julius Scharmann, and Justus Bleidner, as sole acting trustees under the last will and testament of Frederick Westphal, deceased. The assignor received no consideration whatever for this assignment, although Scharmann thereafter, as part of his deception, continued to pay her the interest on the mortgage. The circumstances of the fraud are immaterial; the findings in this particular being conclusive.

[3] By decree of the Surrogate's Court, dated June 12, 1909, Justus Bleidner and Julius Scharmann, as trustees, were permitted to resign, and on November 11, 1909, an order of the Supreme Court was made, appointing the plaintiff herein as a trustee in their place and stead.

Thereupon, and on the 18th day of November, 1909, for a recited consideration of \$1, said Scharmann and Bleidner assigned Mrs. Bowden's mortgage, which they had held up to that time, to Herman W. Orthey as substituted trustee. There was some question at the time of the resignation and accounting of the two trustees as to the sufficiency of the security of the Bowden mortgage which appeared as an asset of the estate, and Scharmann, in order to allay any doubts, gave his personal bond guaranteeing the payment.

It has been found by the trial judge that in their accounting the trustees included the mortgage of \$10,000 as an asset. The sixteenth finding in this particular is as follows:

"* * * The said trustees duly presented an account of proceedings, supplementing an account theretofore filed by them, which accounts of proceedings were examined by the plaintiff herein and by beneficiaries of the trusts contained in the will of Frederick Westphal, deceased, and which accounts of proceedings showed and set forth that the acting trustees, Julius Scharmann and Justus Bleidner, had on April 2, 1906, invested in the bond and mortgage made by the defendants, Bogan and Nishman, to Appolonia Bowden and the said Julius Scharmann, dated August 1, 1905, and

subsequently on April 2, 1906, assigned by the said Appolonia Bowden and Julius Scharmann to the said sole acting trustees of the estate of Frederick Westphal, deceased, the sum of \$10,000, moneys of the estate of Frederick Westphal, deceased. * * *

There is no finding that any money of the trust estate was invested by these trustees in this mortgage. The finding merely is that these trustees represented that such was the case. On the contrary, the trial judge found by further findings of fact numbered 13 and 14 as follows:

"(13) That the signature of the said defendant Bowden to the said instrument was obtained by the said Julius Scharmann with the intent to defraud and deprive the said defendant Bowden of the said bond and mortgage.

"(14) That no consideration was received by the defendant Bowden for the said instrument or for the bond and mortgage referred to therein."

One thing is certain. Up to November 18, 1909, the two trustees, Scharmann and Bleidner, could not have foreclosed the mortgage as against the defendant Bowden. They were not bona fide holders for value. No money of the estate had been invested in the mortgage. The finding is specific that Mrs. Bowden did not receive a dollar as consideration for the assignment. One of them was also guilty of fraud in obtaining the mortgage. Scharmann and Bleidner were not acting as individuals, but took the assignment of the mortgage to themselves as acting trustees for the Westphal estate. What has happened since November 18, 1909, to create a consideration? Nothing has happened except the discharge of these trustees upon an accounting in which they turned over the mortgage as an asset.

[4, 5] The estate at that time paid them no money; it parted with nothing except possibly its right to make them account further. The plaintiff as substituted trustee took over the property of the estate held by his predecessors subject to all its defects and imperfections and all the equities existing in behalf of Mrs. Bowden as against the assignment of this mortgage. If Mrs. Bowden received no consideration for the mortgage, when was the \$10,000 of the estate moneys invested in it? There is no finding upon the matter. The release of the two trustees by the judicial settlement of their accounts could not act as a valid consideration, as the acceptance of the mortgage for moneys which might be due to the estate from Scharmann and Bleidner would not constitute a valuable consideration such as bars out prior equities. It is said that Scharmann may have been indebted to the trust estate for moneys withdrawn by himself from the trust funds, and that there would be a consideration in whatever manner or at whatever time the \$10,000 were paid out of the estate funds.

But if, as is quite apparent from these findings, the \$10,000 or no part of it went into the mortgage or to Mrs. Bowden, but was used by the trustees for some other purpose, the acceptance in 1911 by this plaintiff as substituted trustee of the mortgage as payment for this indebtedness would not be a consideration for the purposes here intended.

[8] It is generally admitted that the mere existence of a precedent debt is not a sufficient consideration to support a conveyance as against prior equities, not even when it is accepted in absolute payment and satisfaction of an antecedent debt. *Weaver v. Barden*, 49 N. Y. 286, 293; *Duncomb v. N. Y., H. & N. R. R. Co.*, 84 N. Y. 190; *Ten Eyck v. Witbeck*, 135 N. Y. 40, 81 N. E. 994, 31 Am. St. Rep. 809; *Howells v. Hettrick*, 160 N. Y. 308, 54 N. E. 677.

The mere statement of a consideration without giving the facts may, for a case like this, be merely a conclusion of law. The findings, however, do not rest with any such conclusion, for they fairly state what this consideration was supposed to be, viz., the acceptance by the substituted trustee of the \$10,000 mortgage as a valid asset of the estate and the discharge of the accounting trustees from liability for this amount.

As above stated, such a payment and discharge for money due from the trustees do not constitute such a valuable consideration as to bar out Mrs. Bowden's equities.

[7-10] Even if we do not read these findings as I have here stated and adopt the view that there is a sufficient finding of fact that the estate of Westphal invested \$10,000 in the Bowden mortgage in 1906, yet the conclusion to which we come must be the same. As above stated, Mrs. Bowden, the assignor, received nothing. The only evidence to sustain a finding that the trustees paid \$10,000 for the assignment of this mortgage is the accounting proceeding which was offered in evidence. While we are foreclosed by the unanimous affirmance from examining the record to see whether there is evidence to sustain a finding, yet we may pass upon the exceptions taken during the trial. The account of proceedings of Julius Scharmann and Justus Bleidner, as sole qualified trustees, filed October 15, 1908, in the Surrogate's Court, was offered in evidence, and received over objection and exception. The objection was to its materiality and relevancy, and that it was not in any way binding upon the defendant Bowden.

While the accounting and the surrogate's decree following might have been received for the purpose of showing that the assignment of this mortgage was held as an asset of the estate, and that Scharmann and Bleidner had been allowed for it in the final settle-

ment, it was no evidence that the estate money had been invested by them in the mortgage, and that at the time of the Bowden assignment to them as trustees they had taken the estate money for such a purpose. Mrs. Bowden got no money at the time of the assignment in 1906, and there is no evidence that the estate paid out \$10,000 to any one at that time, or at any time until the allowance of this amount to Scharmann and Bleidner on the accounting in 1909. Scharmann, who had defrauded Mrs. Bowden, might just as well have defrauded the estate and have taken this mortgage and given it to the estate to cover up his misdoings. As above stated, such a payment of his personal indebtedness would not constitute consideration. Whether this be so or not we do not know, but when it appeared that Mrs. Bowden received nothing for the assignment, the burden was upon the holder to show that the mortgage had been taken without notice and for value. This was not done except by incompetent evidence.

[11] The account as made up by the trustees contained this recital:

"On April 2, 1906, we invested the sum of ten thousand dollars on bond and mortgage covering the improved real property situated on the northwesterly corner of Cook and Bogart streets, Brooklyn, New York City, which said mortgage was made by Abraham Bogan and Isaac Nishman to Appolonia Bowden and Julius Scharmann, * * * and which was assigned to us by said Appolonia Bowden and Julius Scharmann, by assignment dated April 2, 1906."

This was a self-serving declaration, not binding upon Mrs. Bowden, who was not a party to the accounting proceedings; as to her it was mere hearsay. At the time of the trial Scharmann was dead, and Bleidner knew nothing about the transaction. Such a written statement, unsupported by other testimony, was no evidence of the fact as against strangers to the accounting.

The exception taken was good; it touched a vital point, and likewise requires a reversal of the judgment.

It appearing, therefore, that the plaintiff in this case is in no better position as to this mortgage than his predecessors in title and that they could not foreclose the mortgage, not being holders in good faith and for value, this judgment must be reversed, and a new trial granted, costs to abide the event.

CHASE, COLLIN, and CUDEBACK, JJ., concur.

McLAUGHLIN, J., concurs on ground last stated in opinion.

HISCOCK, C. J., and HOGAN, J., dissent.

Judgment reversed, etc.

(238 N. Y. 212)

**FIRST NAT. BANK of ANN ARBOR,
MICH., v. FARSON et al.***(Court of Appeals of New York. April 22,
1919.)**1. PARTNERSHIP §127—"COMMERCIAL PART-
NERSHIP"—"TRADING PARTNERSHIP"—
WHAT ARE.**

A partnership engaged in carrying on the business of buying and selling bonds and other securities is a trading or commercial partnership, and each partner possesses the powers the law attributes to a member of such a firm.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Commercial Partnership; First and Second Series, Trading Partnership.]

**2. PARTNERSHIP §128—TRADING PARTNER-
SHIP—POWERS OF PARTNER.**

Under Partnership Law, § 5, each member of a trading partnership is impliedly empowered to conduct the business in the way usual to that class of business or to his partnership; each partner being a principal, and as to each other partner a general agent.

**3. PARTNERSHIP §129—TRADING PARTNER-
SHIP—POWERS OF PARTNER.**

A member of a trading or commercial partnership has, through implication, the power to buy and sell the articles dealt in, to borrow money for the business, and to give notes and checks of the partnership; such acts being within the general usages and methods of such partnerships.

**4. PARTNERSHIP §147—TRADING PARTNER-
SHIP—POWERS OF PARTNER—GUARANTY OR
SURETYSHIP.**

A member of a commercial partnership has no implied authority to bind his partners or the firm by contracts of guaranty or suretyship either for himself individually or for third persons.

**5. EVIDENCE §21—PARTNERSHIP §147—
JUDICIAL NOTICE—AUTHORITY OF PARTNER
—CUSTOM AND USAGE—GUARANTY.**

The power of a member of a commercial partnership engaged in buying and selling securities to guarantee the payment of securities sold can only be implied from such a custom or usage in the business, and the courts cannot take judicial notice of such power.

**6. PRINCIPAL AND AGENT §110(1)—GUAR-
ANTY OR SURETYSHIP.**

The power of an agent to bind the principal in contracts of guaranty or suretyship can only be charged against the principal by necessary implication, where the duties to be performed cannot be discharged without the exercise of such power, or where such power is the customary and necessary incident to the authority delegated.

**7. PARTNERSHIP §217(1)—AUTHORITY OF
PARTNER—BURDEN OF PROOF.**

When a party takes a guaranty to which a firm name is signed, the burden of proof is on him to show partner who signed such firm

name had authority from one of the legitimate sources to do so.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the First National Bank of Ann Arbor, Mich., against John Farson and William Farson, individually and as copartners doing business under the firm name and style of Farson, Son & Co. From a judgment of the Appellate Division affirming a judgment for plaintiff after trial without jury (178 App. Div. 135, 165 N. Y. Supp. 119), defendants appeal. Reversed, and new trial granted.

Simon Fleischmann, of Buffalo, and Walter H. Pollak, of New York City, for appellants.

Arnold L. Davis, of New York City, for respondent.

COLLIN, J. The plaintiff recovered a judgment in the amount of the face value of five bonds of the Eden Irrigation & Land Company, in virtue of a guaranty executed in the name "Farson, Son & Co." The claim of the defendants is that the member of "Farson, Son & Co." who executed the guaranty, in executing it, exceeded his authority. The findings of fact of the Trial Term were unanimously affirmed by the Appellate Division.

The cardinal facts are: At the times involved, John Farson, Sr., and the defendant John Farson were the members of a general partnership in the name of Farson, Son & Co. They, as the partnership, carried on the business of buying and selling bonds and other securities. On or about April 10, 1908, a salesman of the firm sold to the plaintiff the five bonds we have mentioned. Each bond was of \$1,000, was dated January 1, 1907, was payable January 1, 1916, with interest payable semiannually, and was owned by the partnership. The salesman, in negotiating the sale, offered, on behalf of the partnership, under the authorization of John Farson, Sr., to guarantee the principal and interest of the bonds. In closing the sale the cashier of the partnership, one Parrott, authorized thereunto by John Farson, Sr., delivered to the plaintiff through the mail a written instrument with the signature "John Farson, Son & Co." made by John Farson, Sr., which contained, among other things, the stipulation:

"For value received, we hereby guarantee payment of principal and interest promptly at maturity of the following bonds, namely: [Followed by a designation of the five bonds.]"

The acts of John Farson, Sr., were performed by him purporting to act as a member of the firm. The obligor in the bonds did not pay the principal sum of them at

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Reargument denied 123 N. E. 864.

maturity or at any time, or the interest due upon them from July 1, 1915. In case the defendant John Farson, who is the surviving member of the partnership, is liable to the plaintiff by reason of the guaranty, William Farson is also liable, by reason of an agreement between him and John Farson. The finding of the trial court, as a conclusion of law, "there is now due and owing from the defendants and each of them to the plaintiff the principal sum of the face value of the bonds and the unpaid interest," was duly excepted to. We are to determine whether or not the findings of fact sustain the conclusion of law and the consequent judgment.

[1, 2] The partnership was a trading or commercial partnership. *Kimbrow v. Bullitt*, 22 How. 256, 268, 16 L. Ed. 313; *Pease v. Cole*, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53; *Marsh v. Wheeler*, 77 Conn. 449, 59 Atl. 410, 107 Am. St. Rep. 40; 1 *Bates on Partnership*, 327. Each partner possessed the powers the law attributes to a member of a partnership of that nature. Each constituted the other his agent for the purpose of entering into all contracts for him, and for the partnership, within the scope of the partnership business. The law of agency mainly, although not exclusively, governs the relations of partners to each other, and to the persons who deal with the partnership. Each partner acts, as to himself, as a principal, having a joint interest in the partnership property, and, as to each other partner, as a general agent. The implied powers of a partner rest in the usages and business methods of those conducting commerce and trade, and grew out of the necessities of commercial business. They do not extend broadly to partners in nontrading partnerships. As to third persons, the authority to a partner must be found in the actual agreement of the partners, or through implication, in the nature of the business according to the usual and ordinary course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in those, it may still be inferred from the actual, though exceptional, course and conduct of the business of the particular partnership itself, as personally carried on with the knowledge, actual or presumed, of the partner sought to be charged. The power or authority of a partner in a commercial partnership is to be tested and measured, when the actual agreements between the partners are unknown, by the ordinary usages of and the methods customarily used in partnerships conducting a business like unto, or by the usages and methods of, his own partnership. Each partner is impliedly empowered to conduct the business in the way usual to that class of business, or to his partnership. Partnership Law (Consol. Laws, c.

39), § 5; *Winship v. Bank of the United States*, 5 Pet. 529, 563, 8 L. Ed. 216; *Irwin v. Williar*, 110 U. S. 499, 505, 4 Sup. Ct. 160, 28 L. Ed. 225; *Nemeth v. Tracy*, 217 N. Y. 714, 112 N. E. 1061; *King v. Sarria*, 69 N. Y. 24, 25 Am. Rep. 128.

[3] The instant case does not involve, through the findings or evidence or the briefs or argument of counsel, a method or course of dealing peculiar to Farson, Son & Co., or a ratification of or acquiescence in the guaranty by John Farson, or an express or actual authorization to John Farson, Sr., to execute it. The findings present us with the facts: The existence of the partnership; the nature of its business; the sale and the attendant circumstances; the execution of the guaranty; and the consequent liability. Those findings do not directly or by just and reasonable inference beget the conclusion that persons engaged in the business of buying and selling bonds and other securities in the cities of New York and Chicago, customarily and as an ordinary usage in selling bonds owned by them, guaranteed the payment of the principal and interest of the bonds. The law has known and recognized certain transactions and contracts of one partner as binding upon the other partners and the partnership, because they were manifestly within the scope or objects of the partnership; they were directly and reasonably, if not necessarily, incident to or connected with the business of the partnership. Thus a member of a trading or commercial partnership has, through implication, the power to buy and sell the articles dealt in, to borrow money for the business, and to give notes and checks of the partnership, to transfer and indorse by the partnership the notes and checks given the partnership, or enforce their payment by actions at law, or hire and discharge employes. Those acts and others are within the general usages and methods of those partnerships.

[4-6] The only base upholding the implied authority of John Farson, Sr., to execute the guaranty must, under the findings of fact, arise from the general usages and methods of partnerships of its class. The guaranty executed by John Farson, Sr., to the plaintiff has two elements: The one, it guaranteed the payment of the debts of a third party, namely, the Eden Irrigation & Land Company; the other, the debts or bonds were the property of the partnership and the guaranty was made as a part of and presumably to effect a sale of them. The first element need not detain us, because it is a thoroughly established rule of law that a partner has not implied authority to bind his partner or the partnership by contracts of guaranty or suretyship, either for himself individually or for third persons. *Lavery v. Burr*, 1 Wend. 529; *Foot v. Sabin*, 19 Johns. 154, 10 Am. Dec. 208; *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 381, 9

Sup. Ct. 332, 32 L. Ed. 725; Butterfield v. Hemsley, 78 Mass. (12 Gray) 226; Rollins v. Stevens, 31 Me. 454. The second element requires more consideration. The law does not know, and the courts cannot know or take notice, that a general agent or a partner in making sales of the property of the principal or partnership is impliedly authorized by mere force of the agency to make any guaranty or warranty in relation to the article. Generally speaking, his implied authority, if he has it, springs from the usage of the business in which the principal or partnership is engaged. If in that business it is usual to give the guaranty in making the sale, the authority to sell carries with it the power to guarantee. *Smith v. Tracy*, 36 N. Y. 79; *Wait v. Borne*, 123 N. Y. 592, 604, 25 N. E. 1053; *Bierman v. City Mills Co.*, 151 N. Y. 482, 489, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 635; *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Waupaca Electric Light & Ry. Co. v. Milwaukee Electric Ry. & L. Co.*, 112 Wis. 469, 88 N. W. 308; *First National Bank of Dubuque v. Carpenter*, 41 Iowa, 518; *Sweetser v. French*, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; *Matter of Farmers' & Merchants' Bank*, 194 Mich. 200, 160 N. W. 601; *Hollister Bros. v. Bluthenthal & Bickart*, 9 Ga. App. 176, 70 S. E. 970; *Cockroft v. Clafin*, 64 Barb. 464; *Crist v. Turner*, 175 App. Div. 664, 161 N. Y. Supp. 856; *Clarke v. Wallace*, 1 N. D. 407, 18 N. W. 339, 26 Am. St. Rep. 636; *Brady v. Todd*, 9 C. B. N. S. 591. For a decision of contrary import, see *McNeal v. Gossard*, 6 Okl. 363, 50 Pac. 159. It is a general rule that the power of an agent to bind the principal in contracts of guaranty or suretyship can only be charged against the principal by necessary implication, where the duties to be performed cannot be discharged without the exercise of such a power, or where the power is a manifestly necessary and customary incident of the authority bestowed upon the agent, and where the power is practically indispensable to accomplish the object in view. *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438; *Williams v. Dugan*, 217 Mass. 526, 105 N. E. 615, L. R. A. 1916C, 110; *Mechem on Agency*, §§ 389, 392; *Merchants' National Bank v. Nichols & Co.*, 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752.

There is not a finding that in the business in which Farson, Son & Co. were engaged the usage of guaranteeing the payment of the bonds or securities sold existed. The conclusion of law was ill founded and invalid without it.

[7] Undoubtedly emergencies or extraordinary conditions may arise in virtue of which the ordinary extent of the authority of the agent will be enlarged. As I am recommending the granting of a new trial, I refer to the rule: When a party takes a guar-

anty, to which the partnership name is signed, the burden of proof is on him to show that the partner who signed such name had authority, from one of the legitimate sources, so to do. *Rollins v. Stevens*, 31 Me. 454; *Herring v. Skaggs*, 62 Ala. 186, 34 Am. Rep. 4; *Sibley v. American Exchange Bank*, 97 Ga. 126, 25 S. E. 470; *Standard Wagon Co. of Georgia v. D. P. Few Co.*, 119 Ga. 293, 46 S. E. 109; and cases above cited.

I recommend that the judgment be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, C. J., and CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

Judgment reversed, etc.

(226 N. Y. 246)

In re NUNEZ.

(Court of Appeals of New York. April 22, 1919.)

1. EMINENT DOMAIN \S 249—ENFORCEMENT OF AWARD—SET-OFF OF BENEFITS.

Where an award, in acquiring title to street, was made, and benefit assessments made upon the property, the city had an implied right to set off the assessment against the award under Greater New York Charter, §§ 970, 1007, as amended by Laws 1906, c. 658, the amendment (Laws 1915, c. 606, § 3), not applying to prior proceedings instituted under prior statutes, and one selling the parcels subject to the assessment and retaining the award cannot, while assessments are unpaid, collect the same from the city.

2. EMINENT DOMAIN \S 249—SET-OFF OF ASSESSMENT AGAINST AWARD—IMPLICATION FROM STATUTE.

In determining the legislative intention from a city charter, as to the right of the city to set off an assessment against an award which must be founded upon statutory provisions, while the manifest equity in the cancellation of mutual credits will be considered, the court will not strain to hold that the manifest equity has been ignored, where the statutory scheme suggests by reasonable implication that it has been heeded and obeyed.

3. EMINENT DOMAIN \S 249—AWARDS AND ASSESSMENTS—SET-OFF—ASSIGNMENT OF AWARD.

The right of the city to set off an assessment against an award on parcels was not extinguished by the assignment of the award, since it arose by implication under a special statute with an independent scheme of remedies and was not a question of counterclaim under the Code, particularly since the set-off did not grow out of the owner's personal liability, the owner not being named in the assessment (Charter, § 894), and there being no evidence that payment was ever demanded (Charter, § 1004).

4. EMINENT DOMAIN — 249 — AWARD — SET-OFF OF ASSESSMENT — ASSIGNMENT OF AWARD.

The owner of parcels of land, accepting an award upon the city's acquiring title to a street, accepts it subject to the burden of the assessment, and he does not relieve it from that burden when he assigns it, but the assignee takes it subject to the city's right to set off the assessment against it.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the application of William H. Nunez for payment of an award. From an order of the Appellate Division of the Supreme Court for the Second Department (183 App. Div. 989, 169 N. Y. Supp. 1106), which reversed an order of the Special Term (99 Misc. Rep. 645, 164 N. Y. Supp. 841), and denied the petitioner's application for payment of an award, the applicant appeals. Affirmed.

Thomas C. Blake, of New York City, for appellant.

Joseph A. Solovei, of Brooklyn, for respondent.

CARDOZO, J. In October, 1906, the Supreme Court confirmed the report of commissioners of estimate and assessment in proceedings to acquire title to West Thirteenth street, in the borough of Brooklyn, city of New York. The report made an award of \$875 to the unknown owners of damage parcels Nos. 1 and 2. It imposed on the abutting premises a benefit assessment of \$1,918.57. The owner of the abutting premises was stated in the report to be Anna E. Denyse. In reality, the owner was one Andrew G. Cropsey, who held an unrecorded deed. In 1914 the widow and heirs of Mr. Cropsey conveyed the land, subject to this assessment, to the petitioner, William H. Nunez, and the administrator of the estate of Mr. Cropsey assigned to Mr. Nunez the award. Both land and award thus remained in the same ownership. Thereafter Mr. Nunez conveyed the land to one Mabel Jones "subject to all valid liens for taxes and assessments," but retained the award for himself. In 1916 he made application to the court for the payment by the city of New York of the amount of the award with interest. In opposition, the city asserted the right to offset the assessment. The right was denied at the Special Term, and upheld at the Appellate Division. An appeal to this court followed.

[1, 2] We think the set-off of assessment against award was properly sustained. The rights of the parties must be sought in the statute as it stood in 1906 (Greater N. Y. Charter [Laws 1901, c. 466] c. 17, tit. 3). The amendments of 1915 (Laws 1915, c. 606) do not apply to proceedings already instituted

under earlier statutes (Laws 1915, c. 606, § 3). But we think that under those statutes as under the later one, the right of set-off is implied in the statutory scheme. Compensation is to be made to those persons to whom "the loss and damage" caused by the improvement "shall be deemed to exceed" the benefit and advantage, "for the excess of the damage over and above the value of the benefit." Laws 1901, c. 466, § 970. Interest is not to be demanded by the city except upon the excess of the amount to be paid over and above the amount to be received. Laws 1901, c. 466, § 1007, as amended by Laws 1906, c. 658. These sections do not, like the present statute (Laws 1915, c. 606, § 988), confer the right of set-off in so many words. We think they do confer it, however, by reasonable implication. That has been the prevailing view in the Supreme Court. *Matter of Bankers' Investing Co.*, 141 App. Div. 591, 126 N. Y. Supp. 241; *Matter of Fischer*, 149 App. Div. 618, 133 N. Y. Supp. 1043; *Matter of City of N. Y.*, 151 App. Div. 925, 136 N. Y. Supp. 1134; 206 N. Y. 637, 99 N. E. 1107; *Matter of Jones*, 178 App. Div. 654, 165 N. Y. Supp. 896. A like view has been expressed, though only by way of dictum, in this court. *Matter of City of N. Y. (Jerome Ave.)*, 192 N. Y. 459, 466, 467, 85 N. E. 755. There is a manifest equity in the cancellation of mutual credits. *Lanesborough v. Jones*, 1 P. Wms. 325, 326; *Green v. Farmer*, 4 Burr. 2214, 2220; *Lindsay v. Jackson*, 2 Paige, 581. That is something to be considered in determining the intention of the Legislature. Upon the facts before us, the right of set-off must find its foundation, if it has any, in the provisions of the statute (*Genet v. City of Brooklyn*, 99 N. Y. 296, 304, 1 N. E. 777); but the courts will not strain to hold that manifest equity has been ignored, when the scheme of the statute suggests by reasonable implication that it has been heeded and obeyed.

[3, 4] The question remains, however, whether the right of set-off was extinguished by the assignment of the award. We think our holding should be that the right is unimpaired. This is not a question of counterclaim under the Code. It is one of set-off under a special statute, with an independent scheme of remedies. The award in the hands of its first owner was subject to set-off to the extent of any benefit assessments upon the lands of the same owner. The set-off did not grow out of any theory that the owner had become personally liable for the payment of the assessments. It may be that he was not personally liable. He was not named as owner in the assessment (Charter, § 894), and there is no evidence that payment had ever been demanded (Charter, Laws 1901, c. 466, § 1004). The significance of these circumstances we need not now determine. His duty to submit to set-off had no relation to his personal liability. It existed because the

statute said it should exist. It continued though personal liability might be postponed or even destroyed. It grew out of his position as owner at the confirmation of the report. Not common ownership thereafter, but common ownership then, is the tie that links together assessment and award. The owner, accepting the award, accepts it subject to the burden. But if that is true, he does not relieve it of the burden when he assigns it to some one else. The assignee of a chose in action is subject to all the equities which attach to the thing assigned as against the assignor. *Smith v. Parkes*, 16 Beav. 115; *Roxburghe v. Cox*, 17 Ch. Div. 520, 526; *Central Trust Co. of N. Y. v. West India Improvement Co.*, 169 N. Y. 314, 62 N. E. 387. That is the general principle, of which the rule of subjection to existing set-offs is merely a phase or illustration. *Smith v. Parkes*, supra; *Roxburghe v. Cox*, supra; *Beckwith v. Union Bank*, 4 Sandf. 604, 610, affirmed 9 N. Y. 211. This award was subject to an equity while in the hands of its first owner. It remained subject to the same equity thereafter. The statute views the benefit and the burden as parts of the same transaction, much as in cases of recoupment. *Selbert v. Dunn*, 216 N. Y. 237, 110 N. E. 447. No assignment can divorce them. *Selbert v. Dunn*, supra; *Am. Bridge Co. v. City of Boston*, 202 Mass. 374, 88 N. E. 1089; *Taylor v. Mayor*, etc., of N. Y., 82 N. Y. 10, 17, 18, 20. The burden follows the benefit, no matter into whose hands the benefit may pass.

The order should be affirmed with costs.

HISCOCK, C. J., and CHASE, HOGAN, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order affirmed.

(226 N. Y. 270)

QUAST v. FIDELITY MUT. LIFE INS. CO.

(Court of Appeals of New York. April 29, 1919.)

1. APPEAL AND ERROR ⇨173(14)—NEW DEFENSE IN APPELLATE COURT—ACTION TO RECOVER CASH VALUE OF LIFE POLICY.

In action to recover cash value of life policy, with profits, insurer claiming that when plaintiff surrendered his old policy for the one in suit he signed a certificate of loan, which plaintiff denied, certain matters constituting discrimination in favor of plaintiff, if there was no certificate of loan, and consequent illegality, should have been pleaded, and the defense cannot be raised on appeal under the issues as framed.

2. CONTRACTS ⇨339—ACTION—GENERAL DENIAL—SPECIAL PLEADING OF ILLEGALITY OF CONTRACT.

The general denial in an action on a contract simply puts in issue all matters which

plaintiff is bound to prove to make out his cause of action; to avail himself of facts not appearing on the face of the contract to establish its invalidity or illegality, defendant must plead them.

3. INSURANCE ⇨125(2)—LIFE INSURANCE—NEW YORK CONTRACT.

Where application for a life policy was written and delivered to the insurer's agent in Buffalo, and mailed by the agent to the insurer at Philadelphia, and the first premium was paid at the insurer's office in Buffalo, and the policy sent by mail to insured in Buffalo, the contract of insurance may be considered a New York contract.

4. INSURANCE ⇨138(2)—LIFE INSURANCE—DISTINCTION OR DISCRIMINATION—STATUTE.

Twenty-payment life policy issued to plaintiff, fully stating the consideration, in that it was issued on surrender of an old policy and for ten yearly payments of \$72.68, held not violative of the Pennsylvania statute prohibiting life insurers from making or permitting any distinction or discrimination in favor of individuals between insureds of the same class, etc.

5. INSURANCE ⇨141(1)—LIFE INSURANCE—ACTION ON POLICY—DEFENSE OF ILLEGALITY.

Despite Laws 1892, c. 690, § 89, prohibiting life insurers from making any discrimination in favor of individuals of the same class, and the like Pennsylvania statute, whichever was applicable, a life insurer could not plead as a defense, when sued for the guaranteed cash value of a 20-payment policy, that its issuance of such policy, in return for insured's surrender of his old policy, and his agreement to pay premiums for 10 years, was a discrimination rendering the policy illegal and void, since its discriminatory character did not appear at the time, while no one can profit by his own fraud, as by retaining premiums paid under the old and new policy while disclaiming liability.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by William A. Quast against the Fidelity Mutual Life Insurance Company. From judgment of the Appellate Division (178 App. Div. 908, 164 N. Y. Supp. 1110), affirming judgment of the trial term for plaintiff, defendant appeals. Affirmed.

Wilbur E. Hout, of Buffalo, for appellant.
Charles M. Harrington, of Buffalo, for respondent.

CRANE, J. This is an action upon an insurance policy to recover the guaranteed cash value, together with the profits apportioned thereto.

William A. Quast, a resident of Buffalo, N. Y., in December of 1893 was insured for \$2,000 by the Fidelity Mutual Life Association of Philadelphia. The annual premium was \$32.16, which was paid by the insured for 12 successive years, the last payment being made December 25, 1904.

The company, in 1905, had changed from a mutual life association to a regular stock company, taking the name of the Fidelity Mutual Life Insurance Company, and thereafter instead of writing insurance on the assessment plan proceeded to write all new policies on the legal reserve basis. Being desirous of exchanging the old policies outstanding for those of the new form of insurance which it was issuing, the defendant sent out an agent, one Masten Newton, to call upon the policy holders and effect a substitution where possible. The advantage or reasons for the change need not here be considered.

Newton called upon the plaintiff at his then place of business in Buffalo, and requested him to surrender his old policy and take out a new policy on the 20-payment life plan. The application which the insured signed at Newton's request read as follows:

"Application.

"I, William A. Quast, do hereby apply to the Fidelity Mutual Life Insurance Company, of Philadelphia, Pa., for an insurance on my life for \$2,000 on the 20 Pay G. A. plan, the premium, as stated in the policy, to be payable annually. I was born on the 8 day of December, 1865, and desire policy to be issued as of age 29. Premiums to be fully paid in 10 years from this date. Make policy payable to Della A. Quast, related to me as wife. I select the 10 year accumulation period, and I hereby agree on behalf of myself, and of any person who shall have or claim any interest in the policy issued under this application, that in the matter of distribution of surplus or profits, or the apportionment of dividends the principles and methods which may be adopted by the company for such distribution or apportionment, and its determination of the amount equitably belonging to any policy which may be issued under this application, shall be and hereby are ratified and accepted.

"In consideration of the issuance of the policy herein applied for, I hereby surrender to said company all right, title and interest in and to policy or certificate No. 45635, issued to me under the title of the Fidelity Mutual Life Association.

"Dated at Buffalo, N. Y., May 27, 1905.

"William A. Quast, Applicant,

"Address: 65 Watson St., Buffalo, N. Y.

"Witness: M. Newton."

The premium for the new policy was \$72.68, payable annually for 10 years, the policy becoming a fully paid up policy on May 27, 1915.

The agreement, as understood by the plaintiff and as called for by the application and the policy, was, in substance, that the plaintiff should surrender his old policy upon which he had paid for 12 years and that the defendant would give him a 20-payment life policy to become a fully paid up policy by the annual payment of \$72.68 for 10 years. The first 10 years of the 20-payment life policy were to be paid for by the surrender of the old policy.

The new policy, when issued, recited the contract in these particulars as follows:

"This insurance is granted as of date May 27, 1895, in consideration of the application hereof, which is made a part hereof, and of the surrender and cancellation of policy No. 45635, issued by the Fidelity Mutual Life Association, now the Fidelity Mutual Life Insurance Company, and of the payment in advance of seventy-two and 68/100 dollars, and of the payment of a like amount on or before the 27th day of May in every year thereafter, until premiums for twenty years have been duly paid, or until the prior death of the insured.

"The premium paying period on this policy ends on the twenty-seventh day of May, 1915."

The insured paid the premiums as called for until the maturity of the policy on the 27th day of May, 1915, when he elected to take, in accordance with its provisions, the paid-up cash value, together with the profits. The defendant then for the first time informed him that he had signed a certificate of loan wherein he had agreed to pay \$536, and 6 per cent. thereon for the first 10 years of the 20-payment life policy, and that he was only entitled to the balance of the cash surrender value and the profits after the deduction of this amount. The balance of \$622.93 the defendant offered to pay.

Claiming that he never signed any loan certificate or made any such contract, the plaintiff brought this action upon his policy.

By its answer the defendant, after certain denials and admissions, set forth as a defense the facts in substance as already stated, and further alleged that the plaintiff had borrowed from it, by a certificate of loan signed by him, the sum of \$536, to pay for the first 10 years of the new policy, which was to be deducted from any sum due upon the policy, and the defendant alleged it was ready to pay the plaintiff this balance if he would accept the same.

Under these pleadings the trial proceeded upon the sole issue of whether or not the plaintiff had signed the certificate of loan. The plaintiff denied that his name appearing upon the paper had been signed by him, while the witness Masten Newton testified that the plaintiff signed it in his presence. Both sides called experts in handwriting, those for the plaintiff claiming the signature to be a forgery, and those for the defendant stating it to be genuine. The judge charged the jury as follows:

"If you shall find that the plaintiff did not sign this certificate it will be your duty to return a verdict for the plaintiff for the full amount of \$1,480.53, with interest from May 27, 1915. If you shall find that he did sign the certificate it will be your duty to bring in a verdict for \$622.93, without interest."

The jury found for the plaintiff.

After a unanimous affirmance by the Appellate Division (178 App. Div. 908, 164 N. Y.

Supp. 1110), only one question of law is raised on appeal to this court, which arises from the refusal of requests to charge. They are these:

"I ask the court to charge that plaintiff's contention to the effect that the defendant agreed to issue a policy, or the policy in suit, on the surrender of the old assessment policy, and thereupon and on the payment of 10 annual premiums of \$72.68 by plaintiff the defendant did issue the policy in suit under such consideration only; that the defendant then violated the law controlling the case and did discriminate in favor of individuals, between insureds of the same class in the amount of premiums paid or rates charged for policies in the same class."

"I ask the court to charge the jury that if the defendant did discriminate in favor of individuals between insureds of the same class in the amount of premiums paid or rates charged for policies of the same class that then the policy in suit is illegal and the plaintiff cannot recover in this action."

The point regarding these requests is this: It appeared from the testimony of one of the defendant's witnesses that about 3,000 of the old life policy holders had surrendered their policies for new policies and in each instance had either paid cash for the insurance which was dated back or else had signed a loan certificate authorizing a deduction for such insurance to be made from the amount paid upon the policy. If the plaintiff did neither of these things, but simply surrendered his old policy for a new one which became fully paid in 10 years, he received a benefit or favor not accorded to others in his class. They not only surrendered their policies, but paid for the first years of the 20-payment life, while he surrendered his policy and paid nothing for these first 10 years except what he had already paid upon the old policy. This, it is claimed by the defendant, is a violation of the Pennsylvania or New York statute against discrimination hereafter referred to and rendered the policy or insurance contract void.

[1] At the very outset it will be noted that the defendant has failed to plead the new matter constituting the illegality. It knew before the action was commenced that the plaintiff denied the certificate of loan. By its answer it merely alleged that he had signed the certificate of loan and went to trial upon this issue. The alleged illegality did not appear upon the face of the complaint, nor in the application or insurance policy. It rested entirely upon facts within the defendant's knowledge, i. e., the surrender of old policies by 3,000 other applicants and the payment by them of cash or the giving of loan certificates for back dated insurance. These matters constituting discrimination and illegality should have been pleaded, and such defense cannot now be raised under the issues as framed.

[2] The general denial in the answer in an action on a contract puts in issue simply all matters which the plaintiff was bound to prove to make out his cause of action; in order to avail himself of facts not appearing upon the face of the contract to establish its invalidity or illegality, the defendant must plead them. *Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31, 24 Am. St. Rep. 454; *Codd v. Rathbone*, 19 N. Y. 37; *Morford v. Davis*, 28 N. Y. 481; *Kansas City School District v. Sheldley*, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576.

[3] But passing from the question of pleading to the merits, we have a contract which the parties have assumed to be a Pennsylvania contract. The application for the policy in question was written and delivered to the agent in Buffalo and mailed by the agent to the company at Philadelphia. The first premium was paid at the company's office in Buffalo and the policy sent by mail. Under such circumstances it may be that the contract of insurance was a New York contract. *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497.

The law of New York in 1905 regarding discriminations, being section 89 of chapter 690 of the Laws of 1892, read as follows:

"No life insurance corporation doing business in this state shall make any discrimination in favor of individuals of the same class or of the same expectation of life either in the amount of premium charged or in any return of premium, dividends or other advantages. No agent of any such corporation shall make any contract for insurance or agreement as to such contract other than that which is plainly expressed in the policy issued."

The penalty for violation was found in the Penal Code, the present sections being sections 1191 and 1200 of the Penal Law (Consol. Laws, c. 40).

The parties, however, have treated this as a Pennsylvania contract, and as the result is the same in either case I will pass at once to the consideration of the Pennsylvania statute which was offered in evidence. It reads:

"107. No life insurance company doing business in Pennsylvania shall make or permit any distinction or discrimination in favor of individuals between insureds of the same class and equal expectations of life, in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes, nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract, other than as plainly expressed in the policy issued thereon, nor shall any such company or agent pay or allow or offer to pay or allow nor shall any insureds receive directly or indirectly, as inducements to insurance, any rebate of premium payable on the policy or any

special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance." Purdon's Dig. [13th Ed.] p. 1965.

In the first place it may be noted that this statute provides that the insureds shall not receive any special favor or advantage "not specified in the policy contract of insurance."

[4] As above quoted, the policy of insurance in this case fully stated the consideration for the 20-payment life policy issued to the plaintiff and that it was to be fully paid in 10 years upon the surrender of the old policy and the 10 yearly payments of \$72.68. Under the terms of this statute, therefore, there was no violation. Such has been the interpretation of this law by State of Maine v. Schwarzschild, 83 Me. 261, 22 Atl. 164, where the Maine statute was almost exactly the same as this Pennsylvania law.

[5] But even if this be not a sufficient answer to the appellant's objections, let us pass to the vital point and determine whether the defendant could plead as a defense to its contract its own violation of the law.

Succinctly stated the facts are these: For 12 years the plaintiff paid \$32.16 to the defendant on a policy of insurance. In 1905 he surrendered the old policy of insurance under an agreement that for the surrender of this policy the defendant would give him a 20-year life policy payable in 10 years if he made 10 annual premium payments of \$72.68. The insured has kept his agreement and paid all the amounts to the company, which has never offered to return any part thereof. It refuses to carry out its contract while still holding on to the premiums, pleading its own illegal act as a defense. The illegality is said to consist in giving the plaintiff a favor which it did not give others in his class, and that in so doing it violated the law. It seeks to profit by illegitimate business. No claim is made that the plaintiff knew that he was receiving any discrimination or favor not given to others, and there is no evidence in the case even warranting the inference that the plaintiff could have known or discovered such a fact. The advantage or discrimination, if given, was the voluntary act of the defendant and hidden within its books until revealed upon this trial. Certainly the courts will not listen to such a pleading, or permit the defendant to profit by its own wrong as against one not in pari delicto.

The Pennsylvania act did not intend to make these contracts void for any such discrimination as is here shown; it aimed at the insurance company and agents, only applying to the insured if at all when the favor or discrimination was known to him. While we may be bound to consider only such portion of the Pennsylvania statute as has been offered in evidence, yet the fact is that the penalties annexed to the statute consist of

fines for repeated violations and a disqualification from acting as a life insurance agent. 3 Pepper & Lewis' Digest of Penn. Laws, 1895 to 1897, p. 350. This indicates that the punishment was not to fall upon the innocent policy holder, and that an executed contract was not to be made void. It is the intention which governs in these matters.

As insurance companies have rarely raised such a plea the cases upon this point are scarce, but such as we find express the law as here stated. In *Laun v. Pacific Mutual Life Insurance Co. of California*, 131 Wis. 555, 111 N. W. 660, 9 L. R. A. (N. S.) 1204, the insured sought to recover premiums paid on the ground that a discrimination had been made in his favor. The statute of Wisconsin was the same as that of Pennsylvania, and after a review of the authorities the court said:

"A life insurance company may have contracts with thousands of persons for millions of dollars, and be found to have through its agents, with or without the knowledge of the officers of the company, granted rebates out of the agent's commission or out of the expense fund to many of its patrons. The act is *malum prohibitum* only. The Legislature neither declared the insurance contract void nor made the act a misdemeanor, nor undertook to punish both parties to the transaction, nor undertook to add any sanction to the law against discrimination other than the forfeiture of license of the insurance company, or of the agent, to do business in this state. Can it be presumed under the authorities cited in this opinion that there was a legislative intention that the insurance company should retain all premiums and enrich itself by illegality through absolution from all liability on such policies? Can it be presumed that it was intended that all premiums that the insured might pay at any time within the period limited by law for the commencement of actions could be recovered back to the disadvantage of those insurers who conformed to law and paid the legal rates, by diminishing the annual surplus which should go to lessen their premiums, or by impairing the fund to which such law-abiding insurers must look for security? Would not this put a premium upon violations of this statute and enrich those concerned in such violations at the expense of the just man who kept the law? Were there nothing but these consequences apparent from the peculiar subject-matter of the legislation in question, we might be warranted in inferring that the Legislature intended no such consequences."

In *Meridian Life Insurance Co. v. Dean*, 182 Ala. 127, 62 South. 90, the action was on a life insurance policy for \$2,500; the defense being the violation of a statute like the Pennsylvania act. In the opinion it is stated as follows:

"Insurance statutes are passed to protect the citizens, not to trap them. * * * We must in each case look for the intent of the law that prohibits the act which so entered into or induced the contract. * * * The statute may

in terms declare such contract void, voidable, illegal, or valid; but, if not, it is the subject of judicial construction to ascertain the intent. * * * The question is entirely one of legislative intent. * * * If the defendant's pleas are good in this case, then any insurance company can defeat any recovery on any policy by violating the statute and then setting up its own wrong as a defense to the action on the policy. It can collect the premiums on policies for years, less whatever rebate it sees fit to allow, being careful not to allow the same rebate to all, keep the premiums paid, and escape all liability for losses by setting up that it has violated the law. Such a construction of the statute ought not to be adopted if it can be avoided."

So, also, in *Robinson v. Security Life & Annuity Co.*, 163 N. C. 415, 79 S. E. 681, we find it stated regarding a similar statute:

"The statute does not invalidate the contract of insurance or the agreement of the parties, and it purports to operate upon the insurance companies alone."

See, also, *Smathers v. Bankers Life Insurance Co.*, 151 N. C. 98, 65 S. E. 746, 18 Ann. Cas. 756.

The Supreme Court of Pennsylvania (*Swan v. Watertown Fire Ins. Co.*, 96 Pa. 37), has decided that foreign insurance companies doing business in that state without having complied with the provisions of the statute relating to such companies cannot set up their turpitude to defeat actions on their contracts brought by innocent persons. The statute does not impose upon the insured the duty of seeing that the insurer and his agents have complied with the statutory requirements.

"That a company," said the court, "soliciting and receiving the consideration for insurance, may avoid its obligation on the ground that either itself or its agent has violated the law, is a proposition repugnant to familiar elements of the law."

To the same effect is *Watertown Fire Insurance Co. v. Rust*, 141 Ill. 85, 30 N. E. 772, in which the court said:

"The insurance company knows whether it has complied with the law, but the public do not, and they have the right, in the absence of bad faith and of actual knowledge to the contrary, to presume that a foreign insurance com-

pany assuming to act in this state is acting lawfully, and the company, when sued upon a policy issued under such circumstances, is estopped to allege that it had no lawful authority to issue the policy."

The same principle was applied in *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317.

That statutes similar to this are enacted for the protection of the insured and for the control and punishment only of the insurer in the absence of words to the contrary is stated by Earl, C. J., in *People v. Formosa*, 131 N. Y. 478, 482, 30 N. E. 492, 493 (27 Am. St. Rep. 612), regarding rebates by agents. He said:

"The nature of insurance contracts is such that each person effecting insurance cannot thoroughly protect himself. He is not competent to investigate the condition and solvency of the company in which he insures, and his contracts may run through many years and mature only, as a rule, at his death. Under such circumstances, it is competent for the Legislature, in the interest of the people and to promote the general welfare, to regulate insurance companies and the management of their affairs, and to provide by law for that protection to policy holders which they could not secure for themselves."

The policy of our law that no one will be permitted to profit by his own fraud or to take advantage of his own wrong or to found any claim upon his own iniquity or to acquire any property by his own crime was clearly expressed in *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819.

We therefore conclude that, even if the insurance company were in a position under its pleading to raise the question, the policy in this case is not void for discrimination, and that neither the Pennsylvania nor the New York statute has such effect on the facts and under circumstances here stated.

The judgment appealed from should therefore be affirmed with costs.

HISCOCK, C. J., and CHASE, COLLIN, OUDDEBACK, HOGAN, and McLAUGHLIN, JJ., concur.

Judgment affirmed.

(235 N. Y. 235)

WILLIAMS et al. v. ALT et al.

(Court of Appeals of New York. April 29, 1919.)

1. WILLS \Leftrightarrow 523—CONSTRUCTION—CLASSES.

A will devising land to a son and his wife "during their joint lives," to go to their lawful issue on death of the survivor, indicated a gift to son's wife living at time of execution of will, and not to one whom he might subsequently marry.

2. LIFE ESTATES \Leftrightarrow 25—LEASES—TERMINATION.

Where a life tenant dies, a lease made by him of the property to a third person is terminated, and such third person becomes a trespasser under Code Civ. Proc. § 1664.

3. LANDLORD AND TENANT \Leftrightarrow 296(2) — SUMMARY PROCEEDINGS FOR POSSESSION—RELATION OF LANDLORD AND TENANT—"INTRUDER"—"SQUATTER."

Where a life tenant under a will leases the property and the lease is terminated by his death, making the lessee a trespasser under Code Civ. Proc. § 1664, such trespasser is not a "squatter" nor "intruder" within the meaning of section 2232 (4), and the relation of landlord and tenant does not exist between him and the remaindermen, and he cannot be ejected in summary proceedings, a squatter being one who settles on the lands of another without legal authority, and an intruder being one who enters upon property where he has no right, or one who, after the death of an ancestor, enters upon land unlawfully before the heir can enter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Intruder; Squatter.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Harry C. Williams, individually and as administrator with the will annexed of Thomas Mook, deceased, and others, against William A. F. Alt and others. From an order of the Appellate Division of the Supreme Court in the First Judicial Department (188 App. Div. 235, 174 N. Y. Supp. 460), affirming an order of the Appellate Term of the Supreme Court, which in turn affirmed a final and intermediate order of the Municipal Court in a summary proceeding to recover the possession of real property, plaintiff appeals. Affirmed.

See, also, 174 N. Y. Supp. 928.

William R. Hill, of New York City, for appellants.

Max Schleimer, of New York City, for respondents.

CHASE, J. Thomas Mook died in 1885, leaving a will which was duly admitted to probate. He provided therein as follows:

"Fifth. I give and devise to my son Henry R. Mook and his wife during their joint lives my

house and lot Number 299 Third avenue in the city of New York being about 18 feet 6 inches wide by 97 feet deep, upon the same terms and conditions and with the same powers to the executors as are mentioned in the second clause of this will in reference to said house and lot No. 305 Third avenue. * * *

The second clause of the will gives and devises to another son "and his wife during their joint lives" a house and lot No. 305 Third avenue, and in said clause it is further provided:

"On the death of the survivor of them I give and devise the same to their lawful issue if they have any; if there be no lawful issue then living then I desire my executors hereinafter named or the survivor or survivors of them or such of them as may qualify to sell said premises or any part thereof either at public or private sale as they may deem most expedient and divide the proceeds of such sale among my then surviving children and the lawful issue of such of them as may then be dead, the issue of each deceased child taking the share his or their parent would have taken if living."

At the death of Thomas Mook his son Henry R. Mook was a married man living with his wife, Helen Poole Mook. Helen Poole Mook died March 3, 1910. Henry R. married the second time, November 23, 1914, and died February 24, 1917, without leaving issue. The name of his second wife was Jennie D. Mook, and she is now living. Henry R. Mook, on the 9th day of July, 1914, rented the real property described in the fifth paragraph of the will to the respondent William A. F. Alt for a period of ten years to begin May 1, 1915. Jennie D. Mook claims that as she was the wife of Henry R. Mook at the time of his death she is entitled to the possession of said real property during her life. She has expressly consented that William A. F. Alt remain in the possession of said real property on the terms of the lease of July 9, 1914. The appellants are the administrators with the will annexed of the goods, etc., of Thomas Mook, deceased, and the owners under said will of the fee of said real property subject to the possession thereof for life as therein stated. They brought this proceeding to remove the respondents from said real property. Two questions are before us for consideration:

(1) Has Jennie D. Mook any interest in said real property under the will of Thomas Mook?

(2) Even if Jennie D. Mook has no interest in said real property, can the appellants maintain summary proceedings for the removal of William A. F. Alt and his subtenants therefrom.

[1] We do not think that the gift in this case to the son's wife was in any sense to a class. The rule that a gift to a class to take effect in the future vests in the person or per-

sons who answer the description on the date of distribution is not applicable. *Salter v. Drowne*, 205 N. Y. 204, 98 N. E. 401. The gift was to Henry R., the testator's son, and to his wife. The testator spoke of an existing fact. The gift was to persons designated "during their joint lives." The wife then living or living at the date from which the will is deemed to speak was designated as the person intended by the testator as surely as if she had been mentioned by name.

It has been held that unless there be something in a will indicating the contrary a gift to the wife of a designated married man is a gift to the wife living at the time of the making of the will and not to one whom he may subsequently marry. *Meeker v. Draffen*, 201 N. Y. 205, 94 N. E. 626, 33 L. R. A. (N. S.) 816, Ann. Cas. 1912A, 930; *Van Brunt v. Van Brunt*, 111 N. Y. 178, 19 N. E. 60; *Van Syckel v. Van Syckel*, 51 N. J. Eq. 194, 26 Atl. 156. If the testator had intended to make the gift to his son and his son's wife living at the death of the son, he would have chosen words fairly expressing that intention.

The cases in this state relied upon by the respondents are clearly distinguishable from the case now before us. In *Matter of Harris*, 152 App. Div. 52, 136 N. Y. Supp. 711, affirmed 206 N. Y. 690, 99 N. E. 1108, a testator gave certain property in trust for the benefit of his son for life, and upon the death of the son the principal "shall belong to his wife and children then living." The court held that the wife living at the death of the son, and not a former wife living at the date of the will and the death of the testator, was intended by the testator.

In *Meeker v. Draffen*, supra, the will under consideration devised and bequeathed certain property to the testator's son, and further provided that upon the death of the son the property so devised should be equally divided "between my said wife and my son's widow and child or children." It was held that it was the intention of the testator to give an interest in the residue to the person who was the wife of his son at the time of his (the son's) death.

In the case now before us there is nothing to indicate an intention on the part of the testator to make a gift other than to the wife of his son living at the making of the will or at the time of his (Thomas Mook's) death.

Jennie D. has no interest in the real property under consideration. It has already been so held by the Surrogate's Court, and also by the Appellate Division on an appeal from the order of the Surrogate's Court in a proceeding in which Jennie D. Mook was the petitioner. An administrator with the will annexed of the goods, etc., of Thomas Mook, deceased, was appointed. The appointment was made without notice to Jen-

nie D. Mook. She subsequently made application to the Surrogate's Court to have the letters of administration with the will annexed revoked. That application was denied. *Matter of Mook's Estate*, 167 N. Y. Supp. 170. An Appeal was taken from that order to the Appellate Division, where the order of the Surrogate's Court was unanimously affirmed. 181 App. Div. 934, 167 N. Y. Supp. 1114.

[2] When Henry Mook died the lease made by him, as owner of a life estate in the real property, to the respondent Alt, terminated. *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75, 16 L. R. A. (N. S.) 151.

It is provided by section 1664 of the Code of Civil Procedure as follows:

"A person in possession of real property, as guardian or trustee for an infant, or having an estate determinable upon one or more lives, who holds over and continues in possession, after the determination of his trust or particular estate, without the express consent of the person then immediately entitled, is a trespasser."

Alt, therefore, from the death of Henry R. Mook was a trespasser as were his subtenants, and the reversioners, owners of the fee, were entitled to the possession of said real property.

The question remains whether on the refusal of Alt and his subtenants to deliver possession of the real property to the appellants they were entitled to maintain summary proceedings to obtain possession.

[3] Summary proceedings, except in punishment for contempt and in a few other cases dependent upon special reasons, were not allowed at common law. Summary proceedings, as implied in the name, are short and simple in comparison with those that are usual, regular, and formal. They are authorized by statute in prescribed instances. In this state they are allowed to recover the possession of real property by title 2 of chapter 17 of the Code of Civil Procedure. See sections 2231 to 2233, inclusive. They are generally, but not exclusively, confined to cases where the conventional relation of landlord and tenant exists. Other relations are included by the provisions of sections 2232 and 2233. Section 2232 provides generally that a person who holds over as therein provided may be removed as provided in the title relating to summary dispossession in four specified instances. The first three subdivisions of the section relate in turn to property sold by virtue of an execution—property sold upon foreclosure—and property held under an agreement to occupy and cultivate upon shares. The fourth subdivision of the section provides:

"4. Where he, or the person to whom he has succeeded, has intruded into, or squatted upon, any real property, without the permission of the person entitled to the possession thereof, and the occupancy, thus commenced, has continued

without permission from the latter; or, after a permission given by him has been revoked, and notice of the revocation given to the person or persons to be removed."

It is urged by the appellants that Alt being a trespasser within the provisions of section 1664 quoted comes within subdivision 4 of said section 2232. We think not. He is not a squatter thereon within the meaning of the statute, and his possession did not commence by intrusion therein but by right. The relation of landlord and tenant does not exist as between the appellants and Alt, and as he (Alt) does not come within the terms of the sections quoted which extends the authority of the court in summary proceedings, the remedy of the appellants is by an action to recover possession of the real property.

The fourth subdivision of said section, so far as it affects the question now before us, is sufficiently clear, so that we cannot find that it was the intention of the Legislature to include therein any case not within such clear meaning.

A squatter is one who settles on the lands of another without any legal authority, and an intruder is one who enters upon property where he has no right, or, as it has been defined, one who, after the death of an ancestor, enters upon land unlawfully, before the heir can enter. The respondent Alt entered upon the lands in question by right under the life tenant, then living. The occupancy "thus commenced" has not been changed by any new arrangement with the respondents. The use by the Legislature of the words "squatter" and "intruder" in statutes affecting possession of real property and leading up to the present statutes mentioned does not seem to have been intended to include persons other than those within the ordinary meaning of the words. Chapter 396, Laws of 1857, relating to the punishment of nuisances and malicious trespasses on land and the subsequent criminal statutes, including sections 467 and 640, subdivision 9, of the Penal Code, and 2036 and 1425, subdivision 9, of the Penal Law (Consol. Laws, c. 40); also Revised Statutes, pt. 3, c. 8, tit. 10, § 28, and the amendments thereto from which the present section 2232 of the Code of Civil Procedure originated.

It is said that the reason why summary proceedings should be sustained in the case now before us is as impelling as if Alt and his subtenants were technically intruders or squatters upon the land. The court has no power or authority to sustain a proceeding not within the statutory provisions. It is a case where the Legislature might with good reason add another subdivision to said section 2232 to include a case where persons like the respondents who come rightfully in-

to the possession of real property remain therein without right after the death of a life tenant and the termination of their rightful possession thereof.

The statement of this court in *Barson v. Mulligan*, 198 N. Y. 23, 25, 90 N. E. 1127, about the removal of a person in possession of real property by summary proceedings, was not necessary to the decision of that case, and does not require that we should hold that the proceedings in this case should be sustained.

The order should be affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order affirmed.

(233 Ill. 359)
DUNNE v. ROCK ISLAND COUNTY et al.
(No. 12708.)

(Supreme Court of Illinois. June 6, 1919.)

1. INJUNCTION ~~§~~194 — RELIEF — REMOVAL OF BUILDING.

Where a county, pending a proceeding to enjoin the erection of a jail building on a certain square, partially erected the building, the complainant, upon obtaining perpetual injunction, had a right to have any part of the building constructed while the suit was pending removed.

2. INJUNCTION ~~§~~132, 194—TEMPORARY INJUNCTION—PURPOSE.

The only office of a temporary injunction is to preserve the status until a final hearing, and upon such a hearing, if a perpetual injunction is ordered, the defendant may be required to restore the status.

Appeal from Circuit Court, Rock Island County; W. T. Church, Judge.

Bill by Edmund M. Dunne, Catholic Bishop, against the County of Rock Island and others. From a decree for plaintiff, the defendants appeal. Modified and affirmed.

See, also, 233 Ill. 628, 119 N. E. 591.

C. J. Searle, of Rock Island, for appellants.

James F. Murphy and Kenworth, Dietz, Shallberg, Harper & Sinnett, all of Rock Island, for appellee.

CARTWRIGHT, J. On June 21, 1915, the appellant, Edmund M. Dunne, Catholic Bishop, filed in the circuit court of Rock Island county his bill, alleging that the public square in the city of Rock Island had been dedicated to public use, to be open and free from encroachments of any kind, and praying for an injunction restraining the county of Rock Island from erecting a jail there-

on, to the irreparable injury of his property fronting and abutting on the square. Upon a hearing of a motion for a temporary injunction the motion was contested by affidavits, without any plea or answer to the bill, and the motion was denied, and the bill dismissed. An appeal was prosecuted to this court, and the decree was reversed, on the grounds that the bill on its face stated a good cause of action and affidavits could not be heard on the motion. The court stated the law to be that the words "Public Square," written on the map, clearly indicated that the square was dedicated as a public square, to be used by the public for some public purpose; but the words did not indicate any certain or definite use of the square, and the purpose might be shown by proof of custom or long usage. The cause was remanded, with directions that the parties be required to make up issues in the case by proper pleadings for a final hearing.

After the filing of the bill the General Assembly passed an act approved June 24, 1915 (Laws 1915, p. 491), providing that it should be unlawful to build a jail within 200 feet of any building used exclusively for school purposes, and the complainant contended that he was entitled to insist upon the provisions of that statute; but his claim was not sustained for want of allegations in the bill that his school building was used exclusively for school purposes and that the jail would be within 200 feet of the school building. *Dunne v. County of Rock Island*, 273 Ill. 53, 112 N. E. 342. After the case was reinstated in the circuit court the bill was amended by adding averments that the school building was used exclusively for school purposes, and that the contemplated jail building, when erected, would be within 96 feet of the complainant's building. The prayer for an injunction was amended, so as to bring it within the purview of the act, and prayed for an injunction against constructing the jail building on any part of the public square, and particularly within 200 feet of the school building. The answer denied that the dedication was for use as a public square free from buildings or encroachments of any kind, or that complainant's building was used exclusively for school purposes, and alleged the invalidity of the act as violating provisions of the Constitution. The issues were referred to the master in chancery to take the evidence and report the same with his conclusions. The cause was heard on exceptions to his report, and the amended bill was dismissed for want of equity, and a second appeal was prosecuted from that decree.

The complainant had based his right to an injunction upon two different and distinct grounds, and by the amendment had only sought to restrain the erection of a jail within 200 feet of his building. If that relief should be granted, the prayer of his bill

would be satisfied, and the further claim necessarily abandoned. This court said that if the issue of fact as to the use of the building was found in favor of the complainant, and the act prohibiting the erection of a jail within 200 feet of a building used exclusively for school purposes was not unconstitutional, the other questions raised concerning rights claimed under the original bill were eliminated. The court considered the evidence, and found those issues in favor of the complainant, and the decree was reversed, and the cause remanded to the circuit court, with directions to grant the relief prayed for in the bill. *Dunne v. County of Rock Island*, 283 Ill. 628, 119 N. E. 591. There was not only no decision concerning the power or right of the county to erect a jail on the public square more than 200 feet from the complainant's building, but it was stated that no such question was considered. The only questions were whether the complainant's building was used for school purposes and whether the act was a valid and lawful exercise of the police power, and, these questions having been resolved in favor of the complainant, the circuit court was directed to grant the relief which the court had said the complainant was entitled to under the facts and law. The cause was again reinstated in the circuit court, and a decree was entered enjoining and restraining the county "from locating, building, and constructing and thereafter maintaining said jail building on any part of the said public square, and particularly within 200 feet of said building of the complainant so used exclusively for school purposes."

A reading of the opinion of this court, stating what relief the complainant was entitled to under the facts and law in connection with the mandate, would show that an injunction against erecting a jail at any place on the public square not within 200 feet of the complainant's building was not within the meaning or intent of the direction given, because no question of that kind was considered or decided.

[1, 2] The decree also found that since the institution of the suit, and while it was pending, the county had partially erected a jail building on the public square within 200 feet of the school building, and it was ordered to remove all such parts or portions of the jail building so erected during the pendency of the suit. The only office of a temporary injunction is to preserve the status until a final hearing, and upon such a hearing, if a perpetual injunction is ordered, the defendant may be required to restore the status. *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611; *Turney v. Shriver*, 269 Ill. 164, 109 N. E. 708; *Gulick v. Hamilton*, 287 Ill. 367, 122 N. E. 537. An injunction against the erection of a jail building within 200 feet of the complainant's building having been awarded, the complainant

had a right to have any part of the building constructed while the suit was pending removed by the county.

The decree is modified, by striking out the words "any part of" and the words "and particularly," and, as so modified, the decree is affirmed.

Decree modified and affirmed.

THOMPSON, J., having been state's attorney for the county of Rock Island throughout this litigation, took no part in this decision

(233 Mass. 131)

CAMBRA v. SANTOS et al.

SOUZA v. SAME.

(Supreme Judicial Court of Massachusetts.
Barnstable. May 24, 1919.)

1. MASTER AND SERVANT §150(2)—INJURIES TO SERVANT—NEGLIGENCE.

The captain or owner of a fishing schooner equipped with an auxiliary gasoline engine was negligent in setting two members of the crew at work transferring gasoline in cans from a supply vessel to the storage tank on the schooner without warning in a place which could be found peculiarly dangerous under the circumstances.

2. MASTER AND SERVANT §284(2)—EMPLOYMENT BY CAPTAIN OR ALL OWNERS OF FISHING SCHOONER—QUESTION FOR JURY.

In an action for injuries to two of the crew of a fishing schooner from the explosion of gasoline vapor, whether responsibility for negligence was confined to the captain of the schooner alone as employer or as owner pro hac vice, or was that of all the owners in the enterprise, having a common ownership, controlling the vessel through their agents, and sharing profits and losses, *held* for the jury.

3. MASTER AND SERVANT §88(1)—PARTNERSHIP §9(1) — RELATION BETWEEN CREW AND OWNERS OF VESSEL.

Members of the crew of a fishing schooner who received a lay or share of the profits of each trip could be found to be employees of the master and owners under evidence that their lay or share was in the nature of wages and did not create a partnership.

4. MASTER AND SERVANT §288(1), 289(1)—INJURIES TO SERVANT—DUE CARE AND ASSUMPTION OF RISK—QUESTION FOR JURY.

In an action for injuries in a gasoline explosion on board a fishing schooner, issues of due care of the injured members of the crew, plaintiffs, and assumption of risk by them, *held* for the jury.

5. MASTER AND SERVANT §285(13, 14)—INJURY TO SERVANTS—CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK—BURDEN OF PROOF.

Employers sued for injuries to servants had the burden of proof on the servants' lack of due care and assumption of risk.

6. MASTER AND SERVANT §185(18)—INJURIES TO SERVANT—FELLOW-SERVANT DOCTRINE.

Where the master of a fishing schooner employed members of the crew either as owner pro hac vice or as agent of the owners, the fellow-servant doctrine did not preclude from recovery two members of the crew injured by a gasoline explosion caused by the master's negligence to whom responsibility for the defective and dangerous condition of the essential appliances of the vessel could not be delegated by the owners.

Report from Superior Court, Barnstable County; Louis S. Cox, Judge.

Actions of tort for personal injuries by Joseph Cambra and Frank Souza against Manuel C. Santos and others. On report to the Supreme Judicial Court. Case ordered to stand for trial.

John D. W. Bodfish, of Hyannis, for plaintiffs.

Sawyer, Hardy, Stone & Morrison, of Boston (Edward C. Stone, of Boston, of counsel), for defendants.

DE COURCY, J. These two common-law actions of tort were brought to recover damages for personal injuries received by the plaintiffs, resulting from a gasoline explosion which occurred on board the fishing schooner Mary C. Santos, while she lay in Boston Harbor.

The defendants were the owners of the schooner; Manuel C. Santos, the captain in charge, owning twenty of the thirty-two equal shares, and Joseph A. Manta, the agent, owning five shares. When the vessel was built in 1904 she was equipped with sail power only. In the cabin were two kerosene lamps for lighting, and a coal stove for heating purposes. In 1914 an auxiliary gasoline engine was added; the only change in the construction of the schooner being what was incidental to the installation of the engine and equipment. The engine was placed forward of the original cabin, "the cabin and the engine room were all one," and no change was made in the above method of lighting or heating. The gasoline storage tank was placed on the deck directly above the engine. It was made of metal, and was inclosed in a wooden casing, with an intervening space of four or five inches. The only openings provided were two in the top of the tank, and corresponding ones in the box over it, through which gasoline was poured into the tank. The gasoline was supplied to the engine through a pipe which extended from the bottom of the tank through an opening in the deck. It passed through the cabin and engine room, about three and five feet from the two kerosene lamps respectively. The coal stove was about eight feet from the

gasoline engine; and the pipe, engine, lamps and stove were all in the same room.

The plaintiffs were hired by the captain, the defendant Santos, and the schooner was operated on what was called the Provincetown lay. When the captain landed his load of fish and sold it, he first deducted certain charges, called "great generals," which included bait, trawls, gasoline and all other supplies bought by him for the boat, except the food; then he took out 27 per cent. for the owners of the schooner, and sent it to the defendant Joseph A. Manta, as their agent; the remaining 73 per cent., after payment of the food bills or "small generals," was divided in equal shares among the crew, including the captain. The plaintiffs had no control over the schooner or the disposal of the fish caught; the captain was in full command and could discharge the members of the crew at any time; they had a right to quit, if they so desired, whenever the boat came in and the cargo was discharged; and they received as compensation for their services the lay or share of the proceeds of the trip.

In the afternoon of February 24, 1916, after the fish had been unloaded, and some repairs made on the engine, the Mary C. Santos was towed out to a gasoline supply boat, the Smith Tuttle, which was stationed in Boston Harbor. The captain ordered the plaintiffs, with other members of the crew, to assist in taking in a supply of gasoline. The men formed a line between the storage tank on the fishing schooner and the supply faucet on the gasoline boat; and the gasoline was passed along in five-gallon cans, and emptied into the tank. About one hundred gallons had been so transferred, when the explosion which injured the plaintiffs occurred in the cabin and engine room below. It was then about 4 o'clock. It could be found that the explosion must have been caused by gasoline vapor, mixed with air in such proportions that it would explode, coming in contact with some flame in the cabin and engine room; and there was evidence that about 3 o'clock two kerosene lamps were seen lighted there, and there was a coal fire in the stove, the door of which was open. The gasoline vapor could have arisen from the movement of the open cans while being passed along, and under the weather conditions it could have found its way to the partly opened companionway and down into the cabin. Or it could be found that by reason of the absence of a vent pipe, the residual vapor in the tank was forced out as gasoline was poured in, and passed down the space between the metal tank and the wooden casing, through an opening in the deck at the pipe or elsewhere, into the cabin and engine room below. According to the testi-

mony of the expert witness, Wedger, there should be no fire or light except an electric light, in the vicinity of any place where gasoline is handled, stored or used; storage tanks should be provided with vent pipes ending in a gooseneck; and gasoline should not be transferred from one place to another in open containers.

[1, 2] Confining ourselves to the alleged structural defect in the tank and appliances, there was evidence here of negligence in setting the plaintiffs at work without warning in a place which could be found peculiarly dangerous in the circumstances. *Maddox v. Ballard*, 218 Mass. 55, 105 N. E. 632. It was for the jury to say whether responsibility for this negligence was confined to Santos alone as employer or as owner pro hac vice, or was that of all the defendants as partners in the enterprise, having a common ownership, controlling the vessel through their agents, and sharing the profits and losses at the end of each trip. *Harding v. Souther*, 12 Cush. 307; *Adams v. Augustine*, 195 Mass. 289, 81 N. E. 192; *Crimmins v. Booth*, 202 Mass. 17, 88 N. E. 449, 132 Am. St. Rep. 468; *McMurtrie v. Guiler*, 183 Mass. 451, 67 N. E. 358.

[3-6] Plainly there was evidence that the plaintiffs were employes; that the lay or share given to them was in the nature of wages and did not create a partnership. *Baxter v. Rodman*, 3 Pick. 435; *Grozier v. Atwood*, 4 Pick. 234. The issues of their due care, and assumption of risk, were for the jury, with the burden of proof on the defendants. *Souden v. Fore River Ship Building Co.*, 223 Mass. 509, 112 N. E. 82; *St. 1914, c. 553*. It could not be ruled that the fellow-servant doctrine precluded the plaintiffs from recovery; the defendant Santos was the employer of the plaintiffs, either as owner pro hac vice or as agent of all the owners, and responsibility for the defective and dangerous condition of the permanent and essential appliances to which the employes were exposed in performing their required work cannot be delegated by the employer. *Perry v. Webster Co.*, 216 Mass. 147, 103 N. E. 379.

It may be added that no question is raised as to the jurisdiction of our courts to enforce the common-law rights of the plaintiffs. See *Calvin v. Huntley*, 178 Mass. 29, 59 N. E. 435; *Judicial Code of the United States*, March 3, 1911, c. 231, § 256, 36 Stat. 1160 (U. S. Comp. St. § 1233). And see *Duart v. Simmons*, 231 Mass. 313, 121 N. E. 10, as to Workmen's Compensation Act.

In our opinion the plaintiffs were entitled to go to the jury on the evidence; and in accordance with the report the cases are to stand for trial.

So ordered.

(233 Mass. 147)

COCHRAN v. BARTON.

SAME v. GREENLAW et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 17, 1919.)**1. MUNICIPAL CORPORATIONS ⇨808(5)—ICE ON SIDEWALK — LIABILITY OF ABUTTING OWNER—DISCHARGE OF WATER ON WAY.**

Landowner who collects surface water into an artificial channel, such as a spout, and discharges it upon a public way, where it freezes and makes use of the way dangerous, efficiently creates a public nuisance, and is liable for resulting damage to a traveler using due care.

2. MUNICIPAL CORPORATIONS ⇨821(17)—ICE ON SIDEWALK — LIABILITY OF ABUTTING OWNER—QUESTION FOR JURY.

In an action against the owner and the lessee of premises for injuries to plaintiff when she slipped and fell on ice on the sidewalk, whether the ice was formed by water collected by the conductor on defendants' premises *held* for the jury, though the water was not poured from the spout directly on the sidewalk, but on a sloping bank some feet back from the street.

Report from Superior Court, Suffolk County; Robert F. Raymond, Judge.

Actions of tort by Nellie F. Cochran against Burnham D. Barton and Emma V. Greenlaw and trustee, resulting in directed verdicts for defendants. On report to the Supreme Judicial Court. Judgments ordered to be entered for plaintiff in a certain sum against both defendants, plaintiff being entitled to but one satisfaction of judgment in the two cases.

Fowler, Bauer & Kenney and George H. McDermott, all of Boston, for plaintiff.

Charles H. McIntyre and George W. Abele, both of Boston, for defendants.

DE COURCY, J. The plaintiff slipped and fell upon the ice while walking on the easterly sidewalk of Wenham street, Boston, in front of premises of which the defendant Greenlaw was owner and the defendant Barton was lessee. The plaintiff's due care apparently is not in dispute; no question was raised as to the sufficiency of the statutory notice; and it is stipulated in the report that the plaintiff is to have judgment if the evidence entitled her to go to the jury as against either or both of the defendants.

[1] The principle of law on which the plaintiff bases her claim is the familiar one, that a land owner who collects surface water into an artificial channel, such as a spout, and discharges it upon a public way, where it freezes and makes the use of the way dan-

gerous, is the efficient cause in creating a public nuisance, and is liable for damage resulting therefrom to a traveller using due care. *Hynes v. Brewer*, 194 Mass. 435, 80 N. E. 503, 9 L. R. A. (N. S.) 598; *Field v. Gowdy*, 199 Mass. 568, 85 N. E. 884, 19 L. R. A. (N. S.) 236; *Drake v. Taylor*, 203 Mass. 528, 89 N. E. 1035; *Marston v. Phipps*, 209 Mass. 552, 95 N. E. 954.

[2] In support of the plaintiff's contention there was evidence from which the jury could find the following facts: The land of the defendants has a frontage of forty-five feet on Wenham street, and there is a drop of three feet in the grade from the southerly end, at Sunset avenue, to the northerly end of the lot. The house is on an embankment about four feet above the grade of the sidewalk. At the southwesterly corner of the piazza roof is a conductor, and from its base a V shaped wooden trough extends parallel with and to a point about twelve feet distant from the sidewalk of Wenham street, measuring on the slope of the embankment. There was no ice on the sidewalk at noon, but in the evening there was a strip or ridge of rough ice about fifteen feet in length, and from six inches to two feet wide. It began at the foot of the bank, and widened as it went down hill. There was also ice on the bank extending from this ridge on the sidewalk all the way up to the "drain pipe."

In our opinion the evidence entitled the plaintiff to go to the jury on her contention that the ridge of ice on the sidewalk was formed by water which was collected in the conductor. The fact that it was poured from the spout, not directly upon the sidewalk but upon the sloping bank some feet back from the street is not conclusive against the plaintiff. In *Field v. Gowdy*, *supra*, one of the spouts was about eleven feet from the street line. It is true that there the water reached the way over a concrete walk, while here it followed the natural grade of the embankment. But it is equally a question of fact for the jury whether the plaintiff connected the ice on the sidewalk with the water poured from the conductor. In view of this conclusion we do not find it necessary to consider the admissibility and effect of Revised Ordinances, c. 40, § 17, dealing with the discharge of waste water.

It follows that, in accordance with the terms of the report, "judgments are to be entered for the plaintiff in the sum of four hundred (400) dollars against both defendants; the plaintiff being entitled to but one satisfaction of judgment in the two cases."

Ordered accordingly.

(233 Mass. 153)

PIANTADORI v. NALLY et al.(Supreme Judicial Court of Massachusetts.
Middlesex. June 17, 1919.)**ATTACHMENT 63 — ATTACHMENT OF LAND
NOT OWNED BY DEBTOR.**

Despite Rev. Laws, c. 127, § 4, where the holder of record or legal title conveyed to defendant in an action, plaintiff in such action having actual notice of the deed, though it was not recorded, and at the same time defendant executed deed conveying the premises to a third person, without fraud, and for full value, plaintiff, though he did not know of the unrecorded conveyance to the third person, could not attach, levy upon, and sell the land as that of defendant under the authority of the first part of chapter 178, § 1, since neither on the face of the record nor in fact did defendant have anything to attach.

Appeal from Land Court, Middlesex County; C. T. Davis, Judge.

Writ of entry by Luigi Piantadori against Mary A. Nally and others. Judgment for demandant, and the tenants appeal. Appeal sustained, and judgment entered for the tenants.

Bernard F. Murphy, of Waltham, and Wilfred B. Keenan, of Boston, for appellants.

DE COURCY, J. Piantadori sued Mary A. Nally in an action of contract, and on May 29, 1917, a special precept issued for an attachment of the "estate of the said Mary A. Nally standing in the name of Edwin L. Stone." Attachment was thereupon made of all right, title and interest the said Mary A. Nally had on that date in and to any and all real estate in the county of Middlesex, and also of "the following described real estate, the record or legal title to which now stands in the name of Edwin L. Stone, to wit," the demanded premises, particularly described. The plaintiff obtained judgment in that action, execution was levied on all the right, title and interest which Mary A. Nally had in said real estate at the time of the attachment; and Piantadori was the purchaser at the execution sale on April 27, 1918. Later he brought this writ of entry against Edwin L. Stone, Mary A. Nally and Annie E. Nally. The tenant Stone filed a disclaimer. In the land court judgment was entered for the demandant; and the case is here on the appeal of the other tenants.

At the time of the attachment from which the demandant derives his rights, the record title to the property in question was in said Stone, and had been since September, 1915. Counsel for Piantadori ascertained from Stone that he had conveyed the locus to Mary A. Nally. The date of this deed does not appear; but a deed was executed at the same time conveying the premises from said Mary

A. to said Annie E. Nally. These deeds were not recorded until March 30, 1918.

It would seem that the special attachment in question was made in accordance with the provisions of R. L. c. 167, § 63, on the assumption that the title was retained in Stone with the intent and for the purpose of fraudulently securing the property from attachment by a creditor of Mary A. Nally. That contention is now disposed of by the decision of the judge of the land court: "I do not find that the title to the demanded premises was retained in said Stone either for the purpose of fraudulently securing the land from attachment, or for the purpose of delaying, defeating or defrauding creditors."

According to the interpretation of the land court, the attachment, levy and sale as authorized and actually made were all made directly on the land of the debtor under the authority of the first part of R. L. c. 178, § 1. See *Cunningham v. Bright*, 228 Mass. 385, 117 N. E. 909. Assuming this interpretation of the "special" attachment to be correct, the difficulty with the judge's conclusion is that the locus was not "the land of [the] debtor," Mary A. Nally. Neither on the face of the records nor in fact did she have anything to attach. *Cowley v. McLaughlin*, 141 Mass. 181, 4 N. E. 821. The property was actually owned by Annie E. Nally. It is true that by virtue of R. L. c. 127, § 4, a creditor of Stone, without actual notice of the unrecorded deeds, could have attached the land as Stone's property. *Woodward v. Sartwell*, 129 Mass. 210. See *Coffin v. Ray*, 1 Metc. 212. And the demandant's actual notice of the unrecorded deed to Mary A. Nally would have precluded him from acquiring title by attachment on a claim against Stone, the record owner. His ignorance of the unrecorded deed to Annie E. Nally does not entitle him by virtue of this statute to take her property in payment of his claim against Mary A. Nally, who then had no title to or attachable interest in the property, on the face of the records or otherwise. She had been a mere conduit to pass the title; and whatever interest she acquired by the deed from Stone she had parted with by her deed to Annie E. Nally, who purchased the property without fraud and for full value prior to the attachment in question. The purpose of R. L. c. 127, § 4, was to give the sanction of enactment to the rule already adopted by judicial decisions. *Dole v. Thurlow*, 12 Metc. 157, 164. And as was said in *Lawrence v. Stratton*, 6 Cush. 163, 167, where the history of this statute is traced, " * * * the sole or at least the main object of the registration of deeds was to give constructive notice of such conveyances to purchasers and creditors, having a purpose to acquire title to an estate by conveyance or attachment; and, therefore, if a purchaser or creditor should attempt to

acquire title to the estate by purchase or attachment, having actual notice of the prior deed, unrecorded, it would be a fraud upon the holder of such prior deed, to attempt to defeat it, by setting up his junior recorded deed; which the law would not allow, and so such notice was held to be an exception to the statute."

The present case cannot be distinguished from *Haynes v. Jones*, 5 Metc. 292. As the ruling of the land court in favor of the demandant was wrong, the appeal must be sustained, and judgment entered for the tenants.
So ordered.

(233 Mass. 213)

PROCTOR v. LOMBARD et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 20, 1919.)

1. HUSBAND AND WIFE \S 281—SEPARATION AGREEMENT—SUFFICIENCY OF EVIDENCE.

Evidence held to warrant findings that there had been no repudiation or abandonment of a separation indenture by plaintiff wife, or any modification thereof, and that it continued in force.

2. HUSBAND AND WIFE \S 279(3) — SEPARATION AGREEMENT—FORFEITURE OF RIGHTS—PETITION FOR SEPARATE SUPPORT.

After husband's failure to make monthly payments under their separation indenture, plaintiff wife did not forfeit her rights under the indenture by bringing petition against the husband in the probate court for separate support, there never being any hearing on such petition, which later was dismissed without prejudice by agreement of the parties.

3. HUSBAND AND WIFE \S 281—SEPARATION INDENTURE—SUIT IN NAME OF TRUSTEE.

Where the separation indenture between husband and wife provided that the trustee or his successor might take and begin any legal proceedings necessary and proper to enforce the rights and obligations of either party on application by the other, etc., the wife, suing to enforce the agreement, should have done so in the trustee's name, and she will be permitted to amend her bill by substituting the trustee's name as plaintiff.

Appeal from Superior Court, Suffolk County; Frederick H. Chase, Judge.

Suit by Genevieve Proctor against Willard P. Lombard and others. From the decree, respondents appeal. Plaintiff given leave to amend her bill, and it is ordered that the decree be affirmed thereupon.

Certain evidence in the case was as follows:

Testimony of Genevieve Proctor:

Q. (by Mr. Gottlieb): What is your name? A. Genevieve Proctor.

Q. Your residence? A. 62 Clarendon street, Boston.

Q. You are the wife of the respondent in this case, George M. Proctor? A. Yes.

Q. When were you married? A. February 11, 1909.

Q. Where did you live then? A. We went to room at 496 Columbus avenue.

Q. How long did you live there? A. Several months.

Q. What was your husband's occupation when you were married? A. Taxi driver.

Q. How long did he continue in that occupation? A. I should say about six months.

Q. You were working at that time, when you were married? A. Yes, sir.

Q. Did you continue to work? A. Yes, sir.

Q. What was your occupation? A. Stenographer.

Q. Where did you live after you moved from that address? A. 56 Clarendon street.

Q. How long did you live there? A. About seven months.

Q. What were your earnings at that time? A. \$14.

Q. What were your husband's earnings? A. I should say about \$20.

Q. What did you do with your earnings at that time that you were married? A. I used them for expenses of the house and my self-support.

Q. Did your husband later engage in business? A. Yes, sir.

Q. In what business? A. Automobile renting business.

Q. Where was he located in this business? A. His first location on Springfield street, City.

Q. Has he continued in that business? A. Yes, sir.

Q. Was he engaged in any other business? A. He changed the locality, but he continued the renting business.

Q. Are you now living with your husband? A. No, sir.

Q. When did you cease to live with your husband? A. October 28, 1914.

Q. What were the causes that led up to that separation?

Mr. Lombard: Wait a minute.

The Court: You have the instrument. Wouldn't it be just as well to come right to the question of this agreement?

Q. After you separated, your husband wasn't providing support for you? A. Not proper support.

Q. What did you do then? A. I took proceedings to get proper support.

Q. What did you do?

The Court: She made this instrument. Is there any question about this?

Mr. Lombard: None at all.

Q. After the making of this agreement did you receive payments as provided in the agreement? A. I did up to about six or seven months.

Q. How did you receive those payments? A. Through Mr. Lombard, calling personally for them.

The Court: Let me ask a question. Are you agreed that the payments did stop, or is there a contest about that?

Mr. Lombard: I think I can agree that the payments stopped just about the time alleged in the bill.

The Court: Let's see. You claim they stop-

ped. Do you claim there is due under the agreement, if it is to be observed and performed, the sum of \$1,080?

Mr. Gottlieb: Plus three months. There is \$1,080 to the date of the bill.

The Court: How much is it now?

Mr. Gottlieb: Plus \$165.

The Court: You claim \$1,245. Do you dispute that?

Mr. Lombard: No. I might say there was some question as to modification of the amount under the contract, but up to a certain time she was to receive \$55, and then by mutual agreement that got down to \$30.

The Court: You may leave that for rebuttal; if that claim is made, you need not bother with it just now.

Q. At the time you were receiving \$55, how did that reach you? A. Through Mr. Lombard, calling personally for it.

Q. At the time that your husband reduced the payments to \$30 per month, what led up to that? Did you have any consultation with the attorney at that time? A. I called—

The Court: Your prima facie case is established.

Mr. Gottlieb: Mr. Lombard claims there is some question about reducing payments; I want to show by testimony of the witness that there isn't any.

The Court: It isn't certain that that defense will be made, except he may want to make it if the agreement stands, \$1,245, which has not been paid. Why don't you wait until that defense is put in?

Q. Since the payments stopped under this agreement, Mrs. Proctor, have you received any payments from your husband of any kind, contributions toward your support? A. I don't understand.

Q. Since the payments under this agreement stopped, since you failed to receive any payments, have you received anything from your husband? A. My payment was reduced to \$30.

Q. Since those stopped, have you received anything? A. No, sir.

Q. Did Mr. Lombard ever bring legal proceedings to enforce your rights under this agreement? A. No, sir.

Q. Have you ever surrendered any of your rights, or agreed to give up any of your rights, under this agreement, or to take less payment? A. No.

Q. Have you complied with your covenants that you made in this agreement in every way? A. So far as I could, I have.

Cross-examination:

Q. (by Mr. Lombard): You weren't living with your husband, of course, at the time this agreement was drawn? A. No, sir.

Q. You were living alone in Boston, as you had before you were married? A. Yes, sir.

Q. And working? A. Yes, sir.

Q. Of course, you felt he was to blame for the trouble you had had? A. Yes, sir.

Q. And you told people so, didn't you? A. Not altogether.

Q. Well, you told some people, of course, you felt he was to blame for your separation? A. Yes.

Q. And you still feel that way? A. Yes, sir.

Q. And you still occasionally tell people he

was to blame for it? A. No; I haven't talked about it for some time.

Q. When was the last time you talked about his misconduct? A. A year and a half ago, at any rate.

Q. A year and a half ago? A. Yes.

Q. You are sure it is no longer than a year and a half ago you talked about the separation and said he was to blame for it? A. Yes, sir.

Q. And when you discussed your separation, did you go into details at all? A. I didn't discuss it; no sir.

Q. You just testified a year and a half ago you told somebody he was to blame? A. You didn't mention—

Q. I want to be fair with you; I want to be fair. I understand the last year and a half you said nothing about the separation? A. Yes.

Q. About a year and a half ago you were talking about it occasionally, but not promiscuously; is that right? A. I haven't been discussing it at all.

Q. You don't want to change the statement you just made, you said something about it? A. Up to a year and a half ago; since that I have not.

Q. And I suppose your story is it was misconduct on his part that caused a separation; is that right, Mrs. Proctor; is that right? A. Yes.

Q. You never asked me to commence any proceedings against Mr. Proctor, did you, because of his failure to continue making payments? A. No; it was a mutual agreement we came to.

Q. It was a mutual agreement. In fact, you were collecting \$30 from him directly for some time; is that true? A. It was sent to me.

Q. Yes; he sent it directly to you, and not through me as trustee? A. Yes.

Q. But you also received your \$55 a month through me as trustee? A. Yes, sir.

Q. And was it by a mutual agreement that he discontinued making payments of \$30? A. Through no agreement whatever, as I understand it; he simply dropped off.

Q. Just simply dropped off. I believe you reached a mutual agreement on the \$30, did you not? A. I didn't understand it that way.

Q. Perhaps I can help you out. (Passing letter to witness.) Is that a letter that you wrote to me as trustee? A. Yes.

Q. And that is dated May 25, 1916. (Letter read.) A. Yes.

Q. You had been down to my office, and we had had some conversation about Mr. Proctor's change in circumstances; is that right? A. Yes, sir.

Q. And I told you he had been in to see me, and had stated he would be unable to pay \$55 a month; is that right? A. Yes, sir.

Q. And that his mother and father were both dependent upon him; is that right? A. Yes.

Q. That his father was suffering from a stroke of paralysis; is that right? A. Yes, sir.

Q. And you didn't know whether or not you would accept the \$30 at first, you told me? A. Yes.

Q. Finally you left the office, saying you would let me know? A. Yes.

Q. But you would want me to see Mr. Proctor again, and see if I couldn't get him to raise the amount? A. Yes.

Q. After you got home you changed your mind, and you didn't want me to see Mr. Proctor

tor again; didn't you? You wrote that in this letter, "You may cancel the interview I was going to arrange with you"? A. If it is in the letter, it must be; I don't recall just now.

Q. The letter says, "You may cancel the same so far as I personally am concerned," meaning the interview with me; that is right? You told me not to see Mr. Proctor, and not to try and get more than \$30 a month from him? A. I don't think I said not try to get more than \$30; I asked you if there was any possible chance of getting more than \$30, and you said, if his circumstances didn't permit it, we couldn't get it. I also asked you if it was up to me to find out when the circumstances would permit it, and you said, No, you would look after that.

The Court: Of course, you can't argue as attorney and witness at the same time. Are you appearing for yourself or for the other respondent?

Mr. Lombard: I am appearing for the other respondent.

The Court: Have you entered any appearance for the other respondent? You are trustee under this instrument. Now, so far as you are concerned, the only allegation here is that you haven't brought the bill yourself as plaintiff. So far as I conceive, that is the only allegation which is made against you. Now, have you entered any appearance in behalf of the real respondent, the other party to the instrument?

Mr. Lombard: Yes; our firm, Stover & Sweetser; they are both in military service now.

Q. Then we will leave that matter there that you finally decided that you would accept \$30 as you stated in your letter? A. With the understanding that you were to try and get more a week.

Q. I told you, if later his circumstances warranted it, you would get more? A. Yes.

Q. Now, you have already identified this letter here, have you not? A. Yes.

Q. (reading letter): "In view of the circumstances pertaining to the case, I feel that I no longer require your services and release you of your duties as trustee, and request that my monthly allowance of \$30 be sent to me at my home address, 8 Clarendon street, City. In accordance to the above would ask that you return all papers which you have in your possession in connection with the case to me. Thanking you for your services and attention, I beg to remain, truly yours, Mrs. G. M. Proctor." You were sometime dissatisfied with the arrangement that had been made between yourself and husband? A. Not necessarily between he and I, but between you and I.

The Court: Between whom?

The Witness: Mr. Lombard and I.

Q. That is, you were dissatisfied with me as trustee? A. I thought you became disinterested, and you didn't show much spirit in the case, didn't try, as I looked at it.

Q. And for that reason you discharged me as trustee? A. Yes.

Q. You intended to discharge me as trustee; is that what you intended to do? A. Yes.

Q. And you abandoned this arrangement entirely; is that so? A. Yes.

Q. And later on you brought a petition in the probate court for separate maintenance?

The Court: It will have to be the petition; that is the best evidence, isn't it?

Mr. Lombard: Of course, I ought to produce

the records. I don't suppose there is any question.

Q. Did you see an attorney relative to bringing proceedings in the probate court? A. No, sir; only Mr. Moran.

Q. You saw Mr. Moran? A. Yes, sir.

Mr. Lombard: It can be agreed, I suppose, that on April 2, 1918, you did bring a petition in the probate court for separate maintenance.

Mr. Gottlieb: It is agreed this petition was filed, but never any hearing. It was afterwards discharged without prejudice by agreement of counsel in your office before any hearing on the petition, discharged and dismissed without prejudice.

Mr. Lombard: After pending two or three months.

The Court: The date was what?

Mr. Lombard: April 2, 1918. You agree you also made a motion for counsel fees in the probate court, but never pressed it.

Mr. Gottlieb: I don't recollect.

The Court: Let me see that petition, please. Is this the original, the entry of disposition, I mean?

Mr. Lombard: I have a copy here, I think.

The Court: This petition was filed on the 27th of February; it is dated the 27th of February, and filed March 7th.

Mr. Lombard: The petition for separate maintenance, Suffolk county probate court. It is admitted that you made a petition for allowance of counsel fees in the separate support petition in the probate court, but never pressed the same.

Mr. Gottlieb: I don't believe you could say that, because the petition was never filed in the court; I merely wrote a letter.

Mr. Lombard: It never was filed.

Mr. Gottlieb: It never was filed in court.

Copy of record of probate court in the separate maintenance petition was introduced in evidence by agreement of counsel.

Copy of petition for separate support:

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Respectfully represents Genevieve Proctor, of Boston, in the county of Suffolk, that she is the lawful wife of George M. Proctor, of said Boston; that her said husband fails, without just cause, to furnish suitable support for her, and has deserted her; and that she is living apart from her said husband for justifiable cause and she herein sets forth the following specifications: —; that there has been born to them no children.

Wherefore your petitioner prays that said court will make such order as it deems expedient concerning her support.

Dated this 27th day of February, A. D. 1918.

Genevieve Proctor.

Commonwealth of Massachusetts, Suffolk—ss.: Probate Court. On the petition of Genevieve Proctor, of Boston, in said county, the wife of George M. Proctor, of said Boston, representing that her said husband fails without just cause to furnish suitable support for her and praying that said court will make such order as it deems expedient concerning her support, and the care, custody and maintenance of the minor children of herself and her said husband.

It is ordered that the petitioner give notice to the said George M. Proctor to appear at a

probate court to be held at Boston, in said county of Suffolk, on the 28th day of March, A. D. 1918, at ten o'clock in the forenoon, by delivering to him a copy of this order fourteen days at least before said court if he may be found within this commonwealth, that he may then and there show cause, if any he has, why the prayer of said petition should not be granted; or, if he shall not be so found, by delivering to him such copy wherever found, or by leaving such copy at his usual place of abode, or mailing the same to him at his last known post office address fourteen days at least before said court; and also, unless it shall be made to appear to the court by affidavit that he has had actual notice of the proceedings, by publishing the same once in each week for three successive weeks in the Boston Traveler, a newspaper published in Boston, the last publication to be one day at least before said court.

Witness, Robert Grant, Esquire, judge of said court, this — day of —, in the year one thousand nine hundred and —, Register.

I have served the foregoing citation as therein ordered by delivering to George M. Proctor a copy of above order on March 12, 1918.

Michael F. Fahey.

Suffolk—ss.: March 22, A. D. 1918.

Personally appeared Michael F. Fahey and made oath to the truth of the above return by him subscribed.

Before me,

J. H. Moran, Justice of the Peace.

On back:

No. 181382.

Genevieve v. George M. Proctor.

Separate Support.

Petition—Citation—Decree.

Filed March 7, 1918.

Returnable March 28, 1918.

Allowed 19

Recorded Vol. Page

April 10, 1918.

By agreement of parties, the within petition is hereby dismissed without prejudice.

Robert Grant, Judge of P. C.

For Petitioner:

John H. Moran, 101 Milk St., Boston, Mass.

For Respondent:

Redirect examination:

Q. (by Mr. Gottlieb): Did you ever have any dealings or any other consultation with any other attorney than Mr. Lombard? A. At one time, when I went to call for my payment, there was a young fellow in the office whom I had never seen before, acting for Mr. Lombard.

Q. In the negotiations leading up to your agreement Mr. Lombard advised you entirely? A. Yes, sir.

Q. Did you receive this letter from Mr. Lombard? (Passing letter to witness.) A. Yes, sir.

Q. This letter was written March 25 by Mr. Lombard to Mrs. G. M. Proctor (reading letter): "Dear Madam: Your husband has called at this office and paid \$30 which he claims is all he will be able to give you in the future owing to his circumstances being much poorer than they ever were before. You will probably want to talk with me further concerning this matter, and may do so most any noontime excepting

Monday, March 27. Very truly yours, W. P. Lombard." You also received this letter from Mr. Lombard, dated June 5? A. Yes, sir.

Q. That was in answer to the letter you sent him discharging him? A. Yes, sir.

(Letter read by Mr. Gottlieb. See Exhibit A.)

Q. What were the circumstances in your mind that you referred to in this letter? A. The fact he had become disinterested.

Q. How did he show he was disinterested? A. He seemed to me to feel—when I spoke to him about getting more, he said, if he hasn't got it, we can't get it.

Q. Did he ever advise you he thought it would be a good thing to take proceedings and try to enforce your rights? A. No, sir.

Q. Did you ever talk to him about it? A. I asked him if there was any way I could get it, and he made the remark, if he hasn't got it, we can't get it.

Q. When you sent this letter to Mr. Lombard, did you intend to discharge him as trustee under the agreement?

(Objected to; discussion.)

Q. In any event, Mrs. Proctor, did you ever intend to give up any of your rights under this agreement, or abandon the agreement in any way? A. No, sir.

Q. Even after writing this letter, you continued for some time to receive payments? A. Yes, sir.

Q. They came direct to you? A. Yes, sir.

Q. When the payments stopped, did you consult Mr. Lombard? A. No, I haven't seen him or consulted Mr. Lombard since that letter was written.

Mr. Gottlieb: That is all.

Recross-examination:

Q. (by Mr. Lombard): As I get your testimony now, you didn't intend to break that agreement, but you did intend to discharge me as trustee; is that the idea? A. Yes, sir.

Q. You wanted the agreement to remain operative, but you wanted to remove me as trustee? A. Yes, sir.

Q. And you never had a new trustee appointed or a new agreement drawn? A. No, sir.

Mr. Lombard: That is all.

Testimony of George M. Proctor:

(Testimony of Mr. Proctor received under defendant's exception.)

Q. (by Mr. Gottlieb): What is your name? A. George M. Proctor.

Q. Are you one of the respondents? A. Yes.

Q. Husband of the petitioner? A. Yes.

Q. How much of the capital stock of the Hudford Truck Company do you own? A. About 748 shares.

Q. How many shares of stock are there in all? A. 750.

Q. And what is the authorized capital of the corporation? A. \$10,000.

Q. What is the par value of the stock? A. There isn't any par value.

Q. What is the present market value of the stock? A. There isn't any market value.

Q. What are the present assets of the corporation?

The Court: That, of course, doesn't make any difference. All you are entitled to reach is his share in the corporation.

Q. Are you the owner of a farm up in the state of Vermont? A. Yes, sir.

Q. What is the value of the farm? A. When I bought it I paid \$600.

Q. Is there any mortgage on it? A. Yes, sir.
Mr. Gottlieb: That is all.

Stover & Sweetser, of Boston, for appellant George M. Proctor.

John H. Moran and Samuel Gottlieb, both of Boston, for appellee.

DE COURCY, J. [1,2] In July, 1915, a separation agreement was entered into between the plaintiff and her husband, said George M. Proctor, through the intervention of the defendant Lombard as trustee. This suit was brought to enforce the agreement, and to reach and apply certain property of the husband. At the trial in the superior court he contended, among other defenses, that the agreement had been modified and abandoned by the plaintiff, and also that she had broken the agreement on her part. The judge, however, found:

"There has been no repudiation or abandonment of the indenture by the petitioner, or modification thereof, and the same continues in force."

We cannot say that the findings were not warranted by the evidence. It could be found that the payments for a time of \$30 a month were accepted as part payments of the amount stipulated in the agreement. The plaintiff's letter to the defendant Lombard might well discharge him as her attorney without terminating her rights under the separation agreement; and in fact she continued to receive monthly payments after writing the letter. Nor can we say as matter of law that the petitioner forfeited her rights by bringing a petition for separate support in the Probate Court after her husband's failure to make monthly payments. That petition was filed March 7, 1918, there never was a hearing thereon, and on April 10, 1918, it was dismissed without prejudice by agreement of parties.

[3] It is expressly provided in the separation agreement:

"Tenth. The trustee above named, or his successor, may take and begin any legal proceedings which shall be necessary and proper to maintain and enforce the rights and obligations of the husband or the wife under this indenture upon application by the other for that purpose, being indemnified from any cost or expense by the party making such application and in case the trustee shall for any cause refuse or neglect to take or begin such proceedings, said husband and wife, and each of them, shall have the right to take and begin such proceedings in the name of the said trustee or his successor for the benefit and at the expense of the moving party."

The trial judge found:

"The respondent Lombard has failed and neglected to institute proceedings to enforce the obligations of the respondent George M. Proctor as to payments for the separate support of said petitioner, and has resisted, in behalf of said George M. Proctor, acting as his attorney, the petitioner's attempts to maintain her rights in that respect."

Accordingly, without considering the right of the plaintiff to enforce the agreement in her own name in the absence of the above provision, she is given leave to amend the present bill by substituting the name of the trustee as plaintiff, and thereupon the decree is to be affirmed. St. 1913, c. 716, § 3.

So ordered.

(233 Mass. 168)

BROOKS v. VOLUNTEER HARBOR NO. 4,
AMERICAN ASS'N OF MASTERS,
MATES, AND PILOTS.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 18, 1919.)

ATTORNEY AND CLIENT \S 130—RECOVERY FOR
SERVICES BY ATTORNEY OF OTHER STATE.

An attorney, a member of the bar of the state of Maine, but not admitted to practice in Massachusetts, who, at defendant's request, performed legal services for defendant in Massachusetts, employing local counsel to appear in the courts of the state, could recover reasonable compensation for services so rendered, despite Rev. Laws, c. 185, § 45, as amended by St. 1914, c. 432, having informed defendant he was not admitted in the courts of Massachusetts, and that it would be necessary to have local counsel.

Exceptions from Superior Court, Suffolk County; John D. McLaughlin, Judge.

Action by Gerry L. Brooks against Volunteer Harbor, No. 4, American Association of Masters, Mates, and Pilots. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Blodgett, Jones, Burnham & Bingham and Charles L. Favinger, all of Boston, for plaintiff.

Clarence W. Rowley, of Boston, for defendant.

CARROLL, J. The plaintiff, a member of the bar of the state of Maine but not admitted to practice in the courts of this commonwealth, sued to recover for legal services rendered to the defendant. There was evidence that he had acted, to a limited extent, as attorney of the National Association of Masters, Mates, and Pilots, and while so acting had business relations with the defendant, a local harbor or chapter of the National Association.

The plaintiff testified that, at the request of the defendant's secretary, he came to Boston and met some of its officers, who sought his advice respecting a suit brought against the defendant and some of its members, pending in the superior court for the county of Suffolk; that he informed the defendant he was not admitted to practice in the courts of this state and it would be necessary to employ local counsel; and that on being authorized to do so, he secured the services of a Massachusetts firm of attorneys, who appeared of record in the case and conducted the defense. The defendant's answer alleges that the plaintiff was not admitted to practice law in this commonwealth. There was evidence that the plaintiff was regularly employed by the defendant and performed services. The jury found for the plaintiff.

The only question open now on this record is whether the plaintiff is prevented from recovering because not admitted to practice law in the courts of this commonwealth. R. L. c. 165, § 45, as amended by St. 1914, c. 432, provides:

"Whoever, not having been admitted to practice as an attorney at law in accordance with the provisions of this chapter, represents himself to be an attorney or counselor at law, or to be lawfully qualified to practice in the courts of this commonwealth, by means of a sign, business card, letter head or otherwise," shall be punished as provided in this section.

There was evidence that the plaintiff in no way held himself out as lawfully qualified to practice in the courts of Massachusetts, that he informed the defendant he

"was not admitted in the state court," and it would be necessary for it to have local counsel. The jury were carefully instructed on this point; they were told it was for them to decide upon the evidence whether the plaintiff pretended that he had a right to appear for the defendant in the superior court; by their finding the jury decided that the plaintiff did not violate this statute. The cases of *Browne v. Phelps*, 211 Mass. 376, 97 N. E. 762, and *Ames v. Gilman*, 10 Metc. 239, are not applicable. In the first case the plaintiffs were partners; one member of the firm, who was not admitted to practice law in this commonwealth, represented that he was an attorney and counselor at law lawfully qualified to practice. In *Ames v. Gilman* the plaintiff held himself out as an attorney at law, although not authorized to practice in this commonwealth. In the case at bar, the plaintiff performed legal services for the defendant at its request, although a member of the bar of another state; we see nothing in the evidence to prevent him from recovering a reasonable compensation for the services so rendered.

There was no error in the charge of the presiding judge. The jury were told the plaintiff could not recover if he pretended to be an attorney or attempted to practice law while falsely representing he was authorized to practice, but that it was not a violation of law for a member of the bar of another state to consult with clients in Massachusetts or to perform legal services for them. The defendant's requests were properly refused.

Exceptions overruled.

(233 Ill. 555)

PEOPLE ex rel. CHICAGO BAR ASS'N v.
DONOVAN. (No. 11429.)

(Supreme Court of Illinois. June 18, 1919.)

1. ATTORNEY AND CLIENT — DISBARMENT — CONSPIRACY TO DEFRAUD — SUFFICIENCY OF EVIDENCE.

In proceedings to disbar an attorney, evidence held to justify the commissioner's finding that the attorney conspired with an employé of a workmen's compensation insurer to collect claim of a fraudulent amount from the insurer, of which the attorney and employé would receive the lion's share.

2. ATTORNEY AND CLIENT — DISBARMENT — PREVIOUS GOOD CHARACTER.

While previous good character is a matter to be considered in disbarment proceedings, yet, where the facts show a gross breach of the law and the ethics of the profession, good character should not be allowed to control the decision of the Supreme Court in relation to whether the attorney should be disbarred or merely suspended until he has repaid money improperly received.

Disbarment proceedings by the People, on the relation of the Chicago Bar Association, against C. V. Donovan. Rule made absolute, and respondent's name stricken from the roll of attorneys.

John L. Fogle, of Chicago, for relator.

Charles E. Selleck, of Chicago, for respondent.

STONE, J. The people, on relation of the Chicago Bar Association, leave of court having been obtained, filed an information to disbar the respondent. The information consists of one count, and charges that the respondent entered into an unlawful and fraudulent conspiracy with one Hoffman, who is a trusted employé of a certain casualty insurance company, to secure settlement with said insurance company of the claim of Nick Soter, who was injured while in the employ of O. W. Rosenthal & Co., a corporation of Chicago, while in the performance of his duties as a laborer for said company. The information further charges that, the respondent having secured a settlement of the claim for compensation for Soter for \$1,108.30, of which, under his contract with Soter, he was to pay Soter \$450, he nevertheless paid nothing to Soter, but lost the money through becoming intoxicated. It is further charged on information and belief that the conspiracy between the respondent and Hoffman was to the effect that all money received on the claim of Soter over and above the claim of \$450 was to be divided between the respondent and Hoffman. It is further charged that no part of the money procured by the respondent had been paid to Soter, though

the information was filed more than three months after the money was procured. Respondent filed his answer, in which he denies any conspiracy, but claims the loss of his client's money was due to his intoxication and without any intention on his part to fail or avoid making proper payment thereof to his client. He also avers in his answer that his contract with Soter was to the effect that he should receive one-half of all money over \$450 collected on the claim.

The matter was referred to John W. Ellis, master in chancery of the circuit court, who took the evidence and reported the same to this court with his conclusions of law and fact thereon. It appears from the evidence in the case that the respondent was by this court admitted and licensed to practice as an attorney in this state on June 10, 1896, and that since that date he has been engaged in the practice of law in the city of Chicago. The evidence also shows, and the commissioner reported, that on the 14th day of June, 1916, Nick Soter, who, appears, is a Serbian, unable to speak or write the English language, was injured while in the employ of O. W. Rosenthal & Co.; that he thereafter made claim upon his employer, which claim was referred to the Union Casualty Company, an insurance company selling casualty policies; that through the assistance of W. Rubenstein, a friend of Soter, payments were made from time to time pursuant to the Workmen's Compensation Law; that an agreement was made between the insurance company and Soter for a lump sum settlement of his claim for compensation in the sum of \$450; that the lump sum settlement was not paid, and Soter, with his friend, Rubenstein, from time to time called on the representative of the insurance company and urged payment of his claim; that on or about September 1, 1916, he and his friend again called upon the insurance company, and there talked with J. H. W. Hoffman, who, though employed by another attorney, was devoting his attention especially to the work of said insurance company. It appears from the evidence of the relator that Hoffman suggested that he would obtain for Soter a lawyer who would be able to secure the money claimed by him; that as a result of said suggestion Soter and Rubenstein called upon the respondent and retained him as attorney to make the collection. It is denied by the respondent, but the commissioner finds, that Hoffman accompanied Rubenstein and Soter to respondent's office and there suggested that they employ respondent as attorney. It further appears that respondent prepared in his own handwriting a proposition to himself as attorney at law, which was signed by Soter, authorizing respondent to act as his at-

torney; that the proposition contained the words, "and you are hereby authorized to retain from any money received or secured for me in said matter all moneys over and above the sum of \$450 for your share of compensation for service rendered or to be rendered in my behalf." The instrument, when offered in evidence on the hearing herein, appeared to have been altered in the handwriting of the respondent by the insertion of "½ of," preceding the words "all moneys over and above." Respondent insists that the alteration was made before the proposition was signed, and the commissioner reports that he is unable to determine from the evidence when such alteration was made. It further appears from the evidence that on the day after the respondent was so retained as attorney by Soter respondent, Hoffman, Soter, and his friend, Rubenstein, appeared before the Industrial Board and secured an order of settlement by said board in the sum of \$1,103.30; that said sum was advanced by Rosenthal & Co., with the understanding and agreement that it be later reimbursed by the insurance company; that on the next day a check for \$1,103.30 was made by Rosenthal & Co. payable to the order of respondent, as attorney for Soter, and delivered to respondent. The evidence further shows that on December 23, 1916, on the complaint of John T. Bryne that the sum of \$603.30 of the settlement so made had been divided between respondent and others, a further hearing was had before the board, as a result of which the matter was referred to the grievance committee of the Chicago Bar Association. It further appears from the evidence that after receiving the check for \$1,103.30 the respondent cashed the same at the Boston Store, in the city of Chicago, and received thereon the amount in currency, and that without making any payment whatever to Soter the respondent began to drink intoxicating liquors and became intoxicated, and in some manner lost the money, and that no payment thereof was made to Soter until long after disbarment proceedings were instituted; that on November 2, 1917, nearly 11 months after the money was procured by respondent, a new settlement was approved by the Industrial Board, by the terms of which respondent paid Soter \$250 in cash and gave him his note for a like amount, with his wife as comaker, and deposited with the note, as collateral thereto, certain stock certificates. It appears that the old settlement was set aside and a new settlement was authorized for \$500, payable in this manner. It also appears that up to the time the commissioner's report was filed no further payments had been made on said money, and that none of the balance of \$1,103.30 has been returned to Rosenthal & Co. or the insurance company.

Numerous witnesses testified on behalf of

the respondent as to his previous good character.

[1] The respondent makes no denial of the proof of relator herein concerning what transpired except to that relating to the charges of conspiracy. Upon examination of the record pertaining to that matter, we are of the opinion that the finding of the commissioner that such a conspiracy was entered into for the purpose of absorbing the larger portion of the payment made in settlement of Soter's claim is justified by the evidence. Respondent was not acquainted with Soter or his friend, Rubenstein. The appearance of Soter and Rubenstein at the office of the respondent in company with Hoffman, and the early settlement of the Soter claim before the Industrial Board for a sum amounting to nearly three times the amount agreed upon in the settlement between Soter and the attorney for the insurance company, which order of settlement by the Industrial Board was made with the understanding and agreement of Hoffman, representing the insurance company, all tend to establish the existence of a conspiracy to collect a claim of a fraudulent amount from the insurance company, of which respondent and Hoffman were to receive the lion's share.

[2] The commissioner recommends that, owing to the previous good character of the respondent, he be not disbarred absolutely, but that he be suspended until all of the money received by him should be repaid to those having the right to receive it. The relator, however, excepts to this recommendation of the commissioner and urges that the rule be made absolute. While previous good character is a matter to be taken into consideration in a case of this kind, yet facts are here established showing a gross breach of the law and ethics of the profession, and previous good character should not be allowed to control the decision of this court concerning the matter. The duty rests upon this court and upon every member of the bar to see to it that public confidence in the integrity of those engaged in the profession shall not be forfeited. The relation of attorney and client is a fiduciary one. The public have a right to the maintenance on the part of the profession of a high standard of integrity among its members, and the duty rests upon this court to assist in the maintenance of that standard. The respondent here has been proven guilty not only of a serious breach of professional ethics, but likewise a breach of the laws of the state. The evidence of his conspiracy in this case presents its gravest features, and shows respondent to be lacking in that integrity which the people have the right to demand of one engaged in the practice of the law.

The exceptions of the respondent to the report of the commissioner will be overruled. The exceptions of the relator to the recom-

mendation of the commissioner will be sustained.

The rule will be made absolute, and the name of the respondent stricken from the roll of attorneys.

Rule made absolute.

(238 ILL. 439)

PEOPLE v. BROWN et al. (No. 12608.)

(Supreme Court of Illinois. June 18, 1919.)

1. HOMICIDE \S 89(4)—ASSAULT TO MURDER.

To sustain a charge of assault to commit murder, facts must be proven such that, if death had resulted from the assault, it would have been murder.

2. HOMICIDE \S 11, 13—MURDER—MALICE—“IMPLIED MALICE.”

Malice aforesought, express or implied, is an essential element to constitute murder, being implied where no considerable provocation appears, and all the circumstances show an abandoned and malignant heart.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Implied Malice.]

3. HOMICIDE \S 96(1)—ASSAULT TO MURDER—SHOOTING AT OFFICER.

Defendants' act in shooting at a police officer, who was attempting to arrest them without reason or cause, not holding any warrant, did not constitute an assault to commit murder; defendants not having seen and recognized that the officer had on his uniform.

4. HOMICIDE \S 257(1)—ASSAULT TO MURDER—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to sustain conviction of defendants for the crime of assault to commit murder on a police officer, attempting to arrest them without reasonable suspicion of their having committed felony and without warrant.

Thompson, J., dissenting.

Error to City Court of Granite City; M. R. Sullivan, Judge.

Charley Brown, Ed Morrison, and another were convicted of assault with intent to murder, and the named defendants, the other having died, bring error. Reversed and remanded.

Burrongs & Ryder, of Edwardsville, for plaintiffs in error.

Edward J. Brundage, Atty. Gen., Joseph P. Streuber, State's Atty., of Edwardsville, and James B. Searcy, of Carlinville, for the People.

FARMER, J. Charley Brown, Ed Morrison, and Charles Payne were indicted by the grand jury of the city court of Granite City, Madison county, Ill., for an assault with in-

tent to murder Jeremiah Odem, who was a police officer of Granite City. The assault is alleged to have been committed on June, 12, 1917. They were tried and convicted in December, 1918, and sentenced to confinement in the penitentiary at Chester. Since the trial Payne has died, and defendants Morrison and Brown have sued out this writ of error.

The defendants did not testify on the trial. The record discloses that on June 12, 1917, and previously, a considerable number of men were at work in the southwesterly part of Granite City constructing a sewer, and a number of teams were used in hauling. Defendants are colored men, who were working at driving teams for the contractor having in charge the work. On the 12th of June police officers Odem and Dick, who were members of the police force of Granite City, were notified there was trouble in the vicinity of the sewer ditch being constructed, and they say they understood a man had been shot. They received this notice about 2:15 in the afternoon, and went on foot to where a large number of railroad tracks cross Pacific avenue, in the southwesterly part of Granite City. They had about a mile to travel to reach that point. The railroad tracks run north and south across Pacific avenue, which runs east and west. The sewer ditch is in the neighborhood of one-half mile south of Pacific avenue and runs east and west. At the west end of the sewer ditch is a levee along the Mississippi river, running in a general north and south direction. The territory within this square appears to be mostly vacant, and is variously spoken of as “commons,” “field,” and “dump.” When the officers reached the place where the railroad tracks cross Pacific avenue, defendants were pointed out to them as the persons who had done the shooting. It does not appear that the officers went together to the place of the alleged trouble, or that they were together at the time defendants were pointed out to them as the parties who had been guilty of shooting some one.

Officer Dick testified Odem was nearer the men than he was; that they were about 200 or 300 feet from Odem. Odem testified that when he saw them they were walking away from him; that he started to arrest them, and halloed to them to stop. They motioned to him, but he could not tell whether they motioned to him to stop or to come on. They continued to go away from him, and he pulled his gun and fired a shot into the air. Defendants returned the shot and ran; the two officers pursuing them. A good many shots were fired by the defendants at Odem, who appears to have been nearest to defendants. Odem testified he emptied his gun, and thought the defendants emptied theirs also. One shot hit the ground

close enough to Odem to throw dirt on him, and another cut a weed within a foot of his knee. Several shots struck the ground in front of him. Defendants ran south to the sewer ditch, and crossed over on the south side of it, then turned west to the levee, crossed over the levee, then came back on or east of the levee, and continued south until they were arrested by the police of the village of Madison, at or near Newport. Odem testified that, when he saw he would be unable to overtake and arrest defendants, he went to a house where there was a telephone, near by, and notified the Madison police to be on the lookout, and they arrested defendants.

No complaint or charge had been filed against defendants, and no warrant had been issued for their arrest. While the police officers testified they were informed some one had been shot, and when they went to the place where they were told the trouble had occurred defendants were pointed out to them as the guilty parties, they were not then doing any unlawful act, and there was no proof whatever on the trial that they had shot any one, or fired a gun, or had been guilty of any criminal or unlawful conduct of any kind or nature. When the officers went to the neighborhood where they were informed trouble had occurred, and where defendants were pointed out to them, defendants were from 100 to 200 yards from them, walking away from the place where the officers were. Odem called to them to stop, and started toward them to arrest them. They did not stop, but continued going away from the officers. He fired a shot in the air, whereupon defendants began shooting and running. Odem pursued them, firing at them until he emptied his gun, and as defendants ran they would turn and fire at Odem. It seems there were several men at or near the place when the chase began, and when Odem started toward defendants to arrest them and called to them to stop, some of the crowd started with the officers, and after the shooting began the crowd following defendants grew larger.

[1-3] It is contended the evidence did not warrant the verdict of guilty of assault to commit murder. To sustain the charge of assault to commit murder, such facts must be proven that, if death had resulted from the assault, it would have been murder. It is insisted that no proof was made on the trial that any criminal offense had been committed, that the officer had no warrant for the

arrest of defendants, and that if they had killed the officer the crime could not have been anything more than manslaughter. Malice aforethought, express or implied, is an essential element to constitute murder. It is implied where no considerable provocation appears, or all the circumstances show an abandoned and malignant heart. It was not shown by testimony on the trial that there was any reason or cause for the arrest of defendants by Odem, which act he was attempting to do without a warrant. In *Rafferty v. People*, 69 Ill. 111, 18 Am. Rep. 601, and the same case in 72 Ill. 37, this court held that if a public officer is killed by a person whom he is attempting to illegally arrest without authority of law, the killing will be manslaughter, only, unless the evidence shows previous or express malice.

It is claimed by the people that peace officers may at common law arrest persons in their county without a warrant on reasonable suspicion of their having committed a felony, and it is argued that, as Odem had on his policeman's uniform, defendants knew his official character. No proof was made on the trial of any acts or conduct of defendants which justified suspecting them of having committed a felony. The arrest attempted in the *Rafferty* Case was by a policeman in uniform. In this case it is not very clear that defendants saw and recognized that Odem had on a policeman's uniform. In *People v. Bissett*, 246 Ill. 516, 92 N. E. 949, the court said, before the state could take advantage of the official character of an officer (who was in plain clothes in that case), for the purpose of characterizing as murder the act of killing him by a man he was attempting illegally to arrest, it was essential that it be shown, beyond reasonable doubt, that the slayer had knowledge of his official character and of his authority—citing the *Rafferty* Case and *Starr v. United States*, 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841.

[4] We do not think the evidence in this record sufficient to sustain a conviction for the crime of assault to commit murder. No instruction was given that the jury might, if the evidence warranted it, find the defendants guilty of a lesser crime under the indictment. *Beckwith v. People*, 26 Ill. 500.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

THOMPSON, J., dissents.

(233 Ill. 377)

PEOPLE ex rel. VANCE, County Collector, v.
BUSHU et al. (No. 12392.)

(Supreme Court of Illinois. June 18, 1919.)

1. HIGHWAYS ⇐107(2) — ELECTIONS — BAL-
LOTS.

Under the Road and Bridge Law as revised in 1913 the ballot to be used at elections is made to conform to the Australian ballot, so the requirements of the Ballot Law are applicable to ballots used in elections under the Road and Bridge Law.

2. HIGHWAYS ⇐107(2) — BALLOTS—ILLEGAL
BALLOTS.

Under Ballot Law, § 14, declaring that on the back or outside of the ballot, so as to appear when folded, shall be printed the words, "Official Ballot," followed by the designation of the polling place, etc., and a fac simile of the signature of the clerk or town officer who has caused the ballot to be printed, and in view of section 26, ballots not containing such fac simile of signature of the town clerk who caused them to be printed are not legal ballots for any purpose; so such ballots cannot be considered in an election under the Road and Bridge Law which made the Ballot Law applicable.

Appeal from Edgar County Court; Dan V. Dayton, Judge.

Proceedings by the People, on the relation of Archie N. Vance, County Collector, against James Bushu and others, to collect a tax. From a judgment of the county court sustaining objections to the tax, relator appeals. Affirmed.

Wilber H. Hickman, State's Atty., of Paris, for appellant.

James K. Lauher, of Paris, for appellees.

STONE, J. This is an appeal from a judgment of the county court of Edgar county sustaining objections filed by appellees to a certain tax levied by the highway commissioners of the town of Buck, in said county, for the purpose of constructing, maintaining, and repairing gravel, rock, macadam, or other hard roads, pursuant to a vote of the legal voters of said town at a special election held February 13, 1917.

Numerous objections were presented in the county court, all of which were sustained. One of the objections to the sustaining of which error is assigned is that said tax levy is void and of no effect for the reason that there was no legal election on the matter of authorizing the issuance of the bonds and the levy of a tax therefor.

It appears that on the 20th day of January, 1917, a petition, signed by the requisite number of landowners and legal voters in the town of Buck, county of Edgar, was filed with the town clerk thereof, asking that a special election be called for the purpose of voting upon the proposition for or against an

annual tax of \$1 on each \$100 assessed valuation on the taxable property in said town, for the purpose of constructing and maintaining gravel, rock, macadam, or other hard roads. Said election was called, and was held on the 13th day of February, 1917. The election was held under the Road and Bridge Law as revised in 1913. Hurd's Rev. St. 1917, c. 121. At the special election the votes showed a majority in favor of said proposition.

[1, 2] Among the objections urged to the tax levy or authority of said special election, it is contended that the ballots used by the voters at said special election were wholly illegal; that they failed to conform to the requirements of the statute, in that said ballots did not have on the back or outside of the same the fac simile of the signature of the town clerk. Under the revision of the Road and Bridge Law enacted in 1913 the ballot to be used at such election is made to conform to the Australian Ballot Law, and the requirements of that Ballot Law are applicable to ballots used in elections under the Road and Bridge Law. People v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 266 Ill. 98, 107 N. E. 251. Section 14 of the Ballot Law, approved June 22, 1891 (Laws 1891, p. 107), concerning the requisites of ballots to be used, provides in part as follows:

"On the back or outside of the ballot, so as to appear when folded, shall be printed the words, 'Official ballot,' followed by the designation of the polling place for which the ballot is prepared, the date of the election and a fac simile of the signature of the clerk or other officer who has caused the ballots to be printed."

Section 26 of the Ballot Law, concerning the ballots to be used at elections, provides in part as follows:

"No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted."

It is admitted that the ballots used at the election in question did not contain the fac simile of the signature of the town clerk on the back thereof. This provision of section 14 is mandatory. Such fac simile of the signature of the town clerk or officer preparing the ballots is essential to the validity of the ballots. People v. Snedeker, 282 Ill. 425, 118 N. E. 782. Section 26 of the Ballot Law provides that if ballots do not conform to the requirements of that law they shall not be received or counted. As was said in Parker v. Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227:

"It was evidently the intention of the Legislature to declare what should absolutely destroy a ballot or prevent its being counted, by section 26, supra: 'If the voter marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for any office to be filled,

his ballot shall not be counted for such office. No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted."

While it has been held by this court concerning many of the mandatory provisions of the statute relating to elections that a substantial compliance therewith is sufficient, yet in this case there has been no attempt to comply therewith, and the rule regarding substantial compliance has no application. While it has frequently been held that mistakes or omissions of the officers in charge of the machinery of an election should not defeat the plainly expressed will of the people at such election, yet such has not been held to be the rule where such officers have failed to perform those duties of precaution which safeguard the votes of the people. It is far better that the people of a town shall lose their vote in a single instance than that there shall be written into the law rules which permit election officers to disregard the plain mandates of those provisions of the law intended to protect and safeguard the ballot. A provision requiring the fac simile of the signature of the town clerk or other officer who prepares the ballots is to prevent the fraudulent casting of spurious or illegal ballots. That provision is mandatory, and ballots which do not contain such fac simile are illegal ballots.

It follows that at the election in question there were no legal ballots cast. Such election was therefore illegal, and the tax levy in question herein was unauthorized and void. This being true, the consideration of other assignments of error becomes unnecessary, as the judgment of the county court must for this reason be affirmed.

Judgment affirmed.

(238 Ill. 419)

KANE et al. v. WEIS et al. (No. 12552.)

(Supreme Court of Illinois. June 18, 1919.)

SCHOOLS AND SCHOOL DISTRICTS — 42(2) —
HIGH SCHOOL DISTRICT—PASSAGE OF CURATIVE ACT AFTER DECISION ADVERSE TO DISTRICT.

Where, after decision of the Supreme Court declaring unconstitutional the High School Act of 1911, the Legislature passed the so-called Curative Act of June 14, 1917 (Laws 1917, p. 744), such act does not make a validly organized district of the same district which was involved in the prior decision holding the high school act unconstitutional.

Appeal from Circuit Court, Livingston County; George W. Patton, Judge.

Bill by John M. Kane and others against Oscar L. Weis and others. From decree for complainants, defendants appeal. Affirmed.

C. M. Clay Buntain, of Kankakee, and H. E. Torrance, of Pontiac, for appellants.

Adsit & Thompson, of Pontiac, for appellees.

CARTER, J. This was a bill in equity filed in the circuit court of Livingston county by certain taxpayers of an alleged high school district situated in the counties of Livingston, Kankakee, and Grundy, to restrain, on behalf of complainants and other taxpayers in said district, the collection of certain high school taxes levied for the year 1917. After the plaintiffs in error answered, the cause was heard by the trial court on bill and answer, and a decree entered restraining the collection of said taxes. From that decree this appeal was prayed.

In May and June, 1915, the alleged district was attempted to be organized under the High School Act of 1911 (Laws 1911, p. 505). A quo warranto proceeding was brought in the circuit court of Livingston county as to the legal organization of the district, and a decree entered holding the organization invalid and dissolving it. The judgment of the circuit court was affirmed on appeal to this court. *People v. Weis*, 275 Ill. 581, 114 N. E. 331. There was no attempt made, so far as appears from the record, to reorganize such district after the decision by this court in that case. The same persons who originally acted as the board of education attempted to levy taxes in 1916, and the validity of that levy was passed on by this court in *People v. New York Central Railroad Co.*, 283 Ill. 834, 119 N. E. 299, the tax for that year being held invalid because there was no de jure or de facto school district. No steps were taken by the school authorities of said district thereafter to reorganize said district, and it is conceded the only material difference in the situation with regard to the tax levy so held invalid in the last-named case and the levy here in question is that the taxes so held invalid were levied before the passage of the so-called Curative Act of June 14, 1917 (Laws 1917, p. 744), while the taxes here in question were levied after said act became effective. It is now argued that the district became at least a de facto organization, having been made a valid district by the curative act, and that therefore the tax levy for 1917 should be held valid.

This is the identical district concerning which the High School Act of 1911 was declared unconstitutional. After the decision of this court in that case no attempt was made to keep the legal proceedings alive in any court, and under the reasoning of this court in *People v. New York Central Railroad Co.*, supra, and the recent decision in

People v. Owen, 286 Ill. 638, 122 N. E. 132, it must be held that the Legislature had no power to set aside the final judgment of the courts and validate the organization of this district after such final judgment had been entered. Nothing has been said in any way conflicting with this conclusion of this court in any of the decisions holding the present curative act valid, including People v. Madison, 280 Ill. 96, 117 N. E. 493, People v. Gunn, 281 Ill. 243, 117 N. E. 1039, People v. Mathews, 282 Ill. 85, 118 N. E. 491, and People v. Stitt, 280 Ill. 553, 117 N. E. 784. Counsel for defendants in error concede this except as to People v. Stitt, supra, and it is insisted that the facts in that case are so very similar to those raised here that under the reasoning of that decision this tax should be held valid and the district a de facto organization. It is clear from the reasoning of this court in the last-named case that the original court proceedings were still pending and undecided at the time the opinion was written in People v. Stitt, supra, and on that record that case is clearly distinguishable from this one, as here no court proceedings were pending at the time the curative act was enacted. The final decision of this court in People v. Wels, supra, had been theretofore made and the court proceedings ended long before the enactment of the curative legislation or the levy of this tax. If anything was said in People v. Stitt, supra, contrary to the conclusion here reached, that reasoning was, in effect, overruled in People v. New York Central Railroad Co., supra, and People v. Owen, supra, and if there is anything said in the opinion in the Stitt Case seemingly contrary to this conclusion it is hereby in terms overruled. In no possible way can this case be distinguished, on principle, from the decision of this court in People v. New York Central Railroad Co., supra, or People v. Owen, supra.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(238 Ill. 363)

NOVAK v. KRUSE. (No. 12369.)

(Supreme Court of Illinois. June 18, 1919.)

1. MORTGAGES \Leftrightarrow 38(1) — EVIDENCE — QUITCLAIM DEED.

Evidence held to show that a quitclaim deed was not a mortgage, but was given to lender with authority to record it and take title upon default of payments by the grantor borrower.

2. MORTGAGES \Leftrightarrow 36, 38(2) — EVIDENCE — QUITCLAIM DEED.

The burden of proving a deed absolute on its face was in fact a mortgage is upon the one making such averment, and his proof must be clear and convincing.

3. MORTGAGES \Leftrightarrow 304 — PAYMENT — QUITCLAIM DEED OF MORTGAGED PREMISES.

Where mortgaged premises were quitclaimed by the mortgagor and taken by the mortgagee in payment of the bond and trust deed, the transfer of the title operated as a satisfaction and extinguishment of the bond and trust deed.

4. MORTGAGES \Leftrightarrow 309(1) — RELEASE.

Upon satisfaction of the mortgage debt, the mortgagee is bound to execute a release of the mortgage.

5. SUBROGATION \Leftrightarrow 14(1) — RIGHT TO SUBROGATION.

Purchaser of land from mortgagee, to whom mortgagor had quitclaimed it in payment of the mortgage, such purchaser knowing nothing of the mortgage at time of purchase, and understanding he was getting the land free of incumbrances, could not, in order to acquire a lien prior to a judgment against the mortgagor secured before recording of the quitclaim deed, and to secure priority also to a mechanic's lien judgment against the mortgagor, claim to be subrogated to the mortgage, not having either paid or assumed the payment of the mortgage as a part of the consideration of his deed, and not having advanced the payment of the mortgage debt pursuant to an agreement that the mortgage be held as security for the money so advanced.

Error to First Branch Appellate Court, First District, on Error to Superior Court, Cook County; Denis E. Sullivan, Judge.

Suit by John Novak against Johanna Kruse and others. Decree for complainant was affirmed by the Appellate Court (211 Ill. App. 274), and the named defendant brings certiorari. Reversed and remanded, with directions.

Poulton, Green & Merrick, of Chicago, for plaintiff in error.

Edward J. Novak and Frank H. Novak, both of Chicago, for defendant in error.

STONE, J. The Appellate Court for the First District affirmed a decree of the superior court of Cook county entered in a suit in chancery brought by the defendant in error against plaintiff in error and others to revive and foreclose a released mortgage and remove alleged clouds from the title to certain land. The cause is brought to this court from the Appellate Court by petition for certiorari.

The bill of complaint made John V. Ayers, Johanna Kruse, and others defendants. After issues joined, the cause was referred to a special commissioner, who recommended that a decree be entered in accordance with the prayer of the bill of complaint, pursuant to which the chancellor entered the decree in question, embodying the findings of fact of the special commissioner.

The essential facts necessary to the issues involved, as they appear from the greater weight of the testimony, are that on January 15, 1900, John V. Ayers, being at that time the owner of the land in question, with other real estate not involved in this case, executed a trust deed to John G. Panoch, as trustee for the Bohemian-American Building & Loan Association, to secure the payment of his bond of that date in the principal sum of \$4,000, payable to the order of the association. Edward J. Novak was named in the trust deed as successor in trust. This trust deed was acknowledged on said date and duly recorded in the trust deed records of said county on January 17, 1900. A quitclaim deed was also executed on the same date as the trust deed by Ayers to the association conveying the land in question to the association. Ayers defaulted in his payments on the bond and the association recorded the quitclaim deed on May 8, 1900. Immediately upon recording the deed the association took possession of the land in question and completed the building of certain structures then being constructed upon the land and expended in the aggregate about \$1,800 in completing the buildings. After the completion of the buildings the association leased the property and collected the rent, insured the buildings, and exercised the usual powers of ownership until July 22, 1902. The association, being in financial stress, on that date sold and conveyed the property to James Novak for John Novak, defendant in error, for the consideration of \$4,200, of which \$1,000 was paid in cash and the remainder by receipts for money paid in by John Novak on stock subscription in the association. By its deed the association covenanted that the property was clear and free from all incumbrance. On July 25, 1902, the association executed a release of the trust deed in question. The bond and trust deed were not assigned. On January 30, 1900, Alva Johnson and Charles N. Whitehead recovered a judgment for \$91.84 against Ayers, upon which an execution was duly issued. On November 5, 1900, Theodore N. Bell secured a money judgment for \$432.50 and costs against Ayers by virtue of section 13 of the Mechanic's Lien Act of Illinois, which provided that, in the event the court found no right to a lien existed, recovery against the owner of the property could be had as at law. Said lien was filed against other property of Ayers, and not against the property in question. Execution was duly issued upon the Johnson and Whitehead judgment, and the premises were sold by the sheriff September 30, 1902, for \$130.38, and the sheriff issued his certificate of sale on that date, which was filed for record on October 2, 1902. The holder of the Bell decree redeemed from the sale on the Johnson and Whitehead judgment. The sheriff issued his

certificate of redemption, and on the same day levied an execution on the Bell decree and judgment, and issued a certificate therefor on January 26, 1904, from which, there being no redemption, the sheriff issued his deed to Joseph P. Vesley on January 26, 1904, who later conveyed the lot in question to the plaintiff in error, Johanna Kruse. In July, 1902, the association was insolvent, and shortly after it went into liquidation and its affairs were wound up.

Defendant in error testified that he knew nothing concerning said bond or trust deed, and at the time of the alleged purchase understood that he was getting the lot free of incumbrance. The release of the trust deed was executed by the president of the association, in which release it was recited that John G. Panoch, trustee, refused to release the trust deed, and that the release so executed by the president of the association was at the request of the board of directors of the association, pursuant to the statute in such cases provided. It is contended by the defendant in error, and found by the chancellor, that said release was inadvertently made, and that it should not have been executed; the chancellor holding that the giving of the quitclaim deed and the recording thereof did not pass the title to the premises, nor operate to extinguish the trust deed, and that therefore, when defendant in error took through his brother, James Novak, a warranty deed from the association, he took only the rights of the association under the trust deed and became subrogated thereto, and that the debt under the bond and trust deed had never been paid.

[1, 2] On a review of the evidence we are convinced that the quitclaim deed was given by Ayers to the association, with authority to record the same and take title to the property on default of payments under the bond, and that when the quitclaim deed was recorded the title passed to the association. It appears from the testimony of at least two witnesses, who were shown to have been at that time connected with the association, that such was the intention of the parties to the quitclaim deed. In addition, Ayers, who after the quitclaim deed was recorded abandoned the premises, in his answer to the bill herein, alleges that such was the understanding. This is further borne out by the fact that the association for two years rented the premises, insured the buildings thereon, and paid the taxes, all in its own name, and it recited in its warranty deed to James Novak and in the resolution of its board of directors that it owned the premises. This being the clear understanding of the parties to the deed, such must be the effect of the instrument. The burden of proving that a deed absolute on its face was in fact a mortgage is upon the one making such averment. Such proof must be clear and convincing. Dead-

man v. Yantis, 230 Ill. 243, 82 N. E. 592, 120 Am. St. Rep. 291; Rasch v. Rasch, 278 Ill. 261, 115 N. E. 871.

[3, 4] It is evident that the property was deeded by Ayers and taken by the association in payment of the bond and trust deed for money loaned. That being true, the transfer of the title to the property operated as a satisfaction and extinguishment of the bond and trust deed, and when the association released the trust deed it not only acted in accordance with the understanding of both parties to the bond and trust deed, but did what it was in duty bound to do. It follows that, when the warranty deed was executed to James Novak for defendant in error, the bond and trust deed had been satisfied and extinguished, and no longer existed as a lien against the premises.

[5] By his bill the defendant in error seeks to be subrogated to the rights of the association under and by virtue of the bond and trust deed. But the bond and trust deed having been satisfied and extinguished, there were no rights remaining in the association to which he could be held to be subrogated, and the release of the trust deed, though made after the deed to James Novak, did not prejudice the rights of defendant in error, for the reason that he could acquire no rights under them. It is not even contended that he paid or assumed to pay any obligation of the bond of Ayers or any part thereof. The full value of the property was quoted to him at \$4,200. This amount he paid by receiving full credit for \$3,200 paid in by him on stock subscription and adding thereto the sum of \$1,000. The bond and trust deed were not mentioned; he testifying that he had not at that time heard there ever had been such a transaction. Indeed, it is urged with some force by plaintiff in error that defendant in error in his purchase of the premises overreached other stockholders of the association, in that he was by the conveyance to him of lot 27 allowed to withdraw the full value of the money paid in by him on stock in an insolvent association, while others in the association desired to withdraw and could not.

In *Home Savings Bank v. Bierstadt*, 168 Ill. 618, on page 623, 48 N. E. 161 (61 Am. St. Rep. 146), this court clearly defines the principle of subrogation in the following language:

"Subrogation, as a principle of equity jurisprudence, is generally confined to the relation of principal and surety and guarantors, or to a case where a person is compelled to remove a superior title to that held by him in order to protect his own, and also to cases of insurers. The general principle of subrogation is confined and limited to these classes of cases. *Bishop v. O'Conner*, 69 Ill. 431; *Borders v. Hodges*, 154 Ill. 498, 39 N. E. 597. While these general heads include the doctrine and principles of subrogation, that doctrine has been

steadily expanding and growing in importance and extent in its application to various subjects and classes of persons. This equitable principle is enforced solely for the accomplishment of substantial justice, where one has an equity to invoke which cannot injure an innocent person. The right of subrogation, which springs from the mere fact of the payment of a debt, and which is included under the heads, first above stated, is what is termed 'legal subrogation,' and exists only where included within those classes. But in addition to this principle of legal subrogation there exists another principle, which is termed 'conventional subrogation,' which results from an equitable right springing from an express agreement with the debtor, by which one advances money to pay a claim for the security of which there exists a lien, by which agreement he is to have an equal lien to that paid off, whereupon he is entitled to the benefit of the security which he has satisfied with the expectation of receiving an equal lien. *Coe v. Maryland Railway Co.*, 81 N. J. Eq. 105; *Tyrrell v. Ward*, 102 Ill. 29; *Tradesmen's Ass'n v. Thompson*, 32 N. J. Eq. 133."

Before the complainant could have been held to be subrogated to the benefit of the trust deed of Ayers, he must have paid or assumed the payment of the bond of Ayers secured by the trust deed as a part of the consideration of the deed of the association to him or advanced the payment of the bond pursuant to an agreement that the trust deed should be held as security for the money so advanced. *White v. Cannon*, 125 Ill. 412, 17 N. E. 753; *Tyrrell v. Ward*, supra; *Young v. Morgan*, 89 Ill. 199. Even though the bond and trust deed had not been satisfied, still, the complainant, not having paid or assumed the payment of the bond of Ayers as a part of the consideration of his deed from the association to him, and not having advanced the payment of said bond pursuant to an agreement that the trust deed should be held as security for the money so advanced, would not be subrogated to any interest represented by the bond and trust deed. Defendant in error, not having brought himself within the rule entitling him to subrogation, was in no wise prejudiced by the release of the trust deed in question.

Complainant in his bill, in support of his claim to subrogation to the rights of the association under the bond and trust deed, avers that the same are still in full force and effect, and that under that subrogation he is entitled to have paid to him the \$4,000 represented by the bond and trust deed. In other words, he makes the interesting claim that having paid out no more than the unincumbered fee to the property is worth, he is now entitled to receive back the sum of \$4,000 and interest from January 15, 1900, though he appears to have assumed no obligation under the bond and trust deed, and although Ayers from whom he claims this amount, turned over the entire property to satisfy the indebtedness thereunder. In or-

der to support this claim the bill pleads the legal conclusion that the warranty deed operated merely as an assignment of the bond, trust deed, and quitclaim deed and not to pass title. No facts are averred to sustain such a position and none appear in evidence. The complainant in his testimony admitted that he did not even know of the existence of such trust deed or bond or quitclaim deed at the time his deed was made, and that he considered he was buying the lot free from all incumbrance, yet such is his claim made in his bill and the theory upon which the decree of the chancellor appears to be founded. Nowhere in his bill, however, does he claim to have acquired by his purchase anything other than the lien created by the bond and trust deed, which he asserts is a prior lien. Despite his statement in his testimony, his bill nowhere avers that he ever acquired the title to said property. Indeed, if he admits title in him and avers that he is the beneficial owner of the bond and trust deed, he must show that which this record does not contain to avoid the merging of the two estates. This, apparently, he does not desire. His bill is based wholly upon the theory that he stands subrogated to the rights of a holder of a trust deed who has a right to have the same foreclosed and to have a sale thereon. The bill prayed such a sale and the decree ordered it. The bill also prayed that the judgments herein referred to and deeds thereunder be set aside as clouds upon complainant's title. Since complainant is seeking subrogation to the bond and trust deed and foreclosure of them, and since the decree of the chancellor finding such subrogation and awarding such sale must be reversed, it is unnecessary to discuss the validity of said judgments. Under the theory upon which the defendant in error's bill is drawn it would be immaterial whether such judgments were valid, as under such theory his lien would have been a prior lien.

The judgment of the Appellate Court and the decree of the superior court are reversed, and the cause remanded to the superior court, with directions to dismiss the bill for want of equity.

Reversed and remanded, with directions.

(288 Ill. 451)

KELLNER et al. v. FINKL et al. (No. 11644.)

(Supreme Court of Illinois: June 18, 1919.)

PARTITION — 27 — ABATEMENT — STATUTE.

Under Abatement Act, § 21, prohibiting plea of abatement in partition, a plea in abatement in a partition suit, on the ground that another suit for the same relief between the same parties was pending in the same court, must be stricken, but the court can give relief by con-

solidating the suits, and at the trial dismissing the second, if it appears to have been filed without good reason.

Thompson, J., dissenting.

Error to Second Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Charles M. Foell, Judge.

Suit for partition by Talitha H. Kellner and others against Emma Finkl and others. Decree dismissing the bill was affirmed by the Appellate Court (207 Ill. App. 90), and certain plaintiffs bring certiorari. Reversed and remanded, with directions.

Vincent D. Wyman and Harry C. Kinne, both of Chicago, and Charles E. Carpenter, of Urbana, for plaintiffs in error.

H. W. Masters, of Springfield, and Edgar L. Masters, of Chicago, for defendant in error Herbert.

O'Donnell & O'Donnell, of Chicago, for defendants in error Schmidt.

DUNN, C. J. Under the will of Kaspar G. Schmidt the title to certain real estate in Cook county vested in his 15 grandchildren who were living on May 15, 1915, and early in the morning of that day a bill was filed in the superior court by the son of one of his daughters for the partition of the real estate, and an hour or two later another bill for the same purpose was filed in the same court by the plaintiffs in error, who are the four children of another daughter. A writ of certiorari was allowed to bring before us the record of the Appellate Court, which affirmed a decree dismissing the second bill.

All the grandchildren were parties to both bills. Summons was served on some of the defendants in each case on May 15, and in the first case, which was No. 315,815, all were served in time for the June term. In the second case (No. 315,816) all were served by May 17, but George L. Herbert, who was the complainant in the first bill and a defendant in the second, was a resident of Michigan and was served there with a copy of the bill, so that the service was to the July term, since the June term began in less than 30 days after May 17. All of the defendants in No. 315,816 filed pleas, which, in substance, averred the filing of the bill in No. 315,815, praying the same relief in regard to the same subject-matter to which the parties were the same as in No. 315,816. The pleas further averred that the said bill was still pending and undetermined, and demanded the judgment of the court whether the defendants ought to be compelled to make any answer to the bill in No. 315,816. The plaintiffs in error moved to strike the pleas from the files, and the motion was overruled. They moved to set down the pleas, except

that of George L. Herbert, for hearing as a matter of fact. The motion was denied and the court ordered the pleas set down for argument, and upon such argument ordered the pleas allowed and dismissed the bill.

Section 21 of the Abatement Act (Hurd's Rev. St. 1917, c. 1) provides that no plea in abatement shall be received in any suit for partition, nor shall such suit abate by the death of any tenant. It was said in *Hopkins v. Medley*, 97 Ill. 402, with reference to this section, that it is almost a literal copy of section 3 of chapter 31 of 8 and 9 William III, that in construing this section of the English statute it is uniformly held that no plea in abatement is admissible in partition proceedings, and that in adopting it the Legislature must be presumed to have intended to adopt it with the construction already given it by the English courts. It was further said that the language of the section is clear and unequivocal, and it is difficult to see how any other construction could have been placed upon it, and a plea in abatement in a partition suit for want of parties was held properly stricken from the files. A prior suit in equity pending may, in general, be pleaded to the prosecution of a subsequent suit between the same parties upon the same equity; but, since the statute prohibits pleas in abatement in a partition suit, the motion of the plaintiffs in error to strike the pleas should have been sustained.

Any tenant in common may maintain a suit for partition in any court of competent jurisdiction. If two or more suits are begun by different tenants in common in the same court one cannot be pleaded in abatement of the others. Two decrees in partition will not be entered but the court may control the suits by consolidating them and staying proceedings in one or more of the causes, and thereby grant the relief sought promptly, without delaying any party in the prosecution of his rights. On the final hearing the costs, including the solicitor's fee, may be apportioned among the parties in interest, so that each shall pay only his or her equitable portion thereof in accordance with the statute. The party or parties filing the first bill will be entitled to have the solicitor's fee taxed to pay his or their solicitor, provided his or their suit be properly prosecuted and no proper defense be made to the same. On such final hearing any subsequent bill or bills may be dismissed at the costs of the parties filing the same, if no good reason for the filing of the same shall appear. In this case the two suits were pending in the same court, and an order should have been made for their consolidation and disposition as here suggested.

The judgment of the Appellate Court and the decree of the superior court will be reversed, and the cause will be remanded to

the latter court, with directions to strike the pleas from the files.

Reversed and remanded, with directions.

THOMPSON, J., dissents.

(233 Ill. 574)

PEOPLE v. SPERLING. (No. 12269.)

(Supreme Court of Illinois. June 18, 1919.)

CRIMINAL LAW §1090(8)—ABSENCE OF BILL OF EXCEPTIONS—EXTENT OF REVIEW.

Bill of exceptions having been stricken, there is nothing before the court on appeal upon which to base decision as to assignments alleging error in denying change of venue and in admission of evidence, and, there being no error urged that rests solely upon common-law record, judgment will be affirmed.

Error to Circuit Court, McDonough County; Harry M. Waggoner, Judge.

Walter Sperling was convicted of forgery, and he brings error. Affirmed.

Hardin W. Masters, of Springfield, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Andrew L. Hainline, State's Atty., of Macomb, and Albert D. Rodenberg and James W. Gullett, both of Springfield, for the People.

CARTER, J. Plaintiff in error was indicted in January, 1918, in the circuit court of McDonough county for forgery, and after trial before a jury was convicted and sentenced. This writ of error has been sued out to review the proceedings of the trial court.

Plaintiff in error makes ten assignments, alleging errors for which the judgment should be reversed. These errors all rest upon evidence contained in the bill of exceptions filed in the cause. This court at the April term, 1919, allowed a motion of defendant in error to strike the purported bill of exceptions from the files. Counsel for plaintiff in error relies particularly upon assignments 1 and 3. The first assignment of error is that the court erred in overruling plaintiff in error's motion for change of venue, and the third is that evidence was erroneously admitted with reference to the charter of a certain bank. As the bill of exceptions has been stricken from the files, there is nothing before us upon which to base a decision as to these two assignments of error. *People v. Weston*, 236 Ill. 104, 86 N. E. 188; *Macierz Polska v. Czarnecki*, 272 Ill. 34, 111 N. E. 516; *People v. Tielke*, 259 Ill. 88, 102 N. E. 229. There is no error urged that rests solely upon the common-law record. It follows that the

record presents no question for our consideration.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

(283 Ill. 454)

HUTSON v. HUDELSON. (No. 12717.)

(Supreme Court of Illinois. June 18, 1919.)

1. JUSTICES OF THE PEACE §80(4)—PROCESS—VENUE.

A justice of the peace summons, not referring to any county in the state, but requiring defendant to appear at the justice's office in Benton, "in said county," held insufficient to confer jurisdiction.

2. JUDGMENT §948(1)—FORMER ADJUDICATION—PLEADING.

When a former adjudication of a controversy is relied upon as a defense in equity, it must be pleaded, when an opportunity has been afforded to the defendant to plead it.

3. QUIETING TITLE §29—LACHES—FAILURE OF UNDISTURBED POSSESSOR OF LAND TO LITIGATE TITLE.

Laches cannot be charged against the owner of property in the undisturbed possession of it, from his failure to engage in litigation to remove unfounded claims as clouds upon his title.

4. JUDGMENT §447(1)—EQUITABLE RELIEF—SETTING ASIDE—VALID DEFENSE.

A court of equity will not set aside a judgment for want of service of process, unless it is shown that complainant has a valid defense to the action in which the judgment was rendered.

5. QUIETING TITLE §7(4)—VOID SHERIFF'S DEED.

A court of equity will entertain a bill to remove a void sheriff's deed as a cloud upon the title of the owner of real estate.

6. QUIETING TITLE §14—CONDITIONS PRECEDENT—REIMBURSEMENT.

One seeking to have removed a cloud upon his title, caused by existence of void sheriff's deed, will be required to do equity and to repay to a purchaser in good faith at the void execution sale, who is in possession and has paid an existing incumbrance on the land, the amount which the purchaser has paid to remove the incumbrance, before complainant can recover possession.

Appeal from Circuit Court, Franklin County; Julius C. Kern, Judge.

Suit by E. G. Hutson against C. B. Hudelson. From a decree dismissing the bill, complainant appeals. Reversed and remanded, with directions.

D. G. Thompson, of Mt. Vernon, and W. P. Seeber, of Benton, for appellant.

W. F. Dillon and Thomas J. Layman, both of Benton, for appellee.

DUNN, C. J. E. G. Hutson filed a bill in the circuit court of Franklin county against C. B. Hudelson, which the court upon a hearing dismissed for want of equity, and the complainant has appealed.

The bill alleged that the appellant was in the possession of 20 acres of land, and that on June 4, 1909, the land was sold under a decree of foreclosure; that on February 17, 1910, the First National Bank of Benton, as the assignee of a mortgage subsequent to the one foreclosed, redeemed from the sale and afterward procured a decree of foreclosure of the junior mortgage, in which it was decreed that the complainant should be reimbursed for the redemption money out of the proceeds of the sale of the land; the total amount of the second decree of foreclosure being \$1,605.69. The land was sold by the master to the bank under the second decree of foreclosure. The bill avers that on November 14, 1908, W. F. Dillon and others obtained a pretended judgment against the appellant for \$97.17 and costs before C. C. Payne, a justice of the peace of Franklin county. Without any affidavit being made, as required by statute, an execution was issued on November 18, 1908, which was not served on the appellant, but was returned on the next day "Not satisfied," and on November 21, 1908, a transcript of the judgment was filed in the office of the circuit clerk and an execution was issued thereon on August 8, 1911; that the sum of \$1,777.64 was paid to the master in chancery to redeem from the sale under the decree of foreclosure, and the sheriff levied the execution upon the land, which was sold by the sheriff under the execution to the appellee. It is further averred that the appellee was about to prosecute an action of forcible detainer against the appellant for the possession of the land.

The bill was afterward amended, and it was averred that the transcript of the judgment of the justice of the peace was void, for the reason that the summons did not show any venue and conferred no jurisdiction on the justice of the peace. The amended bill prayed for an injunction to restrain the defendant from prosecuting the forcible detainer suit; that the sheriff's sale under the execution issued on the transcript of the judgment of the justice of the peace, and the deed made pursuant to such sale, be set aside as clouds on the appellant's title; that the title to the land be quieted in the appellant, and that in any event the appellant might have the right to redeem from the sale under the execution. The answer of the defendant relied on the proceedings set up in the bill,

which it denied were irregular and void, but averred were legal, and that by virtue of them the defendant was vested with the fee simple of the premises in controversy. In regard to the proceedings under the judgment of the justice of the peace, the answer denied that they were void, and averred:

"That the Appellate Court for the Fourth District of Illinois has adjudicated and held the said proceedings to be valid, and that said adjudication of the said Appellate Court has never been annulled, reversed, or set aside, and is still in full force and effect."

Objections were stated in the bill, and are relied on in the argument of the appellant, to the redemption from the sale under the decree of foreclosure of the first mortgage, and questions are also raised in regard to the right of homestead and the different descriptions of the property in the various instruments, but these objections and questions are all immaterial. The erroneous proceedings, if there were any, occurred prior to the decree of foreclosure of the second mortgage, and the complainant cannot in this suit go back of that decree to correct errors which the court may have committed in rendering it. The second mortgage released the right of homestead. The court had jurisdiction of the subject-matter and the parties, and any error in the decree, whether in the amount or in any other respect, can be corrected only by a direct proceeding to reverse it.

[1] The appellant contends that the transcript of the judgment before the justice of the peace did not authorize the issue of an execution by the clerk of the circuit court, and that therefore the redemption and sale under the execution and the sheriff's deed are void. The transcript shows the following summons:

"State of Illinois, — County—ss.:

"The People of the State of Illinois, to any Constable of Said County—Greeting:

"You are hereby commanded to summon E. G. Hutson to appear before me, at my office in Benton, in said county, on the 14th day of November, A. D. 1908, at 9 o'clock a. m., to answer the complaint of W. F. Dillon, W. B. Martin, W. W. McCreery, F. H. Stamper, A. L. Copple, and W. H. Moore for a failure to pay them a certain demand not exceeding two hundred dollars, and hereof make due return as the law directs.

"Given under my hand and seal this 9th day of November, A. D. 1908.

"C. C. Payne, [Seal]

"Justice of the Peace."

Upon the summons appears the following return:

"Personally served the within writ by reading the same to the within named defendant, E. G. Hutson, this 11th day of November, A. D. 1908. W. R. Stewart, Constable."

A judgment was rendered by default.

In *Orendorff v. Stanberry*, 20 Ill. 89, a summons bearing the venue of Tazewell coun-

ty was issued to the sheriff of Logan county, commanding him to summon the defendants to appear before the circuit court of said county on the first day of the next term thereof, to be holden at the courthouse in the city of Pekin on the second Monday of the month of October next. The sheriff of Logan county returned the writ executed by reading to the defendants, and a judgment by default was rendered against them. The judgment was reversed—the court holding that the service on the defendants in Logan county was void; that the defendants had a right to know certainly when and where they were required to appear when summoned; and that the language of the writ left it doubtful which county was intended. A like decision was rendered in a similar case in *Gill v. Hoblit*, 23 Ill. 473, and the validity of the rule was recognized in *Hall v. Davis*, 44 Ill. 494, though the writ in that case was different and the validity of the summons and service was upheld. So in *Moore v. Nell*, 39 Ill. 256, 89 Am. Dec. 303, a notice by publication in a newspaper published in Shelby county that an administrator would present a petition to sell land to pay the debts of his intestate at the next term of the Shelby circuit court, to be holden at the courthouse in Shelbyville on the fourth Monday in the month of May next, was held to be a sufficient designation of the county. In the latter case there was no confusion as to the county, no mention of two counties, and the designation of the Shelby circuit court to be holden at the courthouse in Shelbyville indicated the court, and the place of holding it, in terms which could apply to no other court.

The present case is governed by the rule laid down in *Orendorff v. Stanberry*, and *Gill v. Hoblit*, supra. There is no reference in the summons to any county in the state, and it required the defendant to appear at the office of the justice of the peace in Benton, in said county. It is true that the court sitting in Franklin county will take judicial notice that the city of Benton is the county seat of Franklin county, and it will also take judicial notice of the official character of the officers of that county; but this rule does not go to the extent of holding that every individual who happens to be within the limits of the county has the same knowledge. It does not appear that the summons was served upon the defendant in Franklin county; it is not directed to the sheriff or any constable of Franklin county; it does not notify him to appear at any place in Franklin county; it does not even notify him to appear at the city of Benton. It requires him to appear at the office of C. C. Payne, in Benton, and Benton may be a township in any one of the counties of the state. The defendant has a right to know definitely and with certainty, from the summons itself, where he is required to appear when served, without further inquiry. This summons did not give such no-

tice, and the justice of the peace, therefore, acquired no jurisdiction of the person of the defendant, and the judgment rendered by him was of no effect.

[2] The appellee contends that the question of the validity of the judgment of the justice of the peace and of the transcript, the execution, sale, and sheriff's deed has been adjudicated between the appellant and the appellee. When a former adjudication of a controversy is relied upon as a defense in equity, it must be pleaded when an opportunity has been afforded to the defendant to plead it. *Williams v. Williams*, 265 Ill. 64, 106 N. E. 476. The bill as amended averred that the transcript of the judgment was void for the reason, among others, that the summons did not show any venue, and conferred no jurisdiction on the justice of the peace, and the answer averred that the Appellate Court for the Fourth District of Illinois had adjudicated and held the proceedings to be valid. The evidence introduced to sustain the answer in this respect was an opinion of the Appellate Court in the forcible entry and detainer suit against the appellant, in which the appellee had been defeated in the circuit court. No record or judgment of the Appellate Court was introduced in evidence, though the opinion indicates that the judgment of the circuit court was reversed and the cause was remanded for a new trial. The questions considered in the opinion and determined adversely to appellant here were an objection to the sufficiency of the transcript for the reason that execution was issued by the justice of the peace on the fourth day after the judgment was rendered, while the transcript failed to show that the oath required by the statute to authorize the issue of an execution before the expiration of 20 days from the date of the judgment had been made and that the sheriff's deed was executed prior to the expiration of 15 months from the date of the master's sale. If the opinion may be regarded as any evidence of the judgment of the Appellate Court, it indicates merely that the Appellate Court adjudged that there was error in the proceedings of the circuit court in the trial of the forcible entry and detainer suit, and that the cause should be remanded to the latter court for a new trial. There was, therefore, no judgment as to the rights of the parties. These were dependent upon the result of a new trial. A transcript of the record of the circuit court appears in the record, which shows that the appeal in the forcible entry and detainer suit was afterward dismissed in the circuit court and a procedendo was awarded; but neither the judgment of the circuit court nor that of the justice of the peace is alleged in the answer, and this evidence has no bearing on the issue made by the pleadings.

[3] The appellee insists that the appellant's delay in filing his bill constituted such

laches as to be a waiver of the irregularities complained of and barred him of the right to any relief. The sale under the transcript was made on September 2, and the sheriff's deed on November 3, 1911. The bill was filed November 15, 1912. In the meantime the appellant had been in the undisturbed possession of the property, as he had been for many years before, and he was under no obligation to take any steps to remove the cloud from his title so long as his possession was undisturbed. Laches cannot be charged against the owner of property in the undisturbed possession of it, from his failure to engage in litigation to remove unfounded claims as clouds upon his title. *Shaw v. Allen*, 184 Ill. 77, 56 N. E. 403; *Boyd v. Boyd*, 163 Ill. 611, 45 N. E. 118; *Newell v. Montgomery*, 129 Ill. 58, 21 N. E. 508; *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. Rep. 159.

[4-6] The appellee relies upon the rule that a court of equity will not set aside a judgment for want of service of process, unless it is shown that the complainant has a valid defense to the action in which the judgment was rendered. This principle is well recognized, and the reason of it is that a court of equity will not take away from a party a legal advantage which he has acquired without fraud, as a means of securing a just debt, in favor of a party who does not deny that he owes the debt, but claims only the right to defend against a claim to which he has no defense. *Wright v. Simpson*, 200 Ill. 56, 65 N. E. 628. It is equally clear that a court of equity will entertain a bill to remove a void sheriff's deed as a cloud upon the title of the owner of real estate. *Shaw v. Allen*, supra. While the complainant has no right in equity to have the judgment set aside without showing a defense to the cause of action, he has a right in equity to have the cloud upon his title to real estate, caused by the existence of the void sheriff's deed, set aside. He will, however, be required to do equity, and to repay to a purchaser in good faith at the void execution sale, who is in possession of the real estate and has paid an existing incumbrance on the land, the amount which the purchaser has paid to remove the incumbrance before he can recover the possession. *Hutson v. Wood*, 263 Ill. 376, 105 N. E. 343, Ann. Cas. 1915C, 587. The sale under foreclosure was an incumbrance upon the appellant's title, which was about to ripen into a title and entirely deprive him of the ownership of the land. By reason of the redemption that incumbrance has been removed through the sale to the appellee, though the purchaser has acquired no title. The appellant, coming into a court of equity for relief, will be required to do equity, and before he can have the title of the appellee, who purchased in good faith, decreed to be void, he will be required to reimburse the appellee for the amount of the purchase money which

went to the payment of the prior incumbrance on the land. The appellant will therefore be permitted to redeem from the sale to the appellee by the payment of the amount which was paid to the sheriff for the redemption from the previous sale, with interest from the date of the payment to the sheriff to the date of the payment by the appellee.

The decree will be reversed, and the cause remanded to the circuit court, with directions to refer the cause to the master to state an account, charging the appellant with \$1,770.64, the amount paid for the redemption from the foreclosure sale, with interest from August 8, 1911, together with all taxes and special assessments, if any, on the premises paid by the appellee, with interest from the date of such payments, and the additional value, if any, added to the premises by reason of any permanent improvements which the appellee may have made thereon. The appellee will be charged with all rents and profits received by him from the premises. Upon the coming in of the master's report the court will ascertain the balance with which the appellant is chargeable in accordance with the foregoing directions, and will enter a decree that, unless such balance, with interest thereon, be paid by the appellant to the appellee within 90 days from the entry of such decree, the appellee will be entitled to a decree dismissing the bill for want of equity, and if such payment is not made within 90 days the court will enter such decree. If such payment shall be made within 90 days, the court will enter a decree granting the relief prayed in the original bill. In any event the decree will be at the costs of the appellant.

Reversed and remanded, with directions.

(233 Ill. 486)

PEOPLE ex rel. STUCKART, County Collector, v. INSURANCE EXCH. BLDG.
(No. 12435.)

(Supreme Court of Illinois. June 18, 1919.)

1. TAXATION \S 304—ITEMS OF LEVY—SEPARATION.

An item in an annual county appropriation bill, "Juror's fund, for expense of dieting jurors and fees of jurors and witnesses," is insufficient as not separating the items of levy, as required by Revenue Act, \S 121.

2. APPEAL AND ERROR \S 747(1) — CROSS-ASSIGNMENT OF ERRORS—QUESTIONS REVIEWABLE.

On an appeal from a judgment sustaining objection to taxes, appellee cannot raise on cross-errors the question as to correctness of the trial court's rulings and items of tax not included in or affected by the judgment concerning the items appealed from.

3. TAXATION \S 597—PROCEEDINGS FOR COLLECTION—REVIEW—HARMLESS ERROR.

On objections to a tax levy and an order for sale of real estate for delinquent taxes, testimony concerning certain computation tables, which were thereafter admitted in evidence over objection, held harmless error.

Appeal from Cook County Court; S. N. Hoover, Judge.

Proceedings by the People, on the relation of Henry Stuckart, County Collector, against the Insurance Exchange Building to confirm taxes. Judgment for defendant, and plaintiff appeals. Affirmed.

MacLay Hoyne, State's Atty., of Chicago (Charles Center Case, Jr., and Joseph P. Ryan, both of Chicago, of counsel), for appellant.

Landon & Holt, Ellis & Lewis, William Lawton, and Elmer M. Leesman, all of Chicago (Robert N. Holt, of Chicago, of counsel), for appellee.

STONE, J. This is an appeal by the state's attorney on behalf of the people, on the relation of the county collector of Cook county, from a judgment of the county court sustaining objections to certain general taxes levied and extended for county purposes for the year 1917. Cross-errors are assigned on the judgment overruling certain objections and ordering sale of real estate owned by appellee for delinquent taxes.

The questions presented to this court are limited by counsel to objections filed in the trial court to county taxes only, and are confined to four items of the annual appropriation bill of Cook county adopted February 5, 1917, for the then fiscal year. Objections were filed and sustained by the trial court to the appropriation and levy for "Juror's fund, for expenses of dieting jurors and fees of jurors and witnesses, \$408,332." Objections were filed, overruled, and judgment and order of sale entered in the matter of the following items in the annual appropriation bill of said county: "Courthouse building fund, \$100,000;" "Bonds and interest fund, old surplus, \$19,409.13;" "Amount county clerk added for loss and cost to levy for county bonds fund." It is also assigned as error that the trial court permitted the examination of a certain witness by the name of O'Brien from a table not in evidence, and thereafter admitting such table in evidence over objections. The foregoing items will be treated in this court in the order above given, with the respective contentions of the parties interested.

[1] Appellant, in support of his contention that the item of levy, "Juror's fund, for expenses of dieting jurors and fees of jurors and witnesses," is a valid levy, strongly urges that, notwithstanding the case of *People v. Klee*, 282 Ill. 440, 118 N. E. 754, where this

identical item was held invalid as in violation of section 121 of the Revenue Act (Hurd's Rev. St. 1917, c. 120), requiring that the items of levy shall be separate, that under the cases of *People v. Cairo, Vincennes & Chicago Railway Co.*, 237 Ill. 312, 86 N. E. 721, and *People v. Illinois Central Railroad Co.*, 237 Ill. 324, 86 N. E. 724, such levy is valid as a substantial compliance with section 121. Counsel for appellant very earnestly contend that the doctrine of stare decisis should be applied to this case, for the reason that the cases of *People v. Cairo, Vincennes & Chicago Railway Co.*, supra, and *People v. Illinois Central Railroad Co.*, supra, have long been the law in this state, and have been cited in numerous recent decisions, whereas the case of *People v. Klee* is but one case in which a different rule is adopted. An examination of these cases and the *Klee* Case discloses that the court, in determining whether or not certain items of levy were sufficiently definite or sufficiently separated, has construed the language used in the levies in former cases. There appears, however, to have been no departure in the *Klee* Case from the general rules of law and construction laid down in the earlier cases. The *Klee* Case appears to be the only case in which the identical language here used was construed. The construction put upon that language in that case controls here, and the county court did not err in sustaining the objection to said tax.

[2] Appellee has assigned certain cross-errors to the order of the county court overruling its objections to certain items of tax. This court, in the case of *People v. Vogt*, 262 Ill. 170, 104 N. E. 226, laid down the rule that a judgment as to the different items of tax is, in effect, a distinct judgment as to each item, for reasons analogous to the rule laid down in *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336, that where one party appeals from only a portion of a decree, the other matters not appealed from are not before the reviewing court if such other matters are wholly independent of the part of the decree appealed from, so that one part has no influence or bearing upon a decision as to the other part; that case holding that as to the other part not appealed from the decree constitutes a separate decree. We held in the *Vogt* Case, supra, that appellee cannot raise on cross-errors the question as to the correctness of the trial court's ruling on items of tax not included in or affected by the judgment concerning the items appealed from; it being there held that he should have appealed from that decision. That case is controlling here. The court cannot, therefore, review the questions raised on cross-errors.

[3] It is also assigned as error that the trial court permitted the examination of a certain witness by the name of O'Brien con-

cerning certain computation tables which were thereafter admitted in evidence over the objection of appellant. We are of the opinion that such testimony could not in any way affect the holding of the trial court or this court, for the reason that, as we have herein stated, the errors urged are settled by the case of *People v. Klee*, supra.

As the county court did not err in sustaining the objections of appellee upon which appellant has herein assigned error, the judgment of that court will be sustained.

The judgment of the county court is affirmed.

Judgment affirmed.

(238 Ill. 527)

GITS et al. v. ULLRICH et al. (No. 12490.)

(Supreme Court of Illinois. June 18, 1919.)

1. COURTS \S 219(12)—COURTS OF APPELLATE JURISDICTION—FREEHOLD—RECOVERY OF PURCHASE PRICE OF LAND.

A suit to rescind a contract for the sale of land and to recover the money paid, because of breach of contract by the vendor in failing to procure gas and water to be furnished, and to establish a partnership between defendants, does not involve a freehold, so as to confer jurisdiction upon the Supreme Court.

2. COURTS \S 219(18)—COURTS OF APPELLATE JURISDICTION—FREEHOLD—SUITS FOR SPECIFIC PERFORMANCE.

A suit for specific performance to compel the execution of a conveyance of a freehold estate involves a freehold.

3. COURTS \S 219(40)—COURTS OF APPELLATE JURISDICTION—FREEHOLD—TITLE.

Where the title to the freehold is not put in issue in any manner by the pleadings, and there are no assignments of error touching the freehold, a freehold is not involved.

4. COURTS \S 219(21)—COURTS OF APPELLATE JURISDICTION—FREEHOLD—REMOVAL OF CLOUD.

A freehold is involved, when it is sought to cancel a deed purporting to convey the freehold as a cloud on complainant's title.

Error to Circuit Court, Cook County; M. W. Pinckney, Judge.

Suit by Alphons H. Gits and others against Henry Ullrich and others. Judgment for defendants, and plaintiffs bring error. Transferred to Appellate Court.

Haase, Hanley & Howard, of Chicago, for plaintiffs in error.

Morton T. Culver, of Chicago, for defendant in error Ullrich.

Hoyne, O'Connor & Irwin, of Chicago, for defendant in error McElroy.

STONE, J. The circuit court of Cook county sustained a demurrer to the amended and supplemental bill of the complainants, seeking to establish a partnership between the defendants in error in a real estate transaction, to rescind a contract made with one of them, and to recover the money paid for the lands by the plaintiffs in error, upon the tender into court of a special warranty deed of the premises in question covering the time the record title has been in the complainants.

The contract in question is in the form of a letter dated Chicago, Ill., July 21, 1917, addressed to defendant in error Henry Ullrich, alleged in the complainants' bill to have been prepared by or under the direction of Ullrich. After the description of the land in question the letter provides for a total consideration of \$8,850, of which \$500 was earnest money and \$4,500 was to be paid on demand when a good and sufficient warranty deed and guaranty policy issued by the Chicago Title & Trust Company was delivered, showing the title to be free and clear of all incumbrances. The remaining \$3,850 was to be paid in monthly installments of \$500 each. The letter further provides that the complainants were purchasing the premises in question on the following conditions:

(1) That the legal survey of sewer datum will be procured, to the end that complainants must be assured good and ample drainage at a depth of 6 feet below the surface, with an outlet at Fifty-Sixth avenue; (2) that an agreement or letter from the People's Gaslight & Coke Company, to the effect that gas will be furnished on or before May 1, 1918, was to be secured; (3) that an agreement or letter from the water extension department of the city of Chicago be procured, to the effect that water be furnished from the main at Archer avenue; (4) that the defendants would negotiate with the Indiana Harbor Belt Railroad Company for the extension of a lead or side track to the premises in question.

The complainants deposited the sum of \$500 as earnest money and agreed to complete the contract of purchase within 30 days after date of the letter. The complainants further agreed in said letter to furnish from a licensed architect of the city of Chicago full plans, blueprints, and specifications of their proposed manufacturing plant, and apply to the defendants for a loan of \$30,000, if that amount were needed and to be furnished a larger amount, if necessary, and agreed to pay the loan at the rate of \$2,500 each six months until paid. The building was to be completed not later than May 1, 1918. It is further stated in said letter that, in case good and perfect title to the premises therein described is not procured, the \$500 paid down as earnest money is to be returned to complainants. The letter is signed by Alphons H. Gits, Remi Gits, and Gits Bros. Manufacturing Company.

123 N.E.—34

At the time set out in this letter the record title to the premises was in Emmet F. McElroy. The bill alleges that this fact was unknown to the complainants at the time the letter was written and until the delivery of a deed for the property executed by McElroy and his wife. The complainants paid Ullrich \$500 at the time this letter was written and \$4,500 at the time of the delivery of the deed to the premises, at which time notes amounting to \$3,850 were given, thereby paying the purchase price in full.

It is alleged in the bill of complaint that gas, water, or switch track connections have never been supplied, and that such were necessary to the proper prosecution of complainants' business, without which the land in question would never have been purchased; that when complainants accepted the deed to the premises Ullrich told them that he was not ready to furnish the contract or agreement from the gas company or the railroad company, for the reason that these things took time, petitions had to be signed, and other formalities performed; that he had an established business in Chicago, and had had for many years, and that his oral promise for these things was good; that, if complainants did accept the deed and pay the consideration, he would procure contracts for gas, water, and switch track as soon as possible—certainly before the first note fell due; that complainants relied on these representations, paid the consideration, and accepted the deed for the premises; that Ullrich immediately discounted or otherwise disposed of the notes; that none of the conditions have been performed, except to furnish a survey and title guaranty policy; that Ullrich never intended to procure these contracts, but, fraudulently contriving by these promises, at the time induced the complainants to pay cash and give their notes and accept the deed.

It is further alleged in the bill that the complainants were engaged in making oil cups; that they had many war contracts with limits and severe penalty clauses; that they occupied leased quarters; that the lease would expire April 30, 1918; that the defendants knew, or should have known, that the complainants would have to have gas and water—at least these facts were all made known to Ullrich before the making of said offer. The bill further alleges that on September 21, 1917, the complainants notified McElroy and Ullrich of their repudiation and rescission of the contract and made demand for the return of their money. Attached to the bill and made a part thereof are copies of agreements between defendants in error relating to said property and other property, which plaintiffs in error contend establish a partnership between defendants in error.

[1] The first question presented on this record is whether or not this court has ju-

isdiction to review the case. The only ground on which a review here may be had on this writ of error is that a freehold is involved. If a freehold is not involved, the cause should be transferred to the Appellate Court for the First District. Upon an examination of the record, and the issues raised therein, we are of the opinion that a freehold is not involved in this case. Plaintiffs in error are seeking to establish a partnership, and to have returned to them the money they paid as the purchase price of land, because of the failure of Ullrich to perform certain acts which plaintiffs in error say were inducements to them to buy the property. In order to do equity they tender back the property purchased.

[2-4] In a suit for specific performance to compel the execution of a conveyance of a freehold estate, a freehold is involved; but plaintiffs in error have not sought such relief in this case. Where the title to the freehold is not put in issue in any manner by the pleadings, and there are no assignments of error touching the freehold, a freehold is not involved. *Kesner v. Miesch*, 204 Ill. 320, 68 N. E. 406. A freehold is involved when it is sought to cancel a deed purporting to convey the freehold as a cloud on complainant's title; but no such issue is raised here. The issues raised by the bill in this case are, as we have seen, whether or not there was a partnership existing between defendants in error, and whether or not defendants in error were guilty of a breach of a contract made by one of them and relating, not to the freehold, but to certain acts to be performed for the benefit of plaintiffs in error, which, they say, induced them to purchase the property. Such issues do not involve a freehold.

The cause will therefore be transferred to the Appellate Court for the First District.

Cause transferred.

(238 Ill. 470)

RUSSO FU AGATINO v. GINOCCHIO et al.
(No. 12418.)

(Supreme Court of Illinois. June 18, 1919.)

1. APPEAL AND ERROR ¶1083(6), 1095—**INTERMEDIATE COURT—REVIEW—QUESTION OF LAW—EFFECT OF FINDING.**

Facts touching the making of a contract *held* not in dispute, so that a question of law was presented as to whether minds of parties met, and Supreme Court, on writ of error to Appellate Court, though that court made a finding of fact, could determine question for itself.

2. SALES ¶52(5)—**MEETING OF MINDS—EVIDENCE.**

Evidence *held* to show meeting of minds of parties as to contract for purchase and sale of almonds.

3. BROKERS ¶105—**NOTICE TO BROKER.**

After completion of contract of sale negotiated through seller's broker, a letter written to broker by buyer could not operate as a repudiation, where it was not communicated to the seller.

Error to First Branch Appellate Court, First District, on Appeal from Municipal Court of Chicago; Hosea W. Wells, Judge.

Action on three contracts in municipal court by Luigi Russo fu Agatino against L. Ginocchio and others. Judgment for plaintiff was affirmed as to two contracts, and reversed as to other, by Appellate Court (211 Ill. App. 416), and plaintiff brings certiorari. Judgment of Appellate Court reversed, and judgment of municipal court affirmed.

Newman, Poppenhusen, Stern & Johnston, of Chicago (Edward R. Johnston, of Chicago, of counsel), for plaintiff in error.

Culver, Andrews, King & Stitt, of Chicago, for defendants in error.

STONE, J. Plaintiff in error filed his claim in the municipal court of Chicago against defendants in error on three contracts for the sale of almonds. Judgment was secured for the claim in the municipal court in the sum of \$2,251.75. On review the Appellate Court affirmed the judgment of the municipal court as to two of said contracts, and entered judgment on the same for \$803.55, and reversed the judgment of the municipal court as to the remaining contract, with a finding of facts to the effect that no contract existed between the parties. The cause comes here on certiorari to the Appellate Court to review the judgment of that court concerning the third alleged contract. As that contract is the only one in issue in this court, only such portion of the statement of plaintiff's claim and facts relating to said contract need be considered.

The alleged contract was for the purchase and sale of 150 bales of P. & G. almonds at 120 shillings per 100 pounds. Plaintiff in error was represented in Chicago by Harold B. Pinder for the purpose of soliciting orders from Chicago importers. Offers received by Pinder were by him cabled to his principal in Sicily, and, in case the terms of sale were agreed upon by the purchaser and his principal, Pinder confirmed the deal by a written memorandum of the terms of sale, one copy of which was sent to the purchaser, one to his principal, and one was kept on file in Pinder's office. In January, 1914, Pinder called on Costa, a member of the firm of Ginocchio, Costa & Co., defendants in error, for the purpose of securing an order for Sicilian almonds to be shipped during the following September or October. Costa asked for quotations on P. & G. al-

monds to be shipped during the first half of September, 1914. On January 31, 1914, Pinder wired his principal:

"Lowest 150 bales Palma new crop, first half of September, direct steamer."

On the same day Pinder received a cable from his principal, "126 September," which was immediately reported to Costa, who objected to the price, stating, in substance, that he already had an offer from a seller in Hamburg, Germany, quoting the same at 120. Thereupon Pinder cabled his principal on the 31st as follows:

"Hamburg sold 120; business possible same price; telegram."

On the 2d or 3d of February Pinder received a cable from his principal as follows: "I accept 120 September." Shortly after the receipt of this cable Pinder called at Costa's office and acquainted him with the contents of the cable, upon the receipt of which knowledge Costa stated that he would take 150 bales. Thereupon Pinder sent his principal a cable as follows:

"Sold Costa 150 Palma new crop, September, 120, direct steamer."

Following this last message Pinder made out in triplicate a written confirmation of the sale, sending a copy to his principal and the original to the defendants in error, who produced said original on the hearing in the trial court, which is as follows:

"Sold to Ginocchio, Costa & Co., Chicago, Ill., for account of Luigi Russo fu Agatino, Catania, Sicily, 150x220 lb. bales sweet shelled P. & G. almonds, Cat brand, 1914 crop, at 120/- per cwt., gross for net C. & F. per direct steamer to New York. Terms: Payment at 90 days against L/ credit on London bank, shipment September."

Some time in the month of March, after the delivery of this statement, Pinder called upon Costa and suggested that, as the market on almonds was becoming bad, defendants in error should resell the almonds theretofore sold to them for September delivery and save loss, whereupon Costa replied that his order was for the first half of September. Pinder called his attention to the order, whereupon Costa stated that, if the order went in for September delivery, it was wrong, as he had not purchased upon that basis; that his contract was for the first half of September. Thereupon Pinder cabled plaintiff in error that defendants in error understood shipment not later than September 16, instead of September delivery, and asked confirmation. The plaintiff in error confirmed the amendment of these terms by cable, and later wrote Pinder indicating that he (Pinder) would have to stand the loss of such change in the contract as such broker.

[1, 2] It is contended by plaintiff in error that the facts are undisputed in this case, and that whether or not such facts establish a contract described in the amended statement of claim for the sale of the goods in question is a question of law. It is contended by defendants in error that the facts in question are disputed, and therefore the parties hereto are concluded by the judgment of the Appellate Court; that the minds of the parties did not meet on the item described in the original claim, or in the claim as amended; that the defendants in error had been led to believe that the contract had been withdrawn by the plaintiff in error, and therefore they were justified in refusing to carry out the same.

Upon reading the testimony in the record we find no dispute concerning the essential facts in this case. The question, therefore, whether or not they show the existence of a contract between the parties, is a question of law. This court has jurisdiction to review questions of law on writ of error to the Appellate Court, even though that court makes a finding of facts, where such facts are not disputed. The question, under such circumstances, is one of correct application of the law to the undisputed facts. *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127; *Brush v. City of Carbondale*, 229 Ill. 144, 82 N. E. 252, 11 Ann. Cas. 121.

The only question in this case is whether the minds of the parties hereto met in an agreement on the terms and conditions of a contract for the purchase and sale of 150 bales of almonds. This is essential to the existence of any contract. *Weeks v. Chicago & Northwestern Railway Co.*, 198 Ill. 551, 64 N. E. 1039; *Mozeiko v. Lehigh Valley Transportation Co.*, 235 Ill. 324, 85 N. E. 618; *Stanton v. Chicago City Railway Co.*, 283 Ill. 256, 119 N. E. 291. We are of the opinion that the minds of the parties did meet and that a contract was made between them. It appears from the evidence that at the time of the original offer of 150 bales of almonds at "120" the vendor understood the contract to be for "September delivery," which, as explained in the evidence, means in that business a delivery at any time in the month of September, while the vendee claimed that such delivery was to be made during the first half of September. It is evident that at the time the sales memorandum was delivered to defendants in error the minds of the parties had not met on the matter of delivery, which appears to have been one of the conditions of the contract. So the matter stood until the latter part of March of the same year, when the broker, Pinder, called upon defendant in error Costa to suggest to him that, the mar-

ket for almonds having weakened, they ought to resell their contract with plaintiff in error and avoid loss. It at this time became known to the broker that Costa understood that the shipment of the almonds was to be made during the first half of the month of September. Pinder, a day or two thereafter, cabled the plaintiff in error, advising a modification of the contract to conform to the wishes of Costa, to which plaintiff in error replied by cable, "I confirm." Pinder, upon receipt of this cablegram, went to defendants in error, and there showed Costa the cablegram, and told him what he had cabled the plaintiff in error, and that the cablegram was in reply and agreement thereto, to which Costa replied, "All right," or words to that effect.

It is evident that at that time there was a meeting of the minds of the parties on the only difference between them, that of delivery, and that the contract was then and there completed. It appears that nothing further was said about the matter until August 13th following, when plaintiff in error wrote to defendants in error, asking for the name of the London firm with which defendants in error would open letters of credit for the 150 bales of almonds. On September 2d defendants in error notified plaintiff in error that "disturbed banking conditions" prevented them opening letters of credit, and eight days later, in a letter inferring the same reason, canceled "the entire business." There was nothing in either of these communications indicating that the terms had not been agreed upon. The reason assigned was entirely outside the contract. These facts also tend to show that a valid contract existed between the parties.

[3] It is contended that as the plaintiff in error thereafter wrote to Pinder expressing dissatisfaction with the shipment terms of the contract, it showed that he did not agree concerning such shipment, and that the minds of the parties did not meet concerning that matter. The clear language of his cablegram in the latter part of March, in reply to that of Pinder advising modification of the contract in that particular, and the later assent of Costa thereto, shows that the contract was completed. His letter written later was therefore, at most, but an attempt to break the contract, if it could be even so construed, and since it was not communicated to defendants in error it could not amount to a rescission of the contract. *Roebbing's Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518; *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548.

The judgment of the Appellate Court will be reversed, and the judgment of the municipal court affirmed.

Judgment of Appellate Court reversed.

Judgment of municipal court affirmed.

(288 Ill. 304)

PEOPLE ex rel. THRASHER v. EISENBERG. (No. 12632.)

(Supreme Court of Illinois. June 18, 1919.)

1. COURTS — 219(2) — CERTIFICATE OF IMPORTANCE — JURISDICTION OF SUPREME COURT.

As the Supreme Court is without jurisdiction to review by certiorari a determination of the Appellate Court dissolving a temporary injunction, the Supreme Court cannot consider the legality of a mandate of the Appellate Court dissolving a temporary injunction on appeal upon certificate of importance from the affirmance of a judgment of the circuit court assessing damages, after dissolution of such injunction, in favor of defendant, before proceeding with the case on the merits.

2. INJUNCTION — 188 — TEMPORARY INJUNCTION — DISSOLUTION — ATTORNEY'S FEE.

Under Injunction Act, § 12, a defendant against whom a temporary injunction restraining use of premises for lewdness, etc., was issued may, where it was vacated by the Appellate Court, have an assessment of his damages for attorney's fees for services in securing the dissolution of the temporary injunction before further hearing on the merits.

Thompson, J., dissenting.

Appeal from Second Branch Appellate Court, First District; on Appeal from Circuit Court, Cook County; Jesse A. Baldwin, Judge.

Petition and bill by the People, on the relation of Samuel P. Thrasher, against Jacob M. Eisenberg. An interlocutory injunction was reversed by the Appellate Court, and the cause remanded for further hearing, and thereafter defendant filed his suggestion of damages sustained for solicitor's fees, etc. A judgment of the circuit court for defendant for solicitor's fees, etc., rendered in advance of any consideration of the merits, was affirmed by the Appellate Court (212 Ill. App. 337), and relator appeals upon certificate of importance issued by the Appellate Court. Affirmed.

Sims, Welch & Godman, of Chicago, for appellant.

Brady, Rutledge & Devaney, of Chicago (James A. Brady, of Chicago, of counsel), for appellee.

STONE, J. The appellant on August 19, 1916, filed a petition and bill in equity in the circuit court of Cook county to secure an injunction against appellee restraining him from permitting certain property owned by him and located in the city of Chicago to be used for purposes of lewdness, assignation, and prostitution, in violation of the statute on nuisances. *Hurd's Stat. 1917, p. 2022*. Prior to the filing of the bill and petition the relator by mail notified the defendant, Eisen-

berg, that the premises were being used in violation of said act. On August 3, 1916, a written notice was personally served on Eisenberg, notifying him that on June 21st and July 28th, and on divers days between said dates and prior thereto, the premises in question had been used contrary to and in violation of said act. This notice called particular attention to section 2 of said act, which provides that no proceedings shall be instituted to abate the nuisance until five days after service of said notice. It also informed Eisenberg that if he did not abate the nuisance within a reasonable time after the expiration of five days, proceedings would be taken in a court of equity to abate the nuisance. After the expiration of the five days set out in said notice the petition and bill in question were filed in the circuit court of Cook county and a temporary injunction was issued without the previous notice provided for in section 3 of the Injunction Act. Hurd's Stat. 1917, p. 1659. The bill and the petition each set forth the facts aforesaid and pray for the issuing of an injunction writ, and were each verified by the affidavit of the relator. Thereupon, and without any appearance or proceedings of any kind in the circuit court, an appeal was perfected from the interlocutory order to the Appellate Court for the First District. Upon hearing in said court it was held that the allegations of the bill were not sufficient to authorize the court to issue the temporary injunction without notice. It was held by said court that because of the failure to give notice of the time and place of the application for the injunction, as required by section 3 of the Injunction Act, the interlocutory order was wrongfully issued. The Appellate Court reversed the judgment, and remanded, the cause for a further hearing upon the issues set out in the bill. 202 Ill. App. 63. The remanding order of the Appellate Court was duly entered by the circuit court, after which the preliminary injunction was dissolved in accordance with the rulings of the Appellate Court. Thereupon the defendant, Eisenberg, filed his suggestion of damages sustained for solicitor's fees in securing the dissolution of the temporary injunction. After a hearing the circuit court entered a decree and judgment against the relator for the sum of \$500, found by it to be the fair and reasonable value of the services of the defendant's attorney in securing such dissolution. This judgment was awarded by the circuit court in advance of any consideration of the merits of the cause as set forth in the petition and bill. From this judgment an appeal was perfected to the Appellate Court, and was by said court affirmed. 212 Ill. App. 337. The cause comes to this court upon a certificate of importance issued by the Appellate Court.

It is contended by the appellant that a judgment for damages in securing the dissolution of a temporary injunction without

passing upon the issues set forth in the bill is without authority of law; that the preliminary injunction was wrongfully dissolved for the reason that the notice required by section 3 of the Injunction Act does not apply to proceedings under the Nuisance Act; that the petition and bill of complaint of appellant made out a case in equity sufficient for an order granting a temporary injunction without notice, and therefore the assessment of damages was illegal; that the failure to give notice under the Injunction Act, which would, at most, constitute a mere irregularity, did not justify an assessment of damages for attorney's fees only, without evidence of other damages suffered; that upon the filing of a verified petition, if the court is satisfied that the nuisance complained of exists, the court shall allow a temporary writ of injunction with bond (unless the petition is filed by the state's attorney) in such amount as the court may determine, provided no such injunction is issued except on behalf of an owner or agent, unless the court is satisfied that such owner or agent had been personally served with a notice signed by the petitioner five days prior to the filing of said petition; and that this provision of the statute on nuisances makes the notice provided for by section 3 of the Injunction Act useless and inoperative.

It is contended on the part of appellee that the judgment of the Appellate Court on the former appeal of this case, reversing and setting aside the order of the circuit court granting the injunction herein and holding that the injunction had been wrongfully issued on the ground that no notice was given as required by section 3 of the Injunction Act, was not reviewable, and that appellant is therefore precluded from further review of such decision, and that it must be assumed that the injunction was wrongfully issued.

A petition for certiorari was filed in this court from the decision of the Appellate Court, and was dismissed on the ground of want of jurisdiction of this court to review a decision of the Appellate Court touching the disposition of an interlocutory injunction. The judgment herein is for damages assessed by the circuit court of Cook county upon the dissolution of the temporary injunction in accordance with the mandate of the Appellate Court.

[1] The Appellate Court has affirmed the judgment of the circuit court and granted a certificate of importance in this case, and the first question presented here is whether or not this court can take jurisdiction to determine the legality of the mandate of the Appellate Court dissolving the temporary injunction, on which mandate the damages are based, when this court is without jurisdiction to review such order of dissolution by writ of certiorari. To hold that this court has such jurisdiction would be to indirectly confer a jurisdiction which cannot be assumed directly. The result arising from such a

holding would, in effect, confer upon this court jurisdiction to review the decision of the Appellate Court in all cases of the dissolution of interlocutory injunctions where damages had been assessed. We are of the opinion, therefore, that this court is precluded from reviewing the question whether or not the injunction was properly dissolved.

[2] The remaining question in the record is whether or not the assessment of damages for attorney's fees for services in securing the dissolution of the temporary injunction should be allowed before the merits of the bill are passed upon; it being contended by the appellant such assessment of damages is premature. Section 12 of the Injunction Act provides as follows:

"In all cases where an injunction is dissolved by any court of chancery in this state, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damaged by such injunction, and may award execution to collect the same: Provided, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond."

While there appears to have been a conflict in the earlier decisions of this court on this question, an examination shows such to have been due to the different statutes in force at the time of such decisions. The rule in this state has always been that where a temporary injunction is ancillary to the cause of action, damages may be assessed upon the dissolution of a temporary injunction without disposing of the merits of the bill. It was, however, held in *Terry v. Hamilton Primary School*, 72 Ill. 476, that where the only prayer of the bill was for an injunction, it was premature and improper to assess damages until a final disposition of the case. This was the rule in this state subsequent to an amendment to the law of 1861. Section 1 of the Injunction Act of 1861 was the same as section 12 of the Injunction Act of 1874, with the exception that the proviso in section 12 was added. In the case of *Shackleford v. Bennett*, 237 Ill. 523, 86 N. E. 1073, 15 Ann. Cas. 719, the statutes and decisions on this matter were considered. In that case the only relief sought by the bill was a perpetual injunction. A temporary injunction was issued and later dissolved without passing on the merits of the bill. The question there arose whether or not action might be maintained on an injunction bond after the dissolution of the temporary injunction and before the disposition of the injunction bill. It was there held that since the addition of the proviso now in section 12 of the Injunction Act the rule is that upon dissolution of an injunction there is immediate cause of action

upon the bond accruing to the party against whom the injunction is directed. Such being now the rule in this state, the circuit court has authority under said section 12 to assess damages where suggestions for the same are filed. The Appellate Court, therefore, did not err in sustaining the judgment of the circuit court assessing said damages.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

THOMPSON, J., dissenting.

(283 Ill. 371)

PEOPLE v. FOSTER et al. (No. 12713.)

(Supreme Court of Illinois. June 18, 1919.)

1. CRIMINAL LAW §417(16)—SELF-SERVING EVIDENCE.

In a burglary trial, when the manager of a restaurant in another town from that in which the burglary was committed testified he sold accused a lunch at 4:30 in the morning of the day of the burglary, it was proper to exclude, when offered for accused, a written report or sheet of sales which the manager testified he had kept on the night in question, not showing to whom sales were made, but only the date and amount, since, if admissible for any purpose, it was for the purpose of corroborating the manager's testimony, and was self-serving.

2. CRIMINAL LAW §417(14)—SELF-SERVING EVIDENCE.

Statements or declarations as to the act of a party or witness in corroboration of his theory of the case or any fact favorable to him, whether oral or in writing, are generally inadmissible in evidence on his own behalf, except where they are a part of the *res gestæ* or made in the presence of the other party.

3. CRIMINAL LAW §404(4)—IDENTIFICATION OF ARTICLES OFFERED IN EVIDENCE.

In burglary trial the admissibility of goods alleged to have been taken from the burglarized store and found upon the public highways was not open to the objection that they were insufficiently identified, and not found on the direct road between the place of the burglary and the place where defendants' truck was found; there being testimony that a portion of the direct road was in bad repair at the time, and that the goods were found scattered along the highway running to the road on which the truck was found.

4. CRIMINAL LAW §854(2)—SEPARATION OF JURY—DISCRETION.

The trial court may exercise its discretion in allowing the jury to separate during the progress of a trial in a criminal case less than capital unless sufficient cause is shown at the trial why the jury should be kept together; the trial court properly instructing them concerning their duties while separated.

-5. CRIMINAL LAW §786(2)—INSTRUCTIONS—CREDIBILITY OF ACCUSED.

An instruction for the people that "the jury are not bound to accept the defendant's statements upon the witness stand as to the truth" *held* not objectionable.

6. CRIMINAL LAW §786(2)—INSTRUCTIONS—CREDIBILITY OF ACCUSED.

In an instruction as to accused's credibility, the use of the word "permitted" or "permission" in a clause which stated that "defendant is permitted to testify in his own behalf, but by such permission, under the statute," etc., *held* not misleading or erroneous.

7. CRIMINAL LAW §829(1)—INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

Requested instructions covered by other instructions given are properly refused.

8. CRIMINAL LAW §824(15)—FAILURE TO REQUEST INSTRUCTIONS—VERDICT.

Defendants cannot complain that the instructions as to form of the verdict were in such form that the jury would understand they could not find some of the defendants guilty and others not guilty, where no request was made by defendants to give any instruction clearly stating that one could be convicted and the others not.

9. CRIMINAL LAW §1173(2)—HARMLESS ERROR—FAILURE TO INSTRUCT.

Failure to instruct that one defendant could be convicted and the others not was not prejudicial to defendants, where, under the undisputed facts, if one was guilty, all were guilty, and, if one was not guilty, the others were not.

10. CRIMINAL LAW §1130(5) — APPEAL — BRIEFS—AUTHORITIES.

It is insufficient for counsel to state merely, as to a practice followed by the trial court which they urge as error, that such practice has often been condemned by the Supreme Court, without citing authority in support of the statement, since it is no part of the duty of the Supreme Court to search for errors or enter upon an independent investigation of the court's own motion in order to find material upon which to base a judgment of reversal.

11. CRIMINAL LAW §834(1)—INSTRUCTIONS—MODIFICATION.

Under Practice Act, § 74, indicating that written instructions may be given as modified, it is not error for an instruction to be handed to the jury as modified by inserting or striking out and without being rewritten.

12. CRIMINAL LAW §1172(1) — HARMLESS ERROR—INSTRUCTIONS—MODIFICATION.

That in an instruction modified by erasure the erased portion could still be read and understood by the jury was not reversible error, where the erased portion was but a repetition of the same thought stated in the portion un-erased.

13. CRIMINAL LAW §561(1)—PROOF BEYOND REASONABLE DOUBT — EFFECT OF INDICTMENT.

An indictment is merely an accusation or charge against the accused brought by the

grand jury, and is not in itself evidence that the accused is guilty of the crime charged; but the state must still show to the satisfaction of the jury beyond a reasonable doubt that accused is guilty as charged.

14. CRIMINAL LAW §822(1)—INSTRUCTIONS. Instructions should be read as a series.

15. CRIMINAL LAW §1159(2)—REVERSAL—EVIDENCE.

The Supreme Court will not hesitate to reverse a judgment of conviction where the evidence on which it is based is of an unsatisfactory character or where the conviction was probably due to prejudicial or incompetent evidence.

16. BURGLARY §45—QUESTION FOR JURY.

In trial for burglary and larceny, defendants' guilt *held* for the jury.

17. CRIMINAL LAW §1159(3) — VERDICT — CONFLICTING EVIDENCE—CONCLUSIVENESS.

In cases where the evidence is conflicting, depending upon the credibility of opposing witnesses, the finding of the jury can be regarded as conclusive unless it is reasonably clear that an error has been committed.

18. CRIMINAL LAW §1159(2) — REVIEW — VERDICT OF JURY.

It is only where the court is able to say, from a careful consideration of the whole of the testimony, that there is clearly a reasonable and well-founded doubt of the guilt of the accused, that it will interfere on the ground that the evidence does not support the verdict.

Error to Circuit Court, Logan County; T. M. Harris, Judge.

R. R. Foster, James Clinton, and Albert Wehr were convicted of burglary and larceny, and bring error. Affirmed.

Edmund Burke, of Springfield, and H. F. Trapp, of Lincoln, for plaintiffs in error.

Edward J. Brundage, Atty. Gen., C. Everett Smith, State's Atty., of Lincoln, and Floyd E. Britton, of Springfield (McCormick & Murphy, of Lincoln, of counsel), for the People.

CARTER, J. R. R. Foster, James Clinton, and Albert Wehr were indicted by the grand jury of Logan county upon the charge of burglary and larceny. After a trial the jury returned a verdict finding them guilty as charged in the indictment, and they were sentenced to the Southern Illinois State Penitentiary for not less than one year nor more than 20 years until discharged according to law. From that judgment this writ of error has been sued out.

L. Burchett & Son, a partnership, were general merchants in the town of New Holland, in the western part of Logan county. They handled groceries, clothing, and furnishings for men and women, dry goods, boots and shoes, trunks, silverware, etc. On the evening of December 10, 1918, they

closed and locked their store at about 9 o'clock. Stuart Robinson, a clerk, arrived to open the store the next morning at 6 o'clock, and discovered that the building had been burglarized and a large quantity of merchandise taken. He found on the sidewalk near the side door of the store three iron bars which had been taken from a railroad car standing on the side track of the Illinois Central Railroad Company about a block away, and the doors showed evidence of having been forced open by the use of these bars. Among the things taken from the building were a flat-top trunk, a basket containing three or four dozen eggs, and several bars of butter wrapped in white paper. The Burchett store faces south on Lincoln street, and Mason street runs along its west side. Two blocks east of Mason street another street runs parallel thereto, having a closed or blind end at the railroad tracks about a block south. Not far north of the closed end is located an establishment conducted by John Mangold where cement blocks were manufactured, and against the side of the building was a pile of the cement blocks. The tracks of an automobile could be recognized in Mason street, where the car had apparently been run up at right angles to the sidewalk on the west side of the store near the side door, which had been broken open. Mangold also found on the morning of December 11th tracks of an automobile in his cement yard, and on the face of the pile of cement blocks, up to which the tracks led, was a mark about 40 inches from the ground, and there were marks on the blocks at two places lower down. The clerk, Robinson, also found in this cement yard early that morning some dry goods and ladies' hand bags which contained the marks and tags of the firm. About 6 o'clock on the morning of December 11th plaintiffs in error Foster and Wehr came to the home of George Hobkirk, a farmer residing a few miles northeast of Williamsville, in Sangamon county, and asked to telephone, saying their truck had broken down up the road and they wanted to get some help. Foster talked to one Dawson in Springfield, and asked him to send an auto to pull them in. The broken car was then at or near a road intersection about a quarter of a mile east of Hobkirk's house. It had a top and the curtains were down. Foster told Hobkirk and his son his name and mentioned people whom he knew, apparently making correct statements as to these matters. Hobkirk's home is about 20 miles northeast of Springfield and about the same distance southwest of Lincoln. Springfield is about 40 miles southerly from New Holland. One of the witnesses for the state, Fred Knollenberg, driving on the east and west road connecting New Holland and Lincoln about 7 o'clock in the morning of December 11th found some

ladies' silk hose in the road. One Sample, a farmer, residing east of New Holland, found on the same morning, about 3½ miles south and east of New Holland, a piece of crepe de chine. Another witness, McCarthy, on the same morning, about 6:40 o'clock, found in the road several miles east of New Holland two pairs of gloves. Some of these articles had on them marks and tags of L. Burchett & Son. The point at which Knollenberg found the silk hose was some 6 or 7 miles east of New Holland and almost due north of the place where plaintiffs in error were found on the morning of December 11th, about 6 o'clock, in the road near the home of Hobkirk. Wehr was employed by Jacob Kauth, of Springfield, as a deliveryman for his grocery store, located in the extreme north end of Springfield. Wehr lived in the city and kept his employer's car at the place where he lived. Kauth had owned the car, an Overland fitted with a truck body, for some six months, and had tried to run it in his delivery work, but was unsuccessful and had several accidents and therefore hired Wehr, who apparently was an experienced chauffeur, to run it for him.

Foster was the only one of the three plaintiffs in error who testified, and, with the exception of one other witness, was the only witness who testified as to the whereabouts of any of them on the night of December 10th. Foster stated that on the evening of December 10th he made arrangements with Wehr to meet him at 4:30 the next morning and go hunting rabbits when those animals got out into the road in the early morning; that he went to bed in his room about 1 o'clock and got up about 4 o'clock, went to the Ballard-Johnson Company's restaurant in Springfield, where he had previously made arrangements with Farnback, the man in charge, to have a lunch ready for himself and party at 4:30; that about that hour he called for the lunch, which was prepared, and took it with him in a basket and put it into the car when he met Wehr. The evidence is not clear as to where Clinton joined them, but evidently it was in Springfield. Farnback testified that Foster called for this lunch about 4:30 on the morning of December 11th. Foster stated that after the three people were in the car they drove north to Williamsville and went about a mile north of the place where their car later broke down, near Hobkirk's farm, and then, because Wehr wanted to get back to Springfield in time to go to work that day, they decided not to go any farther, and turned around and started south. He testified they were no nearer New Holland at any time on the night in question than a short distance from where the car was broken; that they had no merchandise of any kind in the car, and no basket except the one containing the eggs

and sandwiches for their lunch; that there was nothing in the rear of the car at the time it was broken except a common box and a lap robe, upon which Clinton was sitting. Foster further testified they had shot but one rabbit before the car broke down.

When Foster went to Hobkirk's house and telephoned Dawson to send a truck out to haul them into town, Dawson promised to do so. Dawson had formerly been in the saloon business in Springfield, and was then running a soft drink place, and apparently had nothing to do directly with the auto business. He, however, called up Charles L. Adams, manager of a transfer company in Springfield, and asked him to send a truck out to the Hobkirk place and get the axle of a broken car. Adams directed one of his employes, Louis Newman, to go to the Hobkirk farm and bring in the broken axle. Newman, in a Ford car, went from Springfield about 7 o'clock in the morning of December 11th, pursuant to the directions given by Adams, through Sherman and Williams-ville, to the home of Hobkirk, and was there directed to the truck in question. He found it in the middle of the north and south road, headed south, near a road intersection. Wehr was walking up and down the road, and Foster got out of the car, telling Newman that the car was broken. There was another man lying down in the truck, immediately back of the seat, on something with a flat top, extending across the truck apparently next to the seat and about three inches above it. The truck had side curtains extending from the windshield to the rear, and had a rear curtain; all of which were down. It had one seat and the tool box was under the seat. Newman had occasion to use a wrench from the tool box, and held the curtain up, and also held the seat while one of the plaintiffs in error procured the wrench. He testified that while doing this he saw a market basket in front of the seat upon the floor of the car which contained three or four dozen eggs, and that the same basket contained three or four bricks of butter wrapped in white paper. He also testified that the box or trunk the man was lying on in the car was covered with a lap robe or black cloth, which also covered the contents of the car back of where the man was lying, and that the top of the thing that the man was lying on was two or three feet above the sides of the car; that the top of the contents of the car back of that extended about a foot above the sides of the car; that he could not see what the contents of the car were under the black covering. Newman further testified that, when he went out to where the car was, he understood from the instructions given him that he was to bring in a broken axle, and not to bring in the car, and that, when he was informed that he was to haul the car in, he stated

that he could not do it with the Ford truck, as it was not big or strong enough, and that therefore he soon started back to Springfield. Foster rode with Newman as far as Williams-ville, where he left the car, and Newman proceeded to Springfield. Newman testified that he saw Foster, as he got out of the car, put a revolver in his pocket.

Foster boarded a Chicago & Alton train that pulled into the station at Williams-ville soon after he got out of Newman's car and went on to Springfield and to the garage of Harry Kutscher, where he made arrangements with Kutscher to haul in the crippled car. In accordance with this arrangement Kutscher drove a truck out to the car, arriving shortly before 12 o'clock, Foster accompanying him, and he hauled the car to Springfield, arriving there about 1 o'clock. On the return to Springfield Foster rode with Kutscher, and Wehr and Clinton rode in the disabled car. Foster directed Kutscher to leave the car in the alley between Washington and Jefferson streets and Eighth and Ninth streets in Springfield, which was very near the place then run by Dawson. When Kutscher got out to the Hobkirk farm the curtains of the disabled car were all down and Clinton was in the car. At 10:30 on the evening of December 11th, upon the order of Wehr, Kutscher's firm removed the truck from the alley to their garage, and it was there repaired. On December 13th on the order of a member of the Springfield police force, the car was taken to a garage next door to the police station in Springfield, where it was later examined by Oscar Burchett, one of the Burchett firm, and John Mangold, manager of the cement yard. They found that the car at the rear end showed scars, scratches, and abrasions, with particles of cement at points corresponding in a general way, in distance from the ground, to the marks on the cement blocks in Mangold's cement yard at New Holland. The testimony tends to show that Foster, although according to his testimony he had no interest in the car other than that he had been riding in it, gave all directions and instructions concerning bringing in the car from the place where it was disabled and as to where it should be left in the alley across from Dawson's place of business, and that Wehr, although according to Foster's testimony he was in charge of the car, gave practically no directions or instructions whatever concerning the hauling in of the car or its disposition after they reached Springfield; that the first order he gave was at 10:30 on the evening of December 11th, when he ordered the car taken to Kutscher's garage for repairs. The testimony also tends to show by practically every witness who saw the car in its disabled condition while near Hobkirk's farm that the curtains were drawn down all around it all the time, and that

Clinton, whenever he was seen, was in the car. We find no direct evidence in the record as to the whereabouts of Wehr and Clinton on the night of December 10th prior to 4:30 the next morning, when Foster testified he went with them in the car from Springfield to Hobkirk's farm.

[1, 2] When the manager of the Springfield restaurant, Farnback, testified that he sold plaintiff in error Foster a lunch and delivered it to him on the morning of December 11th, counsel for plaintiffs in error attempted to introduce a written report or sheet of sales which Farnback testified he had kept on the night in question. This report did not show to whom the sales were made, but only the date and amount. The court refused to admit it in evidence. The report did not show or tend to show in any way whether Foster was in the restaurant on the morning in question. It does tend to show that Farnback was there, but that is not disputed. If this report was admissible for any purpose, it was for the purpose of corroborating Farnback's testimony. Statements or declarations as to the act of a party or witness in corroboration of his theory of the case or any fact favorable to him, whether oral or in writing, are, as a general rule, inadmissible in evidence on his own behalf except where they are a part of the *res gestæ* or made in the presence of the other party. 1 Ency. of Evidence, 383; Jones on Evidence (2d Ed.) §§ 235, 236. This report was, in its nature, self-serving, and we cannot see what bearing it would have on any of the material issues of the case. It was rightly excluded.

[3] Counsel for plaintiffs in error also argue that certain goods alleged to have been taken from the Burchett store and found thereafter on the public highways were improperly admitted in evidence, as they were not sufficiently identified and were not found on the direct road between New Holland and Springfield. There was testimony in the record to the effect that a portion of the direct road immediately south of New Holland to Springfield was in a bad state of repair on the night in question, and these goods were found scattered along the highway running east from New Holland to the north and south road upon which the disabled auto was found in the possession of plaintiffs in error. We think the articles were sufficiently identified to be admitted in evidence for what they were worth. All the evidence was before the jury, and they could judge whether or not the articles were any of the stolen goods, and also to show the route the burglars had taken with the stolen goods. We see no error in their introduction.

It is urged also in this connection by counsel for plaintiffs in error that it was error to admit the testimony as to the measure-

ments and condition of the car at the police station in Springfield without in some way requiring evidence to connect that car with plaintiffs in error, and without, as we understand the argument, more definite evidence as to the markings upon the rear of the car in connection with the scratches or markings upon the cement blocks in Mangold's cement yard. The testimony as to the car that was examined by Mangold, the manager of the cement yard, sufficiently identified it as the car used by plaintiffs in error, the markings on the car, and the cement blocks.

[4] Counsel for plaintiffs in error also urge that the trial court committed error in permitting the jury to separate during the recesses of the court while the trial was going on. No question of this nature was raised before the verdict of the jury was received. Furthermore, the law is settled in this state that the trial court may exercise its discretion in allowing the jury to separate during the progress of a trial in a criminal case less than capital unless sufficient cause is shown at the trial why the jury should be kept together; the trial court properly instructing them concerning their duties while separated. *People v. Stowers*, 254 Ill. 588, 98 N. E. 986; *Sutton v. People*, 145 Ill. 279, 34 N. E. 420. The record shows that the jury were properly instructed by the trial court before they were allowed to separate. On this record the court did not commit error in so allowing them to separate.

[5, 6] Counsel for plaintiffs in error earnestly argue that the trial court erred in giving the second instruction for the people. This instruction deals with the credibility of a defendant in a criminal case. The objection of counsel for plaintiffs in error is to the wording of one of the sentences, to the effect that "the jury are not bound to accept of the defendant's statements upon the witness stand as to the truth." We do not see that there is any substantial difference between telling the jury that they are not bound to believe the testimony of the defendant and telling them that they are not bound to accept his statements as to the truth. It is also strenuously insisted by counsel that the first sentence of the instruction is wrong because it contains the word "permitted" or "permission" in a clause which stated that "defendant is permitted to testify in his own behalf, but by such permission, under the statute," etc. The word "permitted" or "permission" was used in similar instructions which were held rightly given in *Hirschman v. People*, 101 Ill. 568, *Rider v. People*, 110 Ill. 10, and *Padfield v. People*, 146 Ill. 660, 35 N. E. 469. The identical instruction so complained of was given on behalf of the state in *People v. Turner*, 285 Ill. 594, 107 N. E. 162, Ann. Cas. 1916A,

1062, as the record in that case shows, although it is not shown in the opinion. While all of the criticisms made in the briefs in this case were not there passed upon by the court, the instruction in that case was held not misleading or erroneous. While it might be held that the wording of the instruction in question might be improved upon, we do not think it misled the jury in any of the particulars claimed by counsel for plaintiffs in error. The reasoning of this court in *People v. Turner*, supra; *Padfield v. People*, supra, and *People v. Duzan*, 272 Ill. 478, 112 N. E. 315, fully answers the criticism of counsel as to the misleading character of this instruction.

[7] Counsel for plaintiffs in error further argue that the court erred in refusing instructions O, H, and I asked on behalf of plaintiffs in error. So far as these refused instructions stated correct principles of law, they were covered by other instructions given on behalf of plaintiffs in error.

[8, 9] Counsel further argue that the court erred in giving the instructions as to the form of the verdict, in that such instructions were in such form that the jury would understand they could not find some of the plaintiffs in error guilty and others not guilty. So far as we can ascertain from the record, no request was made by plaintiffs in error to give any instruction clearly stating that one could be convicted and the others not. Furthermore, we cannot see how the jury were misled or any of the plaintiffs in error were injured because of the failure to give such an instruction. Under the undisputed facts in this record, if one of the plaintiffs in error was guilty all were guilty, and if one was not guilty the other two were not.

The trial court was asked on the part of plaintiffs in error to give instruction 7, which reads:

"The court instructs you that the indictment in this case is no evidence of guilt and should not be so considered by the jury. And no juror should permit himself to be influenced against the defendants because of the fact that an indictment had been returned against them nor because of the nature of the charge made in the indictment."

[10-12] As given to the jury this instruction had the last sentence entirely stricken out by pen lines drawn horizontally through each line of said sentence, but the lines were so erased that the sentence could still be read and understood by the jury. The first sentence was given without any erasure. It is argued by counsel for plaintiffs in error that this last sentence was so stricken out with a pen by the court, and this seems to be conceded by counsel for the state, although there is nothing in the record to indicate whether the court or counsel erased

the last sentence in said instruction. It is most strenuously insisted that the giving of this instruction so modified with this erasure would mislead the jury by causing them to believe that while the indictment is not evidence, still there would be nothing improper in permitting themselves to be influenced by the fact that plaintiffs in error had been indicted and were charged with being burglars. Counsel for plaintiffs in error state that the practice of striking out words in instructions and permitting them to go to the jury in such condition that the words stricken out may be read has often been condemned by this court. However, they cite no authority in support of this statement. We have frequently held that it is no part of our duty to search for errors or enter upon an independent investigation of the court's own motion in order to find material upon which to base a judgment of reversal. *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 798, and cases there cited. While counsel have not pointed out and cited authorities in support of this position, we have investigated the point in question. Section 74 of the Practice Act (*Hurd's Stat.* 1917, p. 2244), in its wording seems plainly to imply that written instructions may be given as modified. Indeed, the only practical way, under this statute, to avoid this, would be for the trial judge to rewrite every instruction that he wished to modify in any way, and with the numerous instructions that are frequently asked by counsel in criminal as well as civil cases, the practice of rewriting all modified instructions by the trial judge would be found very difficult, if not impossible. Somewhat similar questions have been raised in other cases in this court, and, so far as we are advised, a case has never been reversed solely because the instruction had been handed to the jury as modified by inserting or striking out and without being rewritten. See *Manrose v. Parker*, 90 Ill. 581; *Union Railway & Transit Co. v. Kallaher*, 114 Ill. 325, 2 N. E. 77; *Cobb Chocolate Co. v. Knudson*, 207 Ill. 452, 69 N. E. 816; *Leighton v. Chicago Traction Co.*, 235 Ill. 283, 85 N. E. 309. While we do not approve of the practice of modifying instructions so that the portions attempted to be erased still remain legible, manifestly any modification of this kind not necessarily misleading ought not to reverse the case. So long, however, as the laws of this state require all instructions to be in writing when given to the jury, we cannot see how the practice of modifying instructions by the court by erasing a portion and perhaps inserting something in the place of the erased portion and leaving the erased portion in the instruction, in some cases possibly legible, can be prevented in all cases. The erased sentence was a repetition of the same thought that was stated in the first sentence

that was left in the instruction uneraser and given to the jury.

[13, 14] The doctrine attempted to be set out in this instruction, as originally presented, was, in substance, very similar to the rule frequently stated as to the legal presumption of innocence as to the accused party until his guilt is established beyond a reasonable doubt by competent evidence, and the instruction as modified still was intended to convey something of the same idea. There can be no question that an indictment is merely an accusation or charge against the accused as brought by the grand jury, and is not, in itself, evidence that the accused is guilty of the crime charged, but that the state must still show to the satisfaction of the jury beyond a reasonable doubt that the accused is guilty as charged. *Padfield v. People*, supra; 10 R. C. L. 871, and cases cited in notes 10 to 14, inclusive; *Jones on Evidence* (2d Ed.) § 12. This rule that the accused must be given the benefit of this presumption of innocence until the jury finally agree upon the verdict was covered by several instructions given on behalf of plaintiffs in error. The instruction given for them immediately preceding the modified instruction complained of set forth:

That it was the duty of the jury "to presume the defendants [naming them] not guilty in this case; that it is your duty to give the defendants the benefit of this presumption throughout the trial of the case and when you shall have retired to consider of your verdict. The presumption of innocence attends the accused at every stage of the proceedings until the jury agree upon a verdict. And, further, it is the duty of the jury to explain the evidence against the defendants upon the hypothesis or theory that the defendants were not present in New Holland at the time of the commission of the crime charged in the indictment and did not commit such crime, if you can reasonably and consistently do so in the light of the whole evidence."

Again, instruction 11 given on their behalf instructed the jury that the defendants were not required to prove their innocence, but that the prosecution must prove their guilt of the identical crime charged, in manner and form as charged in the indictment, beyond all reasonable doubt, or else they should be found not guilty. Other instructions given on behalf of plaintiffs in error covered, directly or indirectly, the doctrine of the presumption of innocence and that the accused must be proven guilty beyond all reasonable doubt in order to convict them. It has been repeatedly stated by this court that instructions should be read as a series. Assuming for the purposes of this case that instruction 7 as originally proposed, without any modification, stated correct principles of law, and assuming also that the jury understood that the court had modified the instruction by striking out with a pen the

last sentence, still we do not see, in view of all the evidence in the case, read in the light of the instructions given along with this modified instruction, how the jury could have been misled in any way to the injury of the plaintiffs in error, or any one of them, by the modification so made. Taking all the instructions together, along with this modified instruction, we think the jury would necessarily understand that the indictment was not evidence, and that the accused must be presumed to be innocent until they were proven guilty by the evidence in the record beyond all reasonable doubt.

[15, 16] Counsel for plaintiffs in error argue at length that on this record there is clearly a reasonable doubt as to the guilt of their clients; that this court has frequently held that it will not hesitate to reverse a judgment of conviction in a criminal case where the evidence on which it is based is of an unsatisfactory character (*Keller v. People*, 204 Ill. 604, 68 N. E. 512; *Newman v. People*, 223 Ill. 324, 79 N. E. 80; *People v. Martellaro*, 281 Ill. 300, 117 N. E. 1052); or where the conviction was probably due to prejudicial or incompetent evidence (*Mooney v. People*, 111 Ill. 388; *Campbell v. People*, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134; *Waters v. People*, 172 Ill. 367, 50 N. E. 148). We adhere to the reasoning laid down in the decisions just cited, but we do not think that the reasoning applies on the record in this case. This case, while largely depending upon circumstantial evidence, was one in which it was peculiarly within the province of the jury to say whether or not the circumstances so proven showed that the plaintiffs in error were guilty beyond a reasonable doubt. Instruction 9 given for plaintiffs in error told the jury that, if it was possible to account for the facts and circumstances proven by the prosecution upon any reasonable theory other than the guilt of the defendants, consistent with the evidence in the case, then it was the duty of the jurors to so account for it and find the defendants not guilty. The theory of counsel for plaintiffs in error on the trial of the case before the jury and here is that plaintiffs in error went out on the morning of December 11th, at 4:30 o'clock, to hunt rabbits as they jumped in and out of the road, while counsel for defendant in error ridicule the idea that any one should from an auto hunt rabbits as they were jumping in and out of the road in the early morning, and urge that the jury evidently did not believe the story of Foster in this regard. There is no question about the store being burglarized on the night in question and certain goods taken, and that the burglars were not familiar with New Holland streets and its surroundings or they would not have driven the car into the blind street, which necessitated their going into Mangold's cement yard and turn-

ing around. Furthermore, there can be no question that the burglars, whoever they were, traveled east on the road from New Holland towards Lincoln as far as the north and south road upon which the broken car of plaintiffs in error was seen in the early morning of December 11th, adjoining Hobkirk's farm. Chauffeur Newman, who was sent out in a Ford car to give them assistance, testified positively that he saw in a market basket in the car which was in the possession of plaintiffs in error several dozen eggs and some butter bricks. Eggs and butter bricks had been taken from the burglarized store.

Counsel for the plaintiffs in error seem to concede that Newman's testimony, if true, tends strongly to show the guilt of plaintiffs in error, but they argue that he had very little opportunity to see into the car, and may have been mistaken both as to the eggs and as to the contents of the car back of the seat and the box or thing upon which Clinton was lying, and that the testimony of Foster as to the lunch, as corroborated by the testimony of Farnback, accounted for this basket. It may be said in this connection that there was no testimony by Farnback that in any way described the basket in which the lunch was taken away or identified it with the market basket in the car in question.

Counsel for the state also argue that the story of Foster that they turned around in the road about a mile north of where the broken car was found, next to Hobkirk's farm, because Wehr was desirous of getting back to Springfield to work by 8 o'clock, is most unreasonable in view of the actions of plaintiffs in error at the time and after the car was broken; that, if Wehr was so desirous of getting back to Springfield to work at 8 o'clock, he would not have waited around the car and allowed Foster to do all the arranging about getting the broken car in, but would have endeavored to get back to Springfield at once on the interurban or the Alton Railroad from Williamsville; that, if they were on an innocent errand, such as hunting rabbits, the broken car would have been taken at once to the garage where it was ordinarily kept, instead of leaving it in the alley across the street from Dawson's to whom Foster had first telephoned for a relief car; that there was no reason, if they were on an innocent mission, why they should not have attempted to get relief from a garage in Williamsville. Foster testified he did attempt to get relief from a garage owner in Williamsville, and was told by the garage owner that he did not have any auto fitted for that work. There is testimony tending to show that there was only one garage at the time in Williamsville, and the owner testified that

no one had applied to him for any relief such as Foster testified.

[17, 18] The jury heard and saw the witnesses. In cases where the evidence is conflicting, depending upon the credibility of opposing witnesses, the finding of the jury can be regarded as conclusive unless it is reasonably clear that an error has been committed. It is only where the court is able to say, from a careful consideration of the whole of the testimony, that there is clearly a reasonable and well-founded doubt of the guilt of the accused that it will interfere on the ground that the evidence does not support the verdict. *People v. Grosenhelder*, 266 Ill. 324, 107 N. E. 607, and cases cited. The witnesses testified on all the conflicting matters before the jury, and the question as to whether or not Foster, or any of the other witnesses, told the truth was primarily one for the jury to pass upon. We cannot say that the evidence does not support the verdict.

We find no reversible error in the record, and the judgment of the circuit court will be affirmed.

Judgment affirmed.

(288 Ill. 532)

PAUL v. INDUSTRIAL COMMISSION et al.
(No. 12366.)

(Supreme Court of Illinois. June 18, 1919.)

1. MASTER AND SERVANT ~~§~~417(7) — WORKMEN'S COMPENSATION ACT—JURISDICTION OF COMMISSION—REVIEW.

Though the sufficiency of evidence before the Industrial Commission is not subject to review where there is any evidence to establish its findings, questions of the commission's jurisdiction are an exception, and the evidence certified in the record may be reviewed and weighed to determine whether or not the commission has jurisdiction to apply the Compensation Act in any given case.

2. MASTER AND SERVANT ~~§~~417(7) — WORKMEN'S COMPENSATION ACT — ELECTION — QUESTION OF FACT.

Whether or not an employer has elected to operate under the Compensation Act is a question of fact.

3. MASTER AND SERVANT ~~§~~358—WORKMEN'S COMPENSATION ACT—ELECTION TO COME UNDER.

Where an employer, on receipt of demand from the Industrial Commission that he comply with Workmen's Compensation Act, § 26, satisfied the commission of such compliance, and received its certificate to such effect, which action on his part he explains as having been the result of his determination to operate under the act, he cannot be heard to say that he has not elected to come under the act merely because he has not filed formal notice of election with the commission.

4. MASTER AND SERVANT ~~6~~416—WORKMEN'S COMPENSATION ACT — DETERMINATION OF PERSONS ENTITLED.

Though there is no contest between the respective dependent relatives of the deceased employed as to the dependents entitled to payment of award, where there is no voluntary payment on the part of the employer and the Industrial Commission must determine the compensation, it is the duty of the commission to determine the person or persons entitled to the compensation.

Error to Circuit Court, Christian County; J. C. McBride, Judge.

Proceedings for compensation under the Workmen's Compensation Act, by Charles A. Simpson, administrator, for the death of Carl A. Simpson, the employé, opposed by G. A. Paul, the employer. Compensation was awarded by the Industrial Commission, the award was affirmed by the circuit court on certiorari, and the employer brings error. Reversed and remanded, with directions.

John J. Priestley, of Chicago, for plaintiff in error.

J. E. Hogan and Arthur Roe, of Vandalia, for defendant in error.

STONE, J. The circuit court of Christian county affirmed the award of the Industrial Commission of Illinois in favor of the defendant in error, Charles A. Simpson, administrator of the estate of Carl A. Simpson, deceased, for injuries received by the deceased while in the employment of plaintiff in error. The administrator filed his application for adjustment of claim with the Industrial Commission on behalf of the estate, claiming dependency of himself as father of the deceased, and partial dependency of Alice M. Simpson, mother, and James D. Simpson and Ruth Simpson, brother and sister of the deceased. Upon hearing before the arbitrator duly appointed by the commission an award was entered in favor of the applicant. Upon hearing on review before the commission this award was confirmed. The cause was brought before said circuit court on certiorari, as required by the statute, and upon hearing the finding of the commission was affirmed. The circuit court having entered a certificate that the issues herein were proper to be reviewed by this court, the cause is brought here by writ of error.

It is contended by the plaintiff in error that his business does not automatically come under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i), and that he did not elect to provide compensation according to the provisions of the act by filing notice of such election, as required by the statute; that the deceased did not leave any parent, grandparent, or grand-

child who at the time of the accident in question was dependent upon his earnings, as provided in paragraph (c) of section 7 of the act; that the Industrial Commission erred in not making a finding as to the dependents entitled to receive compensation and the relative dependency of such dependents.

Plaintiff in error is engaged in the hardware, sheet metal work, and plumbing business, and said business is conducted in one building and from one office. The employes work wherever they are assigned, and their duties are not restricted to any one part of said business. The deceased was employed generally in the different departments of said business. On July 24, 1917, he was killed by a machine which fell upon him while he was assisting at loading it onto a wagon. This machine is known as a cornice break and weighed about one ton.

[1-3] Plaintiff in error's testimony before the arbitrator on the hearing in this cause was to the effect that he had received notice from the Industrial Commission to make provision for accidents or injuries occurring in connection with the operation of his business under said act; that he had complied with said notice by taking out indemnity insurance under the act, and had a certificate from the commission that he had fully complied with all the requirements of said act. This certificate of the Industrial Commission was offered in evidence, and is in the following language:

"You are hereby notified that the Industrial Commission has approved your compliance with section 26 of the Workmen's Compensation Act upon proof of same in accordance with the provisions of said act, upon the 16th day of July, 1917."

The plaintiff in error also stated to the arbitrator on the hearing, in answer to the question, "In other words, you concluded to work under the Workmen's Compensation Act?" "Yes, and I received a certificate from them." This is presumptive evidence of the filing of the notice of election as required by law.

Section 26 of said act provides that an employer who comes under section 3 of the act, or who elects to provide and pay compensation provided for in the act, "shall, within ten days of receipt by the employer of a written demand by the Industrial Board, (1) file with the board a sworn statement showing his financial ability to pay the compensation provided for in this act, normally required to be paid; or (2) furnish security, indemnity, or a bond guaranteeing the payment of the employer of the compensation provided for in this act normally required to be paid; or (3) insure to a reasonable amount his normal liability to pay such com-

pensation in some corporation, association or organization authorized, licensed or permitted to do such insurance business in this state.

While, under the general rule, the sufficiency of evidence before the Industrial Commission is not subject to review where there is any evidence tending to establish the findings of the commission, yet questions of the commission's jurisdiction are an exception to this rule. The evidence certified in the record may be reviewed and weighed to determine whether or not the commission has jurisdiction to apply the act in any given case. *Thede Bros. v. Industrial Com.*, 285 Ill. 483, 121 N. E. 172; *Hahnemann Hospital v. Industrial Board*, 282 Ill. 816, 118 N. E. 787. Paragraph (a) of section 1 of the act provides the method by which the employer shall give notice of such an election, as follows:

"Election by any employer to provide and pay compensation according to the provisions of this act shall be made by the employer filing notice of such election with the Industrial Board."

However, whether or not an employer elects to operate under the act is a question of fact. Paragraph (a) requires that notice of such election shall be filed with the commission but does not prescribe a particular form of notice to be used, and where the employer, as in this case, upon the receipt of a demand that he comply with section 26, satisfies the commission of such compliance and receives its certificate to that effect, which action on his part he explains as having been the result of his determination to operate under the act, he cannot be heard to say that he had not elected to come under the act merely because he had not filed formal notice of such election with the commission. The Industrial Commission had jurisdiction in this case.

The plaintiff in error having elected to come under the Workmen's Compensation Act, it is not material to discuss whether or not his business brought him automatically under said act.

The arbitrator found from the evidence that the deceased left him surviving his father, mother, brother, and sister; that the father was not able to earn sufficient compensation to support himself and family; that the sister was a minor and the brother was in ill health; that the entire earnings of the deceased was paid to the mother, to be applied to the necessary support and living expenses of the entire family; that the other brother worked a portion of the time, and likewise turned over his earnings to the mother for the same purpose; that the mother had no money in the bank; that all, or substantially all, of the earnings of the deceased was expended in the support of the

family, along with other moneys given to the mother by the father and the other brother; that the deceased was 16 years old at the time of the injury resulting in death; that the injury arose out of and in the course of his employment with the plaintiff in error. The arbitrator gave the minimum award, payable in 275 weeks at \$6 per week, provided in paragraph (c) of section 7 of the act. On a hearing on review the award of the arbitrator was confirmed and declared to be the decision of the commission. There was competent evidence in the record upon which to base such finding.

[4] The award was allowed to the administrator. The Industrial Commission in allowing the award did not determine which of the foregoing relatives were dependent upon the deceased employé. While there is no contest between the respective relatives as to the dependents entitled to the payment of the award, nevertheless where there is no voluntary payment on the part of the employer and the Industrial Commission must determine the compensation, it is the duty of the commission to determine the person or persons entitled to the compensation. *Smith-Lohr Coal Co. v. Industrial Com.*, 286 Ill. 34, 121 N. E. 231.

The judgment of the circuit court will be reversed, and the cause remanded to that court, with directions to remand the same to the Industrial Commission for further proceedings consistent with the views herein set forth.

Reversed and remanded, with directions.

(283 Ill. 442)
PEOPLE v. JOHNSON. (No. 12556.)

(Supreme Court of Illinois. June 18, 1919.)

1. CRIMINAL LAW §254—TRIAL WITHOUT JURY — SUBMISSION OF PROPOSITIONS OF LAW.

Court, trying criminal case without a jury, properly refused to pass upon propositions of law submitted to it; the submission of propositions of law being inapplicable to such case.

2. CONSTITUTIONAL LAW §81 — POLICE POWER.

The police power of a state is an attribute of sovereignty, and exists without any reservation in the Constitution, being founded on the duty of the state to protect its citizens and provide for the safety and good order of society.

3. CONSTITUTIONAL LAW §83(1) — POLICE POWER—RESTRAINT OF LIBERTY.

The mere fact that a law restrains the liberty of citizens of a state does not render it unconstitutional.

4. CRIMINAL LAW §21, 33—OFFENSE MALUM PROHIBITUM—SCIENTER.

The Constitution does not require that scienter is a necessary element of any law where

an offense is *malum prohibitum*, and one may violate the law without any intent to do so.

5. CONSTITUTIONAL LAW §81 — POLICE POWER—MOTOR VEHICLES—DESTRUCTION OR CONCEALMENT OF MANUFACTURER'S IDENTIFICATION MARK.

Motor Vehicle Act, § 15b, making it a crime to have possession of motor vehicle from which manufacturer's serial number or any other manufacturer's identification mark has been removed, defaced, covered, or destroyed for purpose of concealing or destroying its identity, is constitutional, being a valid exercise of police power.

6. CONSTITUTIONAL LAW §258—DUE PROCESS—MOTOR VEHICLES—MANUFACTURER'S IDENTIFICATION MARK.

Motor Vehicle Act, § 15b, making it a crime to have possession of motor vehicle from which manufacturer's serial number or any other manufacturer's identification mark has been removed, defaced, covered, or destroyed, for purpose of concealing or destroying its identity, does not deprive defendant, convicted thereof, of liberty or property without due process of law, in violation of Const. art. 2, § 2, and Const. U. S. Amend. 14.

Error to Municipal Court of Chicago; John Richardson, Judge.

Harry Johnson was convicted of violating the Motor Vehicle Law, and he brings error. Affirmed.

See, also, 285 Ill. 194, 120 N. E. 453.

Fyfe, Ryner & Dale, of Chicago, for plaintiff in error.

Edward J. Brundage, Atty. Gen., and Mac-lay Hoyne, State's Atty., and Edward C. Fitch, both of Chicago (Edward E. Wilson, of Chicago, of counsel), for the People.

THOMPSON, J. The plaintiff in error, Harry Johnson, was convicted in the municipal court of Chicago of a violation of section 15b of the Motor Vehicle Law (Hurd's Stat. 1917, p. 2576), and was sentenced to pay a fine of \$200 and costs. He prosecutes this writ of error to reverse the judgment and sentence of the court.

The facts are not in dispute. The plaintiff in error was the general manager of the Commercial Car Unit Company, whose place of business is located in Chicago. The company was engaged in the business of attaching truck units to pleasure car units and making of them commercial trucks. On January 5, 1918, the Ford Motor Company delivered six new Ford cars to the premises of the Commercial Car Unit Company. The plaintiff in error thereupon ordered one of his workmen to change the motor numbers on these cars. There were seven figures in each of the numbers, which had been stamped on the left-hand side of each of these motors with a steel die by the Ford Motor Company. Following directions of plaintiff in

error, the workmen changed the motor numbers of these new Ford cars by hammering out the third and fourth figures and stamping different figures over the same spots. The first two and last three figures in the number were not touched. No explanation is made for changing the numbers.

The only question before us is the constitutionality of said section 15b of the Motor Vehicle Law, which provides:

"Any person having in his or her possession any motor bicycle or motor vehicle from which the manufacturer's serial number, or any other manufacturer's trade or distinguishing number or identification mark, has been removed, defaced, covered, or destroyed for the purpose of concealing or destroying the identity of such motor bicycle or motor vehicle shall be liable to a fine of not more than two hundred dollars (\$200) or imprisonment in the county jail for a period not to exceed six (6) months, or both."

It is urged that this section of the statute violates section 2 of article 2 of the Constitution of this state as well as section 1 of the Fourteenth Amendment of the federal Constitution, in that it deprives the defendant of his liberty and property without due process of law and denies to him the equal protection of the laws. It is contended that the statute is an arbitrary and unreasonable exercise of the police power of the state.

[1] At the close of all the evidence plaintiff in error submitted eight propositions of law, which he asked the court to hold to be the law as applicable to the case. The court marked each of the propositions "Refused." It will be unnecessary to discuss this action of the court, for the reason that we have held that the submission of propositions of law to the court is inapplicable to a criminal case, where the same is tried by the court without a jury. *People v. Taylor*, 279 Ill. 481, 117 N. E. 62; *Jacobs v. People*, 218 Ill. 500, 75 N. E. 1034; *Chicago, Wilmington & Vermilion Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770.

Motions for a new trial and in arrest of judgment were made and overruled.

[2, 3] The police power of a state is an attribute of sovereignty, and exists without any reservation in the Constitution, being founded on the duty of the state to protect its citizens and provide for the safety and good order of society. The mere fact that a law restrains the liberty of citizens of a state does not render it unconstitutional. In *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610, we discussed at length the powers of the Legislature, and an elaborate repetition of that discussion would serve no good purpose here. We have held in a long line of decisions, where the authorities have been collected and discussed, that it is for the Legislature to determine when the conditions exist calling for the exercise of police

power to meet existing evils, and when the Legislature has acted the presumption is that the act is a valid exercise of such power. *People v. Stokes*, 281 Ill. 159, 118 N. E. 87; *People v. Henning Co.*, 260 Ill. 554, 103 N. E. 530, 49 L. R. A. (N. S.) 1206; *People v. Ellerdling*, 254 Ill. 579, 98 N. E. 982, 40 L. R. A. (N. S.) 893.

[4] It is contended by plaintiff in error that one might be guilty under this act by having a car in his possession from which the numbers had been removed without his knowledge. The Constitution does not require that scienter is a necessary element of any law where an offense is *malum prohibitum*. One may violate the law without any intent on his part to do so. *People v. Nylin*, 236 Ill. 19, 86 N. E. 156; *People v. Spoor*, 235 Ill. 230, 85 N. E. 207, 126 Am. St. Rep. 197, 14 Ann. Cas. 638. Various statutes of this state, punishing the doing of acts without requiring allegation or proof of criminal intent upon the part of the doer, have been upheld on the ground that they were a valid exercise of the police power. *Maguire v. People*, 219 Ill. 16, 76 N. E. 67; *American Car Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766; *Farmer v. People*, 77 Ill. 322; *Mapes v. People*, 69 Ill. 523; *Eells v. People*, 4 Scam. 498. In other jurisdictions laws enacted by the Legislatures punishing the doing of acts without intent or guilty knowledge on the part of the doer have been held to be valid enactments. *People v. Hatinger*, 174 Mich. 333, 140 N. W. 648; *Commonwealth v. Mixer*, 207 Mass. 141, 93 N. E. 249, 31 L. R. A. (N. S.) 467, 20 Ann. Cas. 1152.

[5] Laws cannot be held invalid merely because some innocent person may possibly suffer. The principle of police regulation is "the greatest good to the greatest number." The essence of the offense contemplated by section 15b of the Motor Vehicle Law consists in the "purpose of concealing or destroying the identity" of the vehicle. If it could be shown that the possession of an automobile with mutilated numbers was not for the "purpose of concealing or destroying the identity" of such automobile, we apprehend that a prosecution, not to say a conviction, would be unlikely. We feel that there is no merit in the contention that the enactment of this statute was not a valid exercise of the police power of the state. *People v. Fernow*, 286 Ill. 627, 122 N. E. 155.

[6] As to the objection to the validity of the statute, to the effect that it deprives the defendant of his liberty and property without due process of law and denies him the equal protection of the laws, it is sufficient to say that we have had occasion to discuss these constitutional limitations at length on prior occasions, and a reference to those decisions, without discussing them, will show that there is no merit in this contention.

Burdick v. People, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329; *Munn v. People*, 69 Ill. 80. We are unable to see how plaintiff in error was deprived of any "liberty or property without due process of law." The act does not deprive him of the use of the cars. He is merely prohibited from changing the numbers for the purpose of destroying the means of identification. What loss this will cause him is not revealed. The value of the act for the protection of the property rights of the citizens in general is too patent to need discussion.

We think that the act is a valid exercise of legislative power, and therefore affirm the judgment of the municipal court.

Judgment affirmed.

(283 Ill. 447)
PEOPLE ex rel. COLEMAN, County Collector, v. LEAVENS et al. (No. 12506.)

(Supreme Court of Illinois. June 18, 1919.)

1. DRAINS §14(4)—PROCEEDINGS FOR FORMATION OF DISTRICT—LACK OF JURISDICTION—COLLATERAL ATTACK.

Where the court in an original drainage district proceeding was without jurisdiction of the subject-matter, a judgment against land in such proceeding is void, and may be attacked in a collateral proceeding without resorting to appeal or writ of error.

2. COURTS §17 — "JURISDICTION OF SUBJECT-MATTER."

Jurisdiction of the subject-matter is authority to hear and decide a cause, and does not depend on the correctness of the decision entered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction of the Subject-Matter.]

3. DRAINS §14(4)—FORMATION OF DISTRICT—OBJECTION TO JURISDICTION—REVIEW OF JUDGMENT IN COLLATERAL PROCEEDING.

Where, on petition for the organization of a drainage district under the Levee Act of 1879, objectors appeared and filed objection that the county court was without any jurisdiction because the petition, etc., granted certain discretionary powers to the district engineer, and such objection was overruled, the remedy of objectors was to seek review of the judgment by appeal or writ of error, and, having failed, they are precluded from having such review in collateral proceedings against their lands for delinquent drainage assessment.

Error to Carroll County Court; R. J. Carahan, Judge.

Proceedings to collect a delinquent drainage assessment by the People, on the relation of John A. Coleman, County Collector, against Norman E. Leavens and others. To review judgment against their lands, defendants bring error. Affirmed.

Charles C. McMahon, of Fulton, John D. Turnbaugh, of Mt. Carroll, and John L. Brearton, of Savannah, for plaintiffs in error.

F. J. Stransky, of Savannah, for defendant in error.

STONE, J. This cause comes on a writ of error to the county court of Carroll county to review the judgment of said court against the lands of the plaintiffs in error for a delinquent annual drainage assessment levied by the Savanna-York drainage district, located in said county. This district was organized in 1906. It appears that the drainage commissioners of the district on November 13, 1916, filed their petition in said court under section 37 of the Levee Act of 1879 (Laws 1879, p. 181), in which petition changes and new construction were asked; also authority to raise by assessment the necessary money to defray the expense thereof. Objections were filed to that proceeding by the plaintiffs in error, and it is admitted that all the plaintiffs in error here appeared in the county court on the hearing of the petition. It is also admitted here that they filed and urged against granting the petition and against the confirmation of the assessment roll the same objections here urged; that is, that the county court is without jurisdiction to enter any order on the petition or to authorize the commissioners to make such extensions and repairs or to confirm the assessment roll, for the reason that the petition, and the plans, profiles, and specifications filed therewith and made a part thereof, granted certain discretionary powers to the district engineer; that, since the judgment on the petition was void, it could not become the basis of a judgment for a delinquent annual assessment; that the county court was without jurisdiction of the subject-matter of the petition.

[1, 2] It is a well-settled rule of law that, where the court in the original proceeding is without jurisdiction of the subject-matter, a judgment against land in such proceeding is void, and may be attacked in a collateral proceeding without resorting to an appeal or writ of error. *People v. Sangamon and Drummer Drainage District*, 253 Ill. 332, 97 N. E. 667; *Donner v. Highway Com'rs*, 278 Ill. 189, 115 N. E. 831. It is admitted that the petition was filed under section 37 of the Levee Act of 1879, and that the petition contained the necessary statement of the commissioners as provided by said section and contained plats and profiles as provided thereby; it being contended, however, that the specifications gave the engineer discretion to determine numerous questions concerning said improvement. Jurisdiction of the subject-matter is authority to hear and decide a cause, and does not depend on the correctness of the decision entered. *People*

v. Leonard, 279 Ill. 159, 116 N. E. 623; *People v. Zimmer*, 252 Ill. 9, 96 N. E. 529; *Miller v. Rowan*, 251 Ill. 344, 96 N. E. 285; *People v. Harper*, 244 Ill. 121, 91 N. E. 90; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Polecat Drainage District*, 213 Ill. 83, 72 N. E. 684; *People v. Talmadge*, 194 Ill. 67, 61 N. E. 1049.

In the case of *People v. Leonard*, supra, a petition was filed under section 59 of the Levee Act, and the objection was urged that the court was without jurisdiction to hear the same. It was said in that case that, while the petition was filed under the wrong section of the statute, and the levy of the assessment was void—

"it does not follow that the court was without jurisdiction to make any order. The petition purported to be filed under section 37. The court had jurisdiction of the general subject of assessments upon lands of the district for additional work or the completion of any work already commenced within any drainage district to insure the protection or drainage of the lands in the district. The petition for such an assessment gave it jurisdiction over the particular case. The petition asked for an order which it was erroneous for the court to make, but the general subject was within the jurisdiction of the court. Its order, therefore, however erroneous, was not subject to collateral attack. The remedy of the appellees was a writ of error. They cannot avail of the error on an application for judgment against their lands for the installments of the special assessments."

In *Miller v. Rowan*, supra, the distinction between the jurisdiction of the subject-matter and an erroneous exercise of jurisdiction is laid down, as follows:

"A judgment or decree is not binding upon any one unless the court rendering the same had jurisdiction of the parties and the subject-matter of the cause. The court did have jurisdiction of the parties, and the appellant, who is disputing the binding effect of the decree, was one of the complainants. Jurisdiction of the subject-matter is the power to adjudge concerning the general question involved, and if a bill states a case belonging to a general class over which the authority of the court extends, the jurisdiction attaches, and no error committed by the court can render the judgment void. If the court has jurisdiction, it is altogether immaterial, when the judgment is collaterally called in question, how grossly irregular or manifestly erroneous its proceedings may have been. The judgment cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached. Such a judgment is binding on the parties and on every other court unless reversed or annulled in a direct proceeding, and is not open to collateral attack. If there is a total want of jurisdiction in a court, its proceedings are an absolute nullity and confer no right and afford no protection, but will be pronounced void when collaterally drawn in question. *Buckmaster v. Carlin*, 3 Scam. 104; *Swiggart v. Harber*, 4 Scam. 364 [39 Am. Dec. 418]; *People v. Seelye*, 146 Ill. 189 [32 N. E. 458]; *Clark v. People*, 146 Ill. 348 [35 N. E. 60];

O'Brien v. People, 216 Ill. 354 [75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 986]: People v. Talmadge, 194 Ill. 67 [61 N. E. 1049]."

[3] Under the statute the county court is vested with authority to hear and determine petitions for the organizing, improving, extending and protection of drainage districts and lands therein by virtue of the Levee Act of 1879. The county court had jurisdiction of the subject-matter in this case, and had authority to hear and determine the matter set out in the petition filed in November, 1916. That its judgment on said petition may have been erroneous is a matter not open for discussion on collateral attack. As admitted in this record, all of the objectors here appeared and filed this same objection in the proceedings on the petition and have had their day in court. Their remedy was to have sought a review of the judgment on the petition by appeal or a writ of error. They are precluded from having such review in this collateral proceeding.

The judgment of the county court will be affirmed.

Judgment affirmed.

(238 Ill. 503)

STATE PUBLIC UTILITIES COMMISSION
ex rel. BOARD OF TRADE OF CHICAGO
v. CLEVELAND, C., C. & ST. L. RY. CO. et
al. (No. 12181.)

(Supreme Court of Illinois. June 18, 1919.)

1. CARRIERS \S 12(6½) — FREIGHT RATES — CONTROLLING CONSIDERATIONS.

The convenience and necessity of the public are the controlling considerations in a railroad freight rate hearing before the Public Utilities Commission, and the public to be considered is the producer of the grain, rates for which are sought to be fixed, and its consumer.

2. CARRIERS \S 12(6½) — FREIGHT — FIXING RATES BY COMMISSION—ABSENCE OF JURISDICTIONAL REQUISITES.

Where there is no evidence to support the jurisdictional fact that public convenience and necessity demanded the establishment of through routes and joint rates for grain fixed by the Public Utilities Commission on petition of a board of trade, and no finding by the commission in its order that public convenience and necessity demanded such rates, the circuit court erred in confirming the commission's order fixing rates.

Carter, J., dissenting.

Appeal from Circuit Court, Sangamon County; E. S. Smith, Judge.

Proceedings by the State Public Utilities Commission, on relation of the Board of Trade of Chicago, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Com-

pany and others. From judgment confirming an order of the Commission, the Railway Company and others appeal. Reversed and remanded, with directions.

George B. Gillespie, of Springfield (L. J. Hackney, F. L. Littleton, and C. P. Stewart, all of Cincinnati, Ohio, of counsel), for appellants.

Jeffery, Campbell & Clark, of Chicago (James Clarke Jeffery, of Chicago, of counsel), for appellee.

Edward J. Brundage, Atty. Gen., George T. Buckingham, of Chicago, William E. Trautmann, of East St. Louis, Albert D. Rodenberg, of Springfield, and Matthew Mills, of Chicago, for State Public Utilities Commission.

THOMPSON, J. This is an appeal from the circuit court of Sangamon county, prosecuted to review the judgment of that court confirming an order of the Public Utilities Commission.

On June 22, 1915, the board of trade of the city of Chicago filed a complaint with the Public Utilities Commission in which it charged that the rates of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (hereinafter called the Big Four) for the transportation of grain in carload lots to Chicago from stations located on its several lines in Illinois were unjust, unreasonable, and excessive, and that, excepting from a limited number of stations on its Chicago division, said railroad company had no intrastate through routes between said points and Chicago, and had no joint rates on grain and grain products from said Illinois points to Chicago. At the hearing before the commission this case was consolidated, by stipulation, with the case of Hurst Bros. & McNutt and Newlin Bros. against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, which complaint raised substantially the same issues. The commission heard evidence and entered an order that the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, in connection with the Atchison, Topeka & Santa Fé Railroad Company, the Chicago & Alton Railroad Company, the Chicago & Eastern Illinois Railroad Company, the Chicago, Burlington & Quincy Railroad Company, the Chicago, Rock Island & Pacific Railway Company, the Illinois Central Railroad Company, and the Wabash Railroad Company, establish and put into effect joint rates for all grain moving in carload lots from certain points mentioned on the several divisions of the Big Four to the city of Chicago. As the basis of the order on which these rates were established the commission found "that the rates complained of are unjust and unreasonably high."

The Big Four has one division wholly and

three others partly in the state of Illinois. Its Chicago division, including a branch known as the Kankakee & Seneca Railroad and a contract arrangement by which it reaches Chicago over the Illinois Central Railroad from Kankakee, extends from Seneca and Chicago through Kankakee and Sheldon, Ill., to Indianapolis, Cincinnati, and Louisville. Its Peoria & Eastern division stretches from Peoria Ill., across the state through Danville, Ill., and then east to Indiana and Ohio points. Its St. Louis division runs from East St. Louis through Vermillion, Ill., to Indiana, Ohio, and Michigan points. Its Cairo division extends from Cairo, Ill., to Danville, Ill. Most of the time prior to 1909 the Big Four maintained intrastate through routes and joint rates on carload shipments of grain to Chicago from stations on its Illinois lines. The joint rate for each 100 pounds to Chicago from stations on the Chicago division, Greenwich to Seneca, was five cents, on the Peoria & Eastern division, Beckwith to Peoria, seven cents, and on the St. Louis division, Vermillion to East St. Louis, eight cents. From time to time these intrastate through routes and joint rates were discontinued by the Big Four, so that none remained after 1909. At the time this complaint was filed the Big Four had in effect a rate of seven cents on grain in carload lots to Chicago from stations on the Kankakee & Seneca Railroad—a part of its Chicago division. There were no other intrastate through routes between points on the Big Four and Chicago. From points on the Peoria & Eastern division there was a joint rate of ten cents, from points on the St. Louis division there was a joint rate of eleven cents, and from points on the Cairo division there was a joint rate of from ten to fourteen cents, all via Danville and the New York Central Railroad to Chicago—an interstate route. The intrastate joint rates proposed by the complainant and which were ordered by the commission are five cents from stations Greenwich to Seneca, on the Chicago division, and seven cents from stations Beckwith to Leslie, on the Peoria & Eastern division, and seven cents from stations Vermillion to Mattoon, and eight cents from stations Gays to East Alton, on the St. Louis division, and rates ranging from seven cents to eleven and eight-tenths cents from different stations on the Cairo division to Chicago. The intrastate through routes established by the order of the commission are all two-road hauls.

It is contended by the appellants that the commission was without jurisdiction to make the order establishing through routes and joint rates, because there is no evidence in the record showing that the public convenience and necessity demand the establishing of such through routes and joint rates, and more especially because there is no finding by the commission in its order that public convenience and necessity demand the establishing of through routes and joint rates. Appellee insists that the finding of the commission in its order that the rates complained of are unjust and unreasonably high is sufficient to support the jurisdiction of the commission in entering said order, and that it is unnecessary to show that the public convenience and necessity require the establishment of said through routes and joint rates.

[1] In *State Public Utilities Com. v. Toledo, St. Louis & Western Railroad Co.*, 286 Ill. 582, 122 N. E. 158, we reviewed the authorities extensively, and there held that the proof should show, and that the commission should find, that the public convenience and necessity demanded, before the commission is authorized to establish, a through route and joint rate, either because the rate charged is unjust, unreasonable, or excessive, or because there is no satisfactory through route or joint rate in existence. The convenience and necessity of the public are the controlling considerations in a hearing of this character, and the public to be considered is the producer of the grain and the consumer of it. A careful reading of the case just cited, where the reasons for our conclusion are set forth, will show clearly that this order cannot stand.

[2] In this record there is no evidence to support the jurisdictional fact that public convenience and necessity demand the establishment of through routes and joint rates, and there is no finding by the commission in its order that the public convenience and necessity demanded a through route and joint rate, and therefore the circuit court erred in confirming the order of the commission.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to set aside the order without prejudice to the power of the commission to entertain a new proceeding, either on complaint or on its own motion.

Reversed and remanded, with directions.

CARTER, J., dissenting.

(283 Ill. 576)

SHELDON et al. v. ROCKFORD & I. RY. CO.
(No. 12391.)

(Supreme Court of Illinois. June 18, 1919.)

1. MUNICIPAL CORPORATIONS \S 657(2)—VACATION OF PLAT—STATUTE.

Under Hurd's Rev. St. 1917, c. 109, \S 6, 7, a railway which owned the territory within the part of a plat sought to be vacated had authority to execute a deed of vacation if it did not violate the rights of other proprietors in the plat and the vacation did not close or obstruct any public highway laid out according to law.

2. MUNICIPAL CORPORATIONS \S 657(2) — STREETS—VACATION OF PLATTED SUBDIVISION—NONVIOLATION OF LEGAL RIGHTS.

Legal rights of complainants, proprietors of lots in a platted subdivision, held not violated by vacation of part of the plat by defendant railway which owned it, so as to prohibit the vacation under Hurd's Rev. St. 1917, c. 109, \S 6, 7, complainants not being deprived of access to their lots by the vacation of certain stub ends of streets, while their access to a river was only affected by requiring them, instead of passing through the vacated premises, to travel a little farther and reach the river north and south of the vacated territory.

3. DEDICATION \S 29—VACATION OF PLAT BEFORE ACCEPTANCE.

An owner of land could not compel the municipality to accept streets as platted, and as there must be an acceptance, by improvement or otherwise, before the fee will pass to the city, until that is done the plat may be vacated by the owner.

Appeal from Circuit Court, Winnebago County; Oscar E. Heard, Judge.

Suit by W. D. Sheldon and others against the Rockford & Interurban Railway Company. From decree dismissing the bill, complainants appeal. Affirmed.

David D. Madden, of Rockford, for appellants.

Fisher, North, Welsh & Linscott, of Rockford, for appellee.

FARMER, J. This is an appeal from a decree of the circuit court of Winnebago county sustaining a demurrer to and dismissing a bill in chancery filed by appellants, praying that appellee be required to remove fences and other obstructions from certain streets and alleys in Harlem Park subdivision to the city of Rockford.

The litigation involves the validity of a deed of vacation to part of the plat of Harlem Park subdivision. The land, before it was platted into lots, blocks, streets, and alleys, was purchased by W. H. McCutchan, who gave a mortgage on the tract to secure part of the purchase money. The mortgage

provided that in case the tract of land was platted into lots and blocks and the mortgagee should sell some of the lots, the mortgagee would release the lots so sold from the lien of the mortgage. In August, 1890, McCutchan and wife platted the tract of land into blocks, lots, streets, and alleys, which plat was duly acknowledged and recorded. The tract of land abutted the west bank of Rock river at a place where, as shown by the plat in the record, there is a considerable bend in the river to the east, and blocks 1, 14, and 15 lay farthest east in the bend and next to the river. Strips are shown on the plat of the subdivision running east and west between blocks, as Avenues A, B, C, and D and Brown avenue. The plat shows these streets, as well as streets both north and south of them, extend east to the river or to Harlem boulevard, which is next to the river bank and runs in a general north and south direction parallel with the river. Blocks 1, 14, and 15 abut west on Belmont street, as shown by the plat. Avenue C runs east and west between blocks 14 and 15, and Avenue D east and west between blocks 1 and 14. Avenue B runs east and west along the south end of block 15, and Brown avenue along the north end of block 1, and all the avenues terminate on the east at the river or Harlem boulevard above mentioned. The mortgage given on the tract before its subdivision by McCutchan and wife was foreclosed, except as to lots which had been previously sold. They were not affected by the foreclosure decree. No lots in blocks 1, 14, and 15 had been sold prior to the foreclosure, and at the sale under the foreclosure decree the defendant, the Rockford & Interurban Railway Company, purchased all three of said blocks, and subsequently acquired a deed for them. May 9, 1910, defendant filed a vacation deed, vacating all that part of the subdivision designated on the plat lying east of the east line of Belmont street, including the portions of Avenues B, C, D, and Brown avenue and alleyways east of Belmont street. Complainants each own one or more lots lying west of Belmont street, which street is not affected by the vacation. Seven of the lots front on the west side of that street. Three of them lie a block further west, and one of them is four blocks west of Belmont street. The deed vacates the ends of all streets and alleys east of Belmont street from Brown avenue on the north to Avenue B on the south, which would prevent complainants' access to the river by means of these avenues. The territory vacated is only one block wide and three blocks long from north to south, and, as before stated, it lies next to the river, which would still be accessible to complainants either north or south of the vacated territory, but most of them would be required to travel a little farther for that pur-

pose. Defendant was the sole owner of all the lots and blocks sought to be vacated.

[1] Section 6 of chapter 109 of Hurd's Statutes prescribes when, by whom, and how an entire plat may be vacated. Section 7 authorizes the vacation of part of a plat by the owner in manner prescribed in section 6, provided the vacation does not abridge or destroy the rights or privileges of other proprietors in such plat, and it is further provided that nothing in said section shall authorize closing or obstructing any public highway laid out according to law. Defendant, being the owner of the territory within the part of the plat sought to be vacated, had authority to execute the deed of vacation if it did not violate the rights of other proprietors in the plat, and the vacation did not close or obstruct any public highway laid out according to law. The statute governing this subject has been considered by this court a number of times. *Little v. City of Lincoln*, 106 Ill. 353; *Heppes Co. v. City of Chicago*, 260 Ill. 506, 103 N. E. 455; *Chicago Anderson Pressed Brick Co. v. City of Chicago*, 138 Ill. 628, 28 N. E. 756; *Consumers' Co. v. City of Chicago*, 268 Ill. 113, 108 N. E. 1017; *Illinois Western Electric Co. v. Town of Cicero*, 282 Ill. 468, 118 N. E. 735. These decisions render unnecessary and inappropriate further discussion of the construction and meaning of the statute.

[2] Complainants contend their right as proprietors of lots in the subdivision are violated by vacation of part of the plat; also that the vacation deed purports to vacate streets and alleys, and was illegal for the reason the streets and alleys belonging to the municipality and no action had been taken by the public authorities to vacate them. Complainants are not deprived of ingress to and egress from their lots by the vacation of the stub ends of the streets east of Belmont street. Their access to the river is only affected to the extent that instead of passing east through the vacated premises they are required to travel a little farther and reach the river north or south of the vacated territory. It is not claimed there is any bridge across the river reached by any of the vacated streets or that the land on the other side of the river has ever been platted. "The rights or privileges of other proprietors in the plat which the statute protects are necessarily legal rights and privileges, and such parties cannot, therefore, be affected by the closing of streets not adjacent to their property nor directly affording access thereto and egress therefrom." *Little v. City of Lincoln*, supra.

[3] It is not alleged in the bill or claimed in argument that the streets and alleys vacated were ever improved by the public authorities or that they had done anything to indicate acceptance of them as streets and

alleys. The owner could not compel the municipality to accept the streets and assume the burden of maintaining them, but, as a matter of law, there must be an acceptance before the fee will pass to the city. *Heppes Co. v. City of Chicago*, supra. The streets and alleys vacated by the deed were not public highways laid out according to law. *Chicago Anderson Pressed Brick Co. v. City of Chicago*, supra. A fair and reasonable construction of the deed includes not only the streets and alleys, but all the property belonging to defendant in that part of the plat vacated.

The decree of the circuit court is affirmed.
Decree affirmed.

(233 Ill. 494)

FARMER et al. v. FOWLER et al.
(No. 12692-93.)

(Supreme Court of Illinois. June 18, 1919.)

1. EQUITY ¶263 — ANSWER NOT FILED WITHIN TIME—STRIKING FROM FILES.

Where defendants did not file their answer until the day after the 10 days allowed them under Practice Act, § 44, to plead, the answer was properly stricken, though filed before default was taken, and the court, in denying motion to set aside order striking answer, did not abuse its discretion, where defendants made no showing as to why they were late in filing answer, or that they were acting in good faith in asking to have the order set aside.

2. APPEAL AND ERROR ¶714(4) — STATEMENTS NOT IN RECORD.

The Supreme Court is bound to try the case on the record and not on statements made outside of the record by counsel for either side.

3. EQUITY ¶263—PLEADING NOT FILED IN TIME—STRIKING ON MOTION.

The general rule seems to be that where the time for pleading has expired and the party has filed a pleading without leave of the court and without consent of the adverse party, the filing is an irregularity which, if not waived, renders the pleading liable at the discretion of the court to be stricken on motion, or to be disregarded, or treated as a nullity.

4. EQUITY ¶321—TIME FOR FILING PLEADING—DISCRETION.

If the time is not fixed by statute or rule, the pleading must be filed within a reasonable time, and what is a reasonable time is a question addressed to the discretion of the court; any such a statute or rule is merely directory, and time may be extended by court in its discretion.

5. COURTS ¶78—RULES FOR PLEADING—OBJECT.

Rules of pleading and practice should facilitate getting at the real facts in an orderly manner, and should promote and not impede the administration of justice.

6. EQUITY ¶181—PLEADING AFTER EXPIRATION OF TIME.

After the expiration of rule to plead, defendant has no right to plead without leave of the court; and, while the court may during the term, on good cause shown, rule liberally in allowing pleadings to be filed, the persons who ask for such extension are asking a favor, and should ordinarily show some good reason for their request.

7. APPEAL AND ERROR ¶956(1), 957(1)—MATTERS OF DISCRETION—REVIEW.

Discretion of court in setting aside a default judgment or giving time to plead is not reviewable on appeal, except for abuse.

8. APPEAL AND ERROR ¶1042(1)—FAILURE TO GIVE NOTICE TO ADVERSE PARTY—HARMLESS ERROR.

Whether trial court violated its own rules in not requiring notice to be given defendants before striking answer is immaterial; defendants having had a hearing upon the merits of the question on their motion and request to set aside order striking answer and for leave to refile their answer.

9. EVIDENCE ¶543(2)—OPINION—COMPETENCY OF WITNESS—AMOUNT OF SOLICITOR'S FEES.

One who had been master in chancery of the court was competent to judge from the knowledge so obtained what would be the usual and customary solicitor's fees in that county for the work indicated by the files.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Lake County; C. C. Edwards and R. K. Welsh, Judges.

Two bills between Giles S. Farmer, trustee, and others and Mary E. Fowler and others. From each of the decrees rendered for complainants, an appeal was taken to the Appellate Court, where both decrees were affirmed, and defendants appeal, the causes being consolidated and heard as one on appeal. Affirmed.

S. H. Block, of Waukegan, for appellants.
Cooke, Pope & Pope, of Waukegan, for appellees.

CARTER, J. This was a bill filed in the circuit court of Lake county to foreclose a trust deed given by appellants to Giles S. Farmer, trustee, to secure a note for \$3,500. Another bill was filed in the same court to foreclose another trust deed for \$3,700, secured on other real estate in said county, the parties to both proceedings being the same. After the pleadings were settled in both these cases they were referred to a master in chancery to take proof, and the master reported, recommending the foreclosure of both trust deeds. From each of these decrees an appeal was taken to the Appellate Court for the Second District, and both decrees were

affirmed. The Appellate Court granted a certificate of importance, and both cases have been brought to this court on appeal.

The same material facts and legal questions being involved in both cases, the two causes have been consolidated here on motion and heard as one cause. For convenience we shall consider the consolidated cases as if they were only one foreclosure proceeding.

Appellee the Security Savings Bank was the owner of the notes, and its president, Giles S. Farmer, was named as trustee in the trust deeds. The bills were filed at the March term of the Lake county circuit court. Appellants appeared by counsel on the first day of the term, and obtained leave to plead within 10 days. The day after said 10 days had elapsed appellants filed answers, denying that they made the notes and trust deeds. This denial was in short form, with no attempt to explain the situation. Two days thereafter, March 16th, the appellees' solicitor appeared before the court without any previous notice to appellants or their solicitor, and without the presence of either in court, and moved the court to strike the answers from the files on the ground that they were not filed within the 10 days. The motion was allowed and the answers stricken from the files, and an order was thereupon entered, defaulting appellants and referring the cause to a master in chancery. On March 19, 1918, appellants by their solicitor appeared before the court, having theretofore served notice upon opposing counsel and moved to set aside and vacate the order of March 16th, which struck the answers from the files and ordered default and reference. This motion, after hearing and argument, was denied, and the cause then proceeded to be heard before the master in chancery, testimony being taken and a report being thereafter made by the master, recommending a decree of foreclosure and the allowance of solicitors' fees for appellees. Objections were filed to the master's report, which were overruled, and appellants thereafter appeared before the chancellor in the circuit court and filed exceptions, which were also overruled and decree entered in accordance with the master's report, including the amount due as solicitors' fees to be taxed as costs.

[1] Appellants made no attempt to show the trial court any reason why the answer was not filed in time, or that they had a meritorious defense, but contended there, as they do here, that, having filed their answer before the default was taken, it was legally filed, though a day after the time granted in which to file it. The controlling question, it is conceded by both parties, is therefore whether under proper practice an answer can, as a matter of right and of course, be filed after the expiration of the time given in which to file said answer.

[2] We find in the briefs considerable discussion as to whether or not any statements were made on the hearing of the motion to set aside the order in the circuit court as to why the answer had not been filed in time, and whether the trial court, in ruling that it would not set aside the order striking the answer, stated that it would not allow it to be refiled without the filing of an affidavit by appellants, showing that the defense in said answer was made in good faith. Counsel for appellees contend that such statements were made by the trial judge, while counsel for appellants insist that no such statements were made. Counsel for appellants is correct in saying that the record shows nothing as to any statements being made by counsel or the court as to the merits of the defense on the hearing as to setting aside the order striking the answer. It needs no citation of authority to show that this court is bound to try this case on the record and not on statements made outside of the record by counsel for either side. It is improper for counsel to attempt to base their argument in any case upon matters not found in the record, and we shall not consider any such statements in the consideration of this cause.

[3] The general rule seems to be that where the time for pleading has expired and the party has filed a pleading without leave of court and without the consent of the adverse party the filing thereof is an irregularity, which, if not waived, renders the pleading liable, at the discretion of the court, to be struck out on motion or to be disregarded or treated as a nullity. 21 Ency. of Pl. & Pr. 708, and authorities there cited.

[4] The time when pleadings must be filed is a matter which is usually regulated in each jurisdiction by statute or rule of court. If the time is not fixed by statute or rule, the pleading must be filed within a reasonable time, and what is reasonable is a question addressed to the discretion of the court. Such a statute or rule is clearly directory, and the time limited may be extended by the court within its discretion, good cause being shown; but, unless done with the court's consent, a pleading is filed too late if filed after the expiration of the time prescribed by statute or rule, and it may be stricken out or set aside. 31 Cyc. 597, and cited cases. In *Dunn v. Keegin*, 8 Scam. 292, this court said, in substance, that the general and correct practice is to consider that a pleading was filed in time if filed before the motion for default was entered, rather than to consider that it must be filed within the time limited by the order. For expressions somewhat similar in effect, see *Castle v. Judson*, 17 Ill. 381, and *Cook v. Forest*, 18 Ill. 581. In *Robb v. Bostwick*, 4 Scam. 115, 116, the court said:

"The plea of the defendant interposed no obstacle to the exercise of this authority. It was filed by the defendant, without having pre-

viously obtained leave of the court for that purpose, and should have been stricken from the files of the court; after which there could have been no objection to rendering a judgment at that term."

In *Flanders v. Whittaker*, 13 Ill. 707, the court held that the defendant had no right to plead after the expiration of the rule, without special leave of court, and that a plea so filed might be disregarded. The seeming conflict between *Robb v. Bostwick*, supra, *Castle v. Judson*, supra, *Flanders v. Whittaker*, supra, and *Cook v. Forest*, supra, does not appear to have been referred to in any way by these later decisions. In the quite recent case of *Walter Cabinet Co. v. Russell*, 250 Ill. 416, 419, 95 N. E. 462, 463, the court said:

"After the expiration of the rule the defendant had no right to plead without special leave of the court, and neither the court nor the plaintiff was required to recognize in any way the statement of claim thus placed among the papers in the cause without authority of law"—citing in support of this conclusion *Robb v. Bostwick*, supra, *Flanders v. Whittaker*, supra, and *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635.

Here, again, the court in no way referred to the former decision of *Castle v. Judson*, supra, or *Cook v. Forest*, supra. Section 44 of the present Practice Act (Hurd's Rev. St. 1917, c. 110) provides that—

"On the appearance of the defendant or defendants, the court may allow such time to plead as may be deemed reasonable and necessary."

Section 27 of the Practice Act of 1872 contains a similar provision, as did section 14 of the Practice Act of 1845 (Laws of 1845, p. 415), as also section 11 of the Practice Act of 1833 (Law of 1833, p. 489), and section 11 of the Practice Act of 1827 (Laws of 1827, p. 313).

It is most earnestly argued that the decision in the case of *Walter Cabinet Co. v. Russell*, supra, cannot be held as necessarily overruling the holdings of this court in *Castle v. Judson*, supra, and *Cook v. Forest*, supra, as the last decision was rendered in construing the special provisions of the Municipal Court Act of the city of Chicago, and the practice under that act differs in many respects from ordinary practice in the common-law courts of the state, and that therefore it was not necessary to refer in any way to the rule laid down in *Castle v. Judson*, supra, or *Cook v. Forest*, supra. The same argument might be made with like force with reference to the seeming contradiction between the earlier decisions of this court in *Dunn v. Keegin*, supra, *Robb v. Bostwick*, supra, *Flanders v. Whittaker*, supra, *Castle v. Judson*, supra, and *Cook v. Forest*, supra, as some of these earlier decisions were plainly rendered with

reference to orders entered in vacation under the special statutes then in force. The time when a reply must be filed is, as has been said, usually fixed by statute or rule of court, but these statutes and rules should be given a liberal construction in the interest of justice, and such a practice should doubtless be encouraged by the court so far as is consistent with the prompt and efficient dispatch of the business of the courts. *Dunn v. Keegin*, supra.

[6, 8] Rules of pleading and practice should facilitate getting at the real facts in a legal proceeding in an orderly manner, and should promote and not impede the administration of justice. In our judgment the correct rule was laid down by this court in *Walter Cabinet Co. v. Russell*, supra, both as to our General Practice Act and the Municipal Court Practice Act, that after the expiration of the rule to plead the defendant has no right to plead without leave of court, and while the court could, during the term, on good cause shown, rule liberally in favor of allowing pleadings to be filed in order to hear and decide the case on the merits, the persons who ask for such extension of time are asking it as a favor, and should ordinarily be expected to show some good reason for such request. Courts very generally exercise their discretion in such matters by requiring, in support of such motion, an affidavit setting out such reasons. 31 Cyc. 374. See, also, *City of Carlyle v. Carlyle Water, Light & Power Co.*, 140 Ill. 445, 29 N. E. 556; *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251.

[7] The setting aside of a default judgment, or giving time to plead, is within the sound discretion of the court, and not reviewable on appeal except for abuse of discretion. *Culver v. Hide & Leather Bank*, 78 Ill. 625; *Anderson Transfer Co. v. Fuller*, supra; 21 Ency. of Pl. & Pr. 708, and authorities cited in notes.

In our judgment the answer of appellants was rightly stricken as being filed after the rule had expired, and in moving to set aside such order appellants were asking a favor and not demanding a right, and therefore they were only entitled to its allowance in

the sound discretion of the trial court. As they made no showing why they were late in filing such answer or that they were acting in good faith in asking to have the order set aside striking the answer from the files, there is nothing in this record to show that it would promote the ends of justice for this court to interfere with the discretion of the trial court in refusing to set aside such order. Surely, if appellants were acting in good faith it would have been a very simple matter to make a showing to that effect. Not having done so, we cannot say that the trial court abused its discretion in refusing to set aside said order.

[8] Counsel argue at considerable length that the trial court disregarded one of its rules as to notices of motions when the answer was stricken from the files. The purpose of such a rule is to give both parties a hearing before the court enters an order. They had such a hearing upon the merits of the question, so far as presented in the record, on their motion and request to set aside the order and for leave to refile their answer. We agree with the conclusion of the Appellate Court on this point that whether the trial court violated its own rules in not requiring notice before striking the answer from the files is therefore immaterial.

[9] Counsel for appellants also argues that the trial court erred in allowing solicitors' fees of \$350 and \$400, respectively, in these cases. The objections and exceptions relied upon before the master and court were limited to the fact that the witness who testified as to the work actually done by complainants' solicitors, except what he could judge from an examination of the files. There can be no question as to the competency of the witness. He had been a master in chancery of that court, and we assume was competent to judge from the knowledge so obtained, what would be the usual and customary fee in that county for the work so indicated. We see no reason why the decree of the court should be reversed on this ground.

The judgment of the Appellate Court will be affirmed in each of these cases.

Judgments affirmed.

(288 Ill. 463)

MEINS et al. v. MEINS et al. (No. 12720.)

(Supreme Court of Illinois. June 18, 1919.)

1. WILLS §597(3)—CONSTRUCTION—ESTATES CONVEYED.

Under Conveyance Act, § 18, a devise, though without words of inheritance, conveys a fee simple, if a less estate be not limited by express words, and it is the disposition of the courts to construe a will so as to give an estate of inheritance to the first devisee.

2. WILLS §601(1)—CONSTRUCTION—ESTATE OF INHERITANCE.

When the fee is devised by one clause of the will, other portions will not be given the effect of limiting or qualifying the estate, unless they show that to be the clear intention of the testator.

3. WILLS §597(2)—CONSTRUCTION—RESTRICTION OF ESTATE.

Where other clauses of the will show a clear intention to limit a clause devising the fee, those clauses will prevail, regardless of the part of the will in which they are manifested.

4. WILLS §439—CONSTRUCTION—INTENT OF TESTATOR.

In construing a will, the intention of the testator, if not inconsistent with the established rules of law or public policy, must govern.

5. WILLS §470—CONSTRUCTION—CONSTRUCTION AS A WHOLE.

The intention of testator must be gathered from the whole will, and all its parts taken together.

6. WILLS §450—CONSTRUCTION—OPERATIVE EFFECT OF ALL PARTS.

Every clause and provision of a will, if possible, should have effect given to it according to the intention of testator.

7. WILLS §472—CONSTRUCTION—REPUGNANT CLAUSES.

A later clause of a will, when repugnant to a former provision, is considered as intended to modify or abrogate the former.

8. WILLS §634(16)—CONSTRUCTION—VESTING OF ESTATE—PAYMENT OF LEGACY.

Where testator directed that within three years after the death of his wife his daughter should receive a sum of money from his estate, and after that the remainder was devised to his son, the payment of the legacy to the daughter was not a condition precedent to the vesting of the remainder in the son, but was a charge upon the estate vested in the son.

9. WILLS §614(5)—CONSTRUCTION—ESTATES CONVEYED—LIFE ESTATE.

Where testator devised all his property to his wife, but by subsequent clauses directed that within three years after his wife's death a legacy be paid to his daughter, and devised the remainder of the estate to his son, the wife took only a life estate, though the devise to her would be in fee if it were not qualified by the latter clause of the will.

Appeal from Circuit Court, Whiteside County; Emery C. Graves, Judge.

Suit by Edna L. Meins and others against Lizzie Meins and others for the construction of a will. From a decree construing the will in favor of the latter, the former appeal. Reversed and remanded, with directions.

R. W. E. Mitchell and Henry C. Ward, both of Sterling, for appellants.

Carl E. Sheldon, of Sterling, for appellees.

STONE, J. The only question involved in this case is the construction of the second, third, and fourth clauses of the will of Melno Meins, deceased. The testator left an estate of 240 acres of land in Whiteside county, of the value of approximately \$30,000, and \$800 in cash. The first clause of the will provides for the payment of debts. The other clauses are as follows:

"Second—After the payment of such funeral expenses and debts, I give, devise and bequeath to my wife, Lizzie Meins, all of my property, both real and personal, which I may die possessed of.

"Third—It is my wish, and I hereby direct, that three years after the death of my wife, Lizzie Meins, \$10,000 of my said estate shall be given to my daughter, Annie Oltmans.

"Fourth—After my daughter, Annie Oltmans, has received her share of \$10,000, the remainder of my estate I give, devise and bequeath to my son, Albert Meins.

"Lastly—I nominate and appoint my wife, Lizzie Meins, to be executrix of this my last will and testament."

The chancellor construed the will as vesting an estate in fee in the widow, Lizzie Meins, by the second clause of the will, and decreed accordingly. Albert Meins died, and his widow, Edna L. Meins, personally and as administratrix of his estate, together with her daughters, Mildred A. and Grace E., are appellants herein.

It is the contention of appellants that the second, third, and fourth clauses of the will should be construed as one clause, creating a life estate in the widow, with remainder in fee to Albert Meins, now vested in Mildred A. and Grace E. Meins, his daughters, subject to the dower interest of Edna L. Meins, their mother, and charged with the payment of \$10,000 to Annie Oltmans not later than three years after the death of Lizzie Meins, widow of the testator. On the other hand, the appellees contend that the widow, Lizzie Meins, took a fee simple estate by the second clause of the will, unlimited by the third and fourth clauses thereof; that, by reason of the passing of the fee-simple title under the second clause, the third and fourth clauses of the will are mere precatory words, and are therefore void.

[1-3] The rule is that a simple devise of land without any words of inheritance is sufficient, under section 13 of the Conveyances Act (Hurd's Rev. St. 1917, c. 30), to convey an absolute estate in fee, unless a contrary intent is shown in other parts of the will. It is the disposition of courts to adopt such a construction as will give an estate of inheritance to the first devisee. Therefore, when the fee is devised by one clause of the will, and other portions or clauses of the will are relied upon as limiting or qualifying the estate thus given, they should be such as show a clear intention on the part of the testator to thus qualify the estate granted. *Giles v. Anslow*, 128 Ill. 187, 21 N. E. 225; *Jones v. Jones*, 124 Ill. 254, 15 N. E. 751; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336. Where a testator by his will employed language sufficient to pass the fee-simple title to land, in the absence of the expression of a clear intention to cut down the fee to a life estate, an estate in fee simple will pass. *Bowen v. John*, 201 Ill. 292, 66 N. E. 357. If it is clearly shown by other clauses or parts of the will that the testator intended to limit the fee thus granted, such intention will prevail, and it is wholly immaterial in what part of the will such intention is manifested. *Rose v. Hale*, 185 Ill. 378, 56 N. E. 1073, 76 Am. St. Rep. 40; *Giles v. Anslow*, supra; *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570; *Whitcomb v. Rodman*, 156 Ill. 116, 40 N. E. 553, 28 L. R. A. 149, 47 Am. St. Rep. 181; 2 *Jarman on Wills* (5th Am. Ed.) 53.

[4-7] The principal rules of construction are: The intention of the testator, if not inconsistent with the established rules of law or public policy, must govern. This intention must be gathered from the whole will, and all its parts taken together. Every clause and provision, if possible, should have effect given to it according to the intention of the maker. *Fifer v. Allen*, 228 Ill. 507, 81 N. E. 1105; *Lander v. Lander*, 217 Ill. 289, 75 N. E. 487; *Hamlin v. United States Express Co.*, 107 Ill. 443; *Henderson v. Blackburn*, 104 Ill. 227, 44 Am. Rep. 780; *Bland v. Bland*, 103 Ill. 11; *City of Peoria v. Darst*, 101 Ill. 609; *Giles v. Anslow*, supra; *Boyd v. Strahan*, 36 Ill. 355. A later clause of a will, when repugnant to a former provision, is to be considered as intending to modify or abrogate the former. *Harris v. Ferguy*, 207 Ill. 534, 69 N. E. 844; *Hamlin v. United States Express Co.*, supra.

In the case of *Hamlin v. United States Express Co.*, supra, the devise was to the wife for her own use, with full power to dispose of any of the estate, real or personal, and to convey the real estate by conveyance in fee simple. Elsewhere in the will it was provided that such of the testator's real estate as his wife had not sold during her life-

time should be sold after the death of the wife and divided in the manner therein specified. This court in that case said:

"The wife is given everything, with full power to use, enjoy, and dispose of the same, and convey the real estate by absolute conveyance in fee simple. This, if unqualified, would, of course, vest a fee simple in the real estate; but, being qualified, in order to give the language of the qualification any effect, this language must be restricted to the life of the wife of the testator. * * * The latter part of the will is to be considered, no less than the former part, and to the extent there is repugnance the language of the former part is to be read as modified by that of the latter part."

In *Boyd v. Strahan*, supra, where the testator left property to his wife with the power of disposition, but by later phraseology limited her estate, it was held that, as a general rule, where a will bequeaths personal property to be at the absolute disposition of the legatee, such legatee, in the absence of all clauses showing a contrary intent on the part of the testator, becomes the absolute owner; that the rule which controls in the interpretation of a will is that the intention of the testator to be gathered from the entire will must govern. It was there said:

"There is no other class of written instruments known to the law in which so little importance is to be attached to the technical sense of language in comparison with that sense in which the apparent object of the writer indicates his words to have been used. So far is this principle carried, that the court say in 3 *Wills*. 141: 'Cases on wills may guide us to general rules of construction; but unless a case cited be, in every respect, directly in point, and agree in every circumstance, it will have little or no weight with the courts, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.'"

To the same effect is *Lander v. Lander*, supra.

This court said in *Fifer v. Allen*, supra:

"The purpose of courts in construing a will is to ascertain the intention of the testator, so that such intention may be given effect, if not prohibited by law. The object to be attained is to give the will the interpretation and meaning which the testator intended, and his intention will be carried out whenever it can be done without violating some established rule of law or public policy. *Crerar v. Williams*, 145 Ill. 625 [34 N. E. 467, 21 L. R. A. 454]; *Bradsby v. Wallace*, 202 Ill. 239 [66 N. E. 1088]; *Perry v. Bowman*, 151 Ill. 25 [37 N. E. 680]. To ascertain the intention of the testator the entire will is to be considered and the different parts compared, in view of the circumstances existing when it was made, and the question is: What did the testator intend? *Young v. Harkleroad*, 166 Ill. 318 [46 N. E. 1113]; *Johnson v. Askey*, 190 Ill. 58 [60 N. E. 76]."

[8] It is contended by appellees that the payment of \$10,000 to Annie Oltmans is a condition precedent to the vesting of any estate in Albert Meins, and that, as the law favors vesting of estates, this entire estate must be held to be vested in Lizzie Meins, the widow. In support of this contention appellees cite *Jacobs v. Ditz*, 260 Ill. 98, 102 N. E. 1077. In that case the will specifically provided "that before he shall receive the farm" the son was to pay the testator's daughter a certain sum of money and a certain sum to the testator's stepson, and file receipts therefor with the county clerk. That was held to be a condition precedent to the vesting of the estate. The rule, however, as stated in that case is:

"In doubtful cases the courts are inclined to construe an estate as vested in accordance with an accepted public policy, and in such cases will construe a legacy as a charge upon the land devised rather than a condition precedent to the vesting of the estate."

In *Hempstead v. Hempstead*, 235 Ill. 448, 120 N. E. 782, the rule is laid down that where there is a large charge imposed by the will upon a devisee, or where a devise in a will is made subject to the payment of specific sums to the other beneficiaries, such fact, while not conclusive, is necessarily strong evidence of an intent of the testator to pass by his will a fee to such devisee, as the devise might otherwise not prove a beneficial interest. Page on Wills, § 561; *Johnson v. Johnson*, 98 Ill. 564. In *Bergan v. Cahill*, 55 Ill. 160, the testator devised a life estate to his wife and the remainder to his son, provided the son pay to the daughter \$100 or an equivalent, and there were no words implying a precedent condition, and it was held that upon the testator's death the son took the fee, subject to the legacy. In *Daly v. Wilkie*, 111 Ill. 382, the devise was subject to the condition that the devisee should, within a term of seven years after the death of the testator, pay to the testator's daughter the sum of \$500. The payment was postponed for seven years after the death of the testator, and it was held that the son took the fee charged with the payment of the legacy. In *Parsons v. Millar*, 189 Ill. 107, 59 N. E. 606, the devise was subject to the provision that the son should pay certain sums to the testator's daughters within two or three years after his death. The payments were postponed and held to be charges on the property. To the same effect is the case of *Spangler v. Newman*, 239 Ill. 616, 88 N. E. 202. The rule is that the postponement of the time of payment indicates that the payment was not a condition precedent to the vesting of the estate. *Jacobs v. Ditz*, supra.

[9] Counsel for appellees cite the case of

Reed v. Welborn, 253 Ill. 338, 97 N. E. 669, in support of their contention that the widow in this case took the fee. An examination of that case discloses that it is to be distinguished from the case at bar. The will devised the property in question to the widow and upon her death to the daughter, with the further provision that if the widow outlived the daughter and the daughter should die leaving no child or children, then at the death of the widow the property was to go to the nearest kin of the testator. The question there was whether or not the fee in remainder vested in the daughter upon the death of her father, the testator. It was there held, under the rule that the court will, if possible, construe a will so as to give an estate of inheritance to the first donee, that the fee vested in the daughter. That case, however, does not contravene the rule, well established in this state, that where other provisions of the will clearly show an intention on the part of the testator to limit a fee the will must be so construed. That rule is applicable here.

Reading the entire will, the second, third, and fourth clauses of which all treat of the same subject-matter, and applying the rules herein discussed, we are convinced that it was the intention of the testator that the widow, Lizzie Meins, should have a life estate in the property conveyed by the will and that the remainder should vest in fee in the son, Albert Meins, charged with the payment of the sum of \$10,000 to Annie Oltmans. The subsequent provisions of the will, whether they be read as one clause or separately, clearly and unequivocally show the intention of the testator to limit the estate given to the widow by the second clause to a life estate. The third clause directs that \$10,000 shall be given to the daughter, Annie Oltmans, which the testator in the fourth clause designates as her share of the estate. The fourth clause gives, devises, and bequeaths the remainder of the testator's estate to his son, Albert Meins. These are not precatory words, but positive directions. In addition it may be said that the second clause of the will contains no words of inheritance, and under the well-established rule such a devise passed but a life estate. Albert Meins being now deceased, the remainder in the property in question vests in fee in his daughters, Mildred A. and Grace E. Meins, subject to the dower interest of their mother, Edna L. Meins, and charged with the payment of \$10,000 to Annie Oltmans not more than three years after the death of the testator's widow, Lizzie Meins.

The decree of the circuit court will be reversed, and the cause remanded, with directions to enter a decree in accordance with the views herein expressed.

Reversed and remanded with directions.

(238 Ill. 568)

McCARTNEY et al. v. JACOBS et al.
(No. 12301.)

(Supreme Court of Illinois. June 18, 1919.)

1. PERPETUITIES §8(4)—REQUEST FOR CARE OF BURIAL LOT — UNINCORPORATED CEMETERY ASSOCIATION.

A bequest to an unincorporated cemetery association in trust to place at interest perpetually, and use the interest for caring for a burial lot, is void, as violating rule against perpetuities; Hurd's St. 1917, c. 21, § 31a, empowering an incorporated cemetery association to receive a gift in trust in perpetuity for care of a burial lot, not aiding it.

2. WILLS §558(1) — UNCERTAINTY — REQUESTS FOR GRAVE MARKERS.

Requests for markers for graves of testatrix and her brother, to cost not less than \$75 each, is not objectionable as uncertain and indefinite, and giving executor uncontrolled power; the county court having jurisdiction and power to control the amount expended.

3. WILLS §673 — CONSTRUCTION — CREATION OF TRUST.

A clause of a will held to show intention to create, and to create, a valid trust, of the rents and profits of the interest of testatrix, in lands owned by her in common with an insane brother, for purpose of caring for him during his life.

4. TRUSTS §160(2) — TRUSTEE — APPOINTMENT BY COURT.

A will creating a trust for care for testatrix's insane brother during his life, without naming a trustee, the court properly appoints one.

5. INSANE PERSONS §71 — ELECTION TO TAKE LAND DEVISED IN LIEU OF PROCEEDS.

Even if under a will directing sale of land and distribution of proceeds among testatrix's heirs, they had right to elect to take the land, one of them being insane, election on his part would have to be by the court, to authorize which it must clearly appear to be for his best interests.

Appeal from Circuit Court, Marshall County; Clyde E. Stone, Judge.

Suit by Andrew J. McCartney and others against Henry E. Jacobs, executor, and others. From decree granting only part of relief asked, complainants appeal, defendants assigning cross-errors. Affirmed.

Elmer J. Slough, of Peoria, for appellants.
Clarence W. Heyl, of Peoria, for appellees.

FARMER, J. Appellants, heirs at law of Isabelle McCartney, filed their bill in the

circuit court of Marshall county to construe her will.

Isabelle McCartney, who was never married, died testate February 8, 1917. She was 68 years old at the time of her death, and left surviving as her only heirs five brothers, one of whom, George W. McCartney, was insane and had been for several years. He had been in the hospital for insane at Bartonville some time, but his sister, the testatrix, caused him to be removed from that place to the Lake Geneva Sanitarium, in Wisconsin. In addition to the property individually owned by the testatrix, she and her insane brother each owned the undivided one-half of 240 acres of farm land as tenants in common. At the time of her death she was conservator for her insane brother. The will is paragraphed into nine items. Item 1 simply directs the payment of the testatrix's debts and funeral expenses. The clauses of the will sought to be construed are items 2, 3, and 4. Item 2 directs the payment by the executor of \$200 to the United Presbyterian Cemetery Association, or the proper authority having charge and management of the United Presbyterian Cemetery in the town of La Prairie, Marshall county, Ill., to be held in trust and placed at interest perpetually, the interest only to be used each year for taking care of the John D. McCartney burial lot in said cemetery. Said item 2 further directs the executor to procure markers for the burial lots of testatrix and her brother George at a cost of not less than \$75 for each marker. Item 3 directed that "the real estate held in common by myself and my said brother, George W. McCartney" (describing the 240 acres), be rented from year to year and the rents received therefrom applied to the expense of keeping George in the Lake Geneva Sanitarium the remainder of his life. Said item further directed that testatrix's said brother should be kept at said sanitarium and should not be sent to or placed in any other institution; that after paying out of the rents of the 240 acres the maintenance of George, if there was any remainder it should be applied to the payment of taxes and the general upkeep and improvement of the land. In case the rents were insufficient to pay the expense of keeping and maintaining the insane brother, then the will directed that additional funds necessary be procured by loan "upon any of the real estate aforesaid," and if any conservator was appointed to succeed testatrix, she expressed the wish that said conservator be authorized by the court to procure a loan on the interest of George to make up any deficiency. If that could not be done, then the will directed that the trustee thereafter named should borrow what was necessary on the interest of the testatrix in the 240

acres of land, and Henry E. Jacobs was in the same clause named as trustee for the purpose of looking after and caring for George, and to "conserve the rentals aforesaid so far as my interest or control therein may appertain, and to apply the rents for the maintenance of my brother George W. McCartney, pay the taxes and improvements, if need be, secure the amount for any deficiency of fund necessary to meet those items by loan against my interest in the real estate in this item of this my will above described." Item 4 directed the executor to sell, within one year after testatrix's death, a 40-acre tract of land described, which was her sole property. Preference was given testatrix's brother Andrew to buy said land within six months, if he desired, for the price of \$200 per acre. In case he should not buy it within that period the executor was directed to sell it at private sale for the best price obtainable. The money derived from the sale, after the debts and funeral expenses and bequests were paid, was directed to be distributed equally among the heirs of testatrix. The executor was given full power and authority to execute necessary deed to convey to the purchaser title in fee simple. Andrew J. McCartney did not exercise his option to buy the land, and the executor sold it for \$210 per acre.

The bill charges that the \$200 bequest in item 2 to the cemetery association, which was unincorporated, in trust, the interest to be used in taking care of the burial lot of John D. McCartney, who was the father of testatrix, was in violation of the rule against perpetuities; that the provision in said item for markers for the graves of testatrix and her brother George, at a cost of not less than \$75 each, is uncertain and indefinite, and leaves it to the discretion or whim of the executor to unnecessarily spend and dissipate the money of the estate; also it is alleged said provision is void because it is uncertain, now or in the future, about where George will be buried, as he owns no lot in the cemetery mentioned, and the testatrix did not have legal power or authority to designate where he shall be buried. The objections alleged in the bill to item 3 are that it is indefinite and uncertain, in that it cannot be known whether George, in order to receive the maintenance provided, shall be required to stay at the Lake Geneva Sanitarium the remainder of his life, or whether, if removed to some other institution, the maintenance will be forfeited, and whether, if a loan is made, it shall be upon the whole of said lands or upon the undivided interest of George. The bill makes inquiry whether item 3 creates a valid trust in the property, and whether, if it does, it is a trust in the life estate only of George and the in-

terest of the testatrix in fee if necessary for the maintenance of George, and whether said item is null and void because of uncertainties and insufficiencies. The bill alleges under item 4 it is uncertain whether the complainants, as heirs or devisees of the testatrix, have the right, if all concur, to take, subject to debts and charges, the 40 acres of land directed to be sold and the proceeds divided, or whether the land must be sold, and whether the executor, without a specific devise to him of the title, has power to convey the land in fee simple or whether the power of sale is void and the title descended to the heirs under the laws of descent.

Harry E. Jacobs, in his capacity both as trustee and executor, the United Presbyterian Cemetery Association of the town of La Prairie, and the individual members of said association, were made defendants to the bill. After answer and replication were filed the cause was referred to the master in chancery to take the proofs and report his conclusion. Before the master had completed taking testimony, and made his report defendants filed an amended answer, and Henry E. Jacobs, as executor and testamentary trustee, filed a cross-bill, praying that he be appointed trustee as provided in and by the will of Isabelle McCartney. Defendants to the cross-bill and the guardian ad litem for George W. McCartney, insane defendant, answered, and the cause was re-referred to the master. The master reported, recommending a decree denying the relief prayed by complainants in their original bill except as to the \$200 bequeathed to the cemetery association and the provision for markers for the graves of testatrix and her brother George in item 2, which he recommended be decreed to be null and void. The court entered a decree in accordance with the report and recommendation of the master, except the court decreed the provision for markers for the graves of testatrix and her brother George was valid, that the county court had jurisdiction and authority to control the amount expended for the markers, and that said provision was not subject to the objection alleged in the bill. The only relief granted complainants by the decree was the holding that the bequest of \$200 to the cemetery association was void. The court decreed that by item 3 it was intended to create a trust of the rents and profits from the interest of testatrix in the land described for the purpose of caring for her insane brother, and that a trustee should be appointed to carry out that provision of the will, and Henry E. Jacobs was appointed such trustee and required to give bond in the sum of \$5,000.

[1] Defendants have assigned cross-errors on the part of the decree holding the bequest to the cemetery association void. Bequests to similar associations for the perpetual care

of burial lots were held to violate the rule against perpetuities, and to be therefore void, in *Mason v. Bloomington Library Ass'n*, 237 Ill. 442, 86 N. E. 1044, 15 Ann. Cas. 603; and *Burke v. Burke*, 259 Ill. 262, 102 N. E. 293. The association was never incorporated, and therefore was incapable of taking under the act of 1911. *Hurd's Stat.* 1917, c. 21, § 31a.

[2] The objections to the bequest for markers for the graves of testatrix and her brother George, to cost not less than \$75 each, are that it is uncertain and indefinite, and it is left to the uncontrolled power of the executor to dissipate the money and funds of the estate in providing the markers. The circuit court correctly held that the county court had jurisdiction and power to control the amount of money expended for the markers.

[3, 4] As to item 3 the court properly decreed that it was the intention of the testatrix to, and said item did, create a valid trust of the rents and profits of the interest of the testatrix in the 240 acres of land for the purpose of caring for the insane brother during his life, and a trustee was properly appointed to carry out said provision.

[5] As to the fourth item, which directs the sale by the executor of a 40-acre tract of land and the distribution of the proceeds among the heirs, the objection is that it is uncertain whether, if all the heirs and devisees concurred, they could elect to take the land subject to the charges and indebtedness. Whether they could have elected to take the land or not, they never attempted to make any such election. By their bill they did not offer to elect, but merely asked the court whether they had such right. If the court had decreed they had such right, it would have been optional with them whether or not they would exercise it. Furthermore, the insane heir and devisee was not capable of electing. Any election on his behalf would have been required to have been made by the court. No prayer of that kind was contained in the bill, and if there had been it seems quite clear the court would not have been warranted in electing for the insane heir to take the land. To authorize such election it must clearly appear to be for the best interests of the insane heir. *Gorman v. Mullins*, 172 Ill. 349, 50 N. E. 222.

The wishes and intentions of the testatrix are expressed in her will in language easily understood, and, except the bequest to the cemetery association, none of its provisions are contrary to any rule of law or against public policy.

The decree of the circuit court is affirmed. Decree affirmed.

STONE, J., took no part in this case.

(233 Ill. 561)

ROBERTS v. GOODIN. (No. 12358.)

(Supreme Court of Illinois. June 18, 1919.)

1. MORTGAGES \S 526(1)—FORECLOSURE SALE
—SETTING ASIDE MASTER'S SALE—PARTIES
ENTITLED—WIFE OF DEBTOR.

Wife, having inchoate right of dower and a homestead interest in a particular tract of the land sold under mortgage foreclosure, has such an interest as entitles her to file objections before confirmation of sale on ground of fraud on her dower rights, and that sale having been made en masse deprived her of homestead interest, and this though she withdrew her answer in mortgage foreclosure proceedings.

2. DOWER \S 35—REMEDY FOR PROTECTION OF
WIFE'S INTEREST.

In view of Dower Act, § 3, while during lifetime of husband wife's right of dower is inchoate, and cannot be asserted against husband, it is such an interest as can be made the basis of a suit to set aside a deed executed in fraud of wife's marital rights.

3. MORTGAGES \S 526(2)—FORECLOSURE SALE
—SETTING ASIDE MASTER'S SALE—GROUNDS
—FRAUD ON MARITAL RIGHTS—SALE EN
MASSE.

Court, on application before confirmation, properly set aside sale en masse of property susceptible of division, under mortgage foreclosure, where decree authorized sale of so much of the land as is necessary to discharge debt; the sale en masse bringing twice amount of the debt, and wife of debtor being injured in her dower and homestead rights.

4. MORTGAGES \S 526(1)—FORECLOSURE SALE
—SETTING ASIDE MASTER'S SALE—DISCRE-
TION OF COURT.

Chancellor has a broad discretion in matter of approving or disapproving a master's sale, made subject to the court's approval by the terms of the decree.

5. MORTGAGES \S 526(1)—FORECLOSURE SALE
—SETTING ASIDE—ESTOPPEL.

That a wife, injured in her homestead and dower rights by unauthorized sale en masse under mortgage foreclosure, bid on the sale en masse, would not estop her to apply to the court to set aside the master's sale as defrauding her marital rights.

Appeal from Circuit Court, Pike County; Harry Higbee, Judge.

Petition by Elizabeth A. Roberts to reopen sale under mortgage foreclosure. George E. Goodin, purchaser, on leave, entered appearance as party defendant, and from a judgment opening the sale, he appeals. Affirmed.

William Mumford and Barry Mumford, both of Pittsfield, for appellant.

W. E. Williams and A. Clay Williams, both of Pittsfield, for appellee.

STONE, J. This is an appeal by George E. Goodin, purchaser at a master's sale under

a decree of foreclosure, from an order and decree of the circuit court of Pike county vacating and setting aside said sale and ordering a resale of the lands described in the mortgage in separate tracts.

On July 20, 1910, Palmedus D. Roberts—his wife, Lucy Roberts, joining him—executed a certain mortgage on the farm on which they then resided, consisting of about 100 acres, valued at about \$7,000, to Strauss & Bro. to secure their certain note for the principal sum of \$4,250, due in three years after date. Lucy Roberts, wife of the mortgagor, died soon thereafter, and in September, 1915, the mortgagor, Palmedus D. Roberts, married the appellee, Elizabeth A. Roberts. Payments on the note were made from time to time. At the time of the decree of foreclosure the accrued interest and principal amounted to \$2,169.21. The mortgagor at the time of his marriage with appellee was 72 years of age and the appellee 38 years of age. This marriage was opposed by the wife of the appellant, only daughter of the mortgagor. The evidence tends to prove that the appellant solicited Strauss & Bro. to file their bill for foreclosure.

The appellee filed her answer to the bill for foreclosure, averring that the property constituted the homestead of her husband, Palmedus D. Roberts, and herself; that she had a right of homestead in said premises, and a right to redeem from any sale of the same; and that she had an inchoate right of dower in the land subject to the mortgage—and prayed that her rights in the premises be safeguarded and protected by any decree that might be rendered in said court, and that her right of redemption be saved to her from any sale made under order of said court. Her husband made default. The cause was referred to the master in the usual way. The appellee concluded that she was not financially able to redeem the premises and obtained leave of court to withdraw her answer.

A decree was entered on the master's findings, ordering the sale of so much of said land as was necessary to discharge the debt and costs, and which could be sold separately without material injury to the parties interested. On the sale the property was offered for sale en masse. The appellee bid the amount of the debt and costs, and continued to bid against the appellant until the amount bid more than equaled her ability to pay. The property was not offered in separate tracts, as provided in the decree for sale. On the offer as a whole the appellant was the highest bidder, and the property was declared sold to him for \$5,025. The master thereupon issued his certificate of purchase to the appellant, paid the judgment and costs including solicitor's fees, and the residue, amounting to \$2,563.21, to the mortgagor, Palmedus D. Roberts, husband of appellee,

over the protest of counsel for appellee, who served notice that objections would be filed on the convening of court the following Monday to the approval of the report of sale, and that a motion to vacate the sale would be made.

On the convening of court the appellee filed her verified written objections to the sale and to the master's report thereof, and petitioned the court to vacate the sale and to order the land resold, in which she averred that the land was worth more than it sold for; that her husband was financially able to and could have paid the mortgage debt and prevented a foreclosure; that her husband had children by a former marriage, who opposed this second marriage, and who had never become reconciled to the marriage; that these children advised and persuaded her husband to default in payment of his interest charges and to bring about a foreclosure of the mortgage, so that appellee would be defrauded, cheated, and deprived of her homestead and inchoate right of dower in the premises; that she and her husband reside on the 40 acres of the land as a homestead; that, in furtherance of a common design and plan to defraud appellee with respect to her rights and interest in the premises as the wife of the mortgagor, George Goodin, the son-in-law of the mortgagor, became the purchaser at this sale; that it is the purpose and aim of appellant, with the connivance and consent of her husband, to obtain a deed to the premises at the expiration of the period of redemption; that the appellee attended such sale, ready, willing, and able to purchase and intending to bid the amount of the judgment and costs for all the land except the homestead 40, but was prevented from doing so by the master, who offered the land as a whole, and not in separate tracts; that the property is capable of division, and would have sold in separate tracts for a sufficient sum of money to have complied with the decree for sale, without selling her homestead, and should have been offered in separate tracts, and not as a whole; that her highest bid was \$5,000; that she was compelled to desist from further bidding because of her limited resources and means; that she has secured a loan on the balance of the land outside of the homestead sufficient to pay the debts and costs; that if the court vacates the sale, and orders the property sold in separate tracts, and the same is struck off to her, she will join with her husband in a mortgage on part or all of the land to secure the loan; that the excess of the selling price above the debt and costs has been, or is about to be, turned over to her husband; that if the master's report of sale is approved the appellee will be deprived and defrauded of her inchoate right of dower in the homestead by reason of her inability to redeem; that she made demand of the master to vacate

the sale and order a resale, at which time the part of the premises not included in the homestead might be offered first, but that this request was ignored.

The purchaser, George E. Goodin, appellant, leave first being granted by the court, entered his appearance as party defendant and moved the court to strike from the files the objections and exceptions of appellee, which motion was by the court denied. Thereupon appellant filed his written answer, under oath, to the objections, exceptions, and petition of appellee, in which he admits the less material averments of the objections, denies the value of the land as fixed by appellee at \$125 per acre, avers its true value to be \$60 per acre, denies that it was possible for appellee to avoid the foreclosure, and denies all and each of the other allegations in the petition of appellee.

After the taking of testimony on these issues so made up, the court sustained the objection and petition of appellee, refused to approve the master's report of sale, vacated and set aside the sale, and all certificates and documents following and appertaining to the sale, and ordered a resale in separate tracts. Appellant excepted to this ruling and order, and prayed and perfected an appeal to this court. The mortgagor and mortgagee abide the decree.

[1] It is contended by the appellant that the appellee has no standing in court to make and prosecute the proceedings; that the motion to strike the objections should have been sustained; that appellee has waived her rights, and is now estopped to make her objections to the sale.

The circuit court, in setting aside the sale, found that the property sold is susceptible of division and sale in separate tracts, that the property is of a value largely in excess of the judgment and costs against it, and that there was no necessity for the sale of the whole of the premises to satisfy the mortgage indebtedness. Upon examination of the testimony we are of the opinion that the chancellor was justified in the finding of these facts. The property was sold for more than twice the amount due against it. There also appears to have been no good reason for the master's selling the land en masse, when the decree provided otherwise. The decree of sale provided that so much of the land should be sold as was necessary to discharge the amount due against it. This was a clear direction to sell in parcels. The court is warranted in setting aside a sale, where property sold en masse is susceptible of division and sold in separate tracts, and where the decree provides for the sale of only so much as is necessary, and where the sale of the entire property is not necessary.

The appellee is the wife of Palmedus D. Roberts, and lives with him on the northeast quarter of the southwest quarter of the

land described in the decree as a homestead. Upon the hearing the chancellor found that the remainder of the property, aside from that upon which the homestead is situated, is of sufficient value to satisfy the lien of the mortgage, and should be first offered for sale separately from the homestead tract. We are of the opinion that this finding is also sustained by the evidence.

[2] But it is objected that the appellee is but a volunteer, and that when she withdrew her answer she was no longer a party in interest. We cannot agree with this contention. Under section 3 of the Dower Act (Hurd's Rev. St. 1917, c. 41) appellee was entitled to dower out of the land in question as against every person except the mortgagee and those claiming under him. While this right of dower is inchoate, and cannot be asserted in the lifetime of the husband, it is, however, such an interest as can be made the basis of a suit to set aside a deed executed in fraud of the marital rights of the wife. *Higgins v. Higgins*, 219 Ill. 146, 76 N. E. 86, 109 Am. St. Rep. 316; *Bigoness v. Hibbard*, 287 Ill. 301, 108 N. E. 294. In addition it will be noted that the appellee has a homestead interest in the property subject to the mortgage. It follows that the appellee is not a volunteer, in the sense of being one who has no interest in the property in question.

In the case of *Lurton v. Rodgers*, 139 Ill. 554, 29 N. E. 866, 32 Am. St. Rep. 214, it was held that, where property susceptible of division is sold en masse for an inadequate price without first offering the same in separate parcels, the sale will be set aside within a reasonable time. It is the contemplation of the statute relating to sales under foreclosure decrees, as well as under executions, that only so much of the property affected by the lien shall be sold as is necessary to discharge the lien, where the property is susceptible of division. We are of the opinion that the chancellor was justified, under the facts of this case, in holding that the 56 acres not a part of the homestead should have been sold first.

[3, 4] The setting aside of the sale and ordering the property resold was a matter which rested largely within the discretion of the chancellor, whose duty it was to see that the lien be enforced with the least damage possible to the property rights of the mortgagor. Counsel cite numerous cases touching their contention that the chancellor erred in setting aside this sale. The cases cited, however, arose after the sale had once been confirmed, and not where, as here, the objection to the confirmation of the sale was filed immediately after the sale, and before any confirmation had taken place. The chancellor has a broad discretion in the matter of approving or disapproving a master's sale made subject to the court's approval by the terms of the decree. *Jennings v. Dunphy*,

174 Ill. 86, 50 N. E. 1045. Where it appears, as it does here, that the property may be sold in parcels, and where it appears that a portion of the property may be sold for a sufficient amount to cover the judgment and costs against the entire property, thereby leaving a homestead untouched, it is not an abuse of discretion on the part of the chancellor to set aside the sale and to order a resale of the property in separate tracts. The chancellor has the power to set the sale aside on his own motion in a case where such sale is made subject to the approval of the court. It is apparent from the evidence that the foreclosure and sale were brought about as a fraud upon the marital rights of the appellee. She has such an interest in the property as entitles her to the protection of the court against any sale which would result in fraud of her marital rights.

[5] It is also contended that by attending the sale and bidding on the property en masse appellee waived her right to complain that it was not sold in separate tracts. We do not think so. The decree of sale directed the master to sell in separate tracts. Appellee cannot, therefore, by bidding at the sale, be held to have waived her right to have the master in chancery do that which the decree ordered.

The chancellor did not err in setting aside said sale and ordering a resale of the property in separate tracts. The decree of the circuit court will be affirmed.

Decree affirmed.

(283 Ill. 347)

MOLL v. INDUSTRIAL COMMISSION et al.
(No. 12674.)

(Supreme Court of Illinois. June 18, 1919.)

MASTER AND SERVANT — 386 — WORKMEN'S COMPENSATION ACT — ILLEGAL EMPLOYMENT.

Under Workmen's Compensation Act, § 3, declaring the business of mining to be extrahazardous, and Act to Regulate the Employment of Children, § 6, making it illegal to employ in any extrahazardous employment a child under 16 years, a boy under 16 employed by a clay-mining company was illegally employed, and the Compensation Act did not apply to him.

Error to Circuit Court, La Salle County; Samuel C. Stough, Judge.

Proceedings for compensation under the Workmen's Compensation Act by Frank Moll, the employé, opposed by the Illinois Clay Products Company. Compensation was denied by the arbitrator and Industrial Commission, and the decision affirmed on certiorari by the circuit court, which certified the case to the Supreme Court for review. Judgment of the circuit court affirmed.

J. E. Malone, Jr., of La Salle, for plaintiff in error.

Sonnenschein, Berkson, Lautmann & Levinson, of Chicago, for defendant in error.

FARMER, J. Frank Moll was employed June 19, 1916, by Arthur Corbin, a farmer, to work on the farm at a wage of \$22 per month, with board and lodging. He did the ordinary farm work on Corbin's farm until August 16, 1916, when Corbin made a contract with the Illinois Clay Products Company to strip or remove the top surface of earth from a stratum of clay the Clay Products Company was mining and shipping to market. Moll was paid by Corbin the \$22 per month wages while he worked on the job at the Clay Products Company's mine and Corbin was paid by the company. The removal of the top surface from the clay was done under and in accordance with the directions of the Clay Products Company, with plows and scrapers furnished by the company. Moll began work at the company's mine August 16, 1916, and continued to work there until September 19th. Most of the time he was engaged in stripping earth from the clay, but occasionally, when directed by officers of the company to do so, did some other kind of work about the mine. While engaged in the work at the company's mine Moll lodged and boarded at Corbin's and performed chores there mornings and evenings. On the 19th of September, while driving a team hitched to a plow which Jones, president of the company, was riding to make it sink deeper in the ground, a chain attached to the whiffletree broke, and the whiffletree flew back, striking Moll's right leg, breaking both bones above the ankle. A physician was called by the president of the company, and Moll was removed to a hospital, where the fracture was set and where he could receive proper attention. He remained in the hospital until November 24th, and claims he was totally disabled until the 10th of May following, and that there is a permanent partial disability. He made application for an award under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) against the Clay Products Company. Moll was not 16 years old at the time of his injury. He was born October 26, 1900, and was 16 years old the 26th of October following his injury on the 19th of September. The arbitrator who heard the application denied it, and on review by the Industrial Commission that body affirmed the decision of the arbitrator. The cause was removed to the circuit court for review by certiorari. That court affirmed the decision of the Industrial Commission and certified the case was one proper to be reviewed by this court.

At the hearing before the arbitrator it was admitted defendant in error and its employes

were under and subject to the Workmen's Compensation Act, but it was and is denied that plaintiff in error was an employé of defendant in error; the claim being that he was the employé of an independent contractor. Liability to pay compensation was also denied on the further grounds that the employment of the plaintiff in error at the time of his injury was casual, and also because he was under 16 years of age and was engaged in work he could not legally be employed to do.

Plaintiff in error contends: (1) That he was an employé of defendant in error at the time of his injury; (2) that, if he was not, then, under section 31 of the Workmen's Compensation Act, defendant in error is liable because of its failure to require Corbin to insure his liability to pay compensation; (3) that the employment was not casual; (4) that the statute in force at the time of the injury did not prohibit plaintiff in error's employment in the work he was doing.

Plaintiff in error contends that the statute concerning the employment of child labor in force when the injury occurred did not make the employment of minors under 16 years of age illegal in such industries as that of defendant in error; that prior to 1917 the statute enumerated a large number of employments in which children under 16 were forbidden to be employed, and mills were not mentioned among the prohibited employments. By amendment in 1917 mills were specifically mentioned among the forbidden employments, and counsel says the word "mill" embraces defendant in error's plant and occupation, employment in which of minors under 16 years of age was not illegal before 1917. Plaintiff in error insists that prior to 1917 there was a group of employments declared extrahazardous by the Workmen's Compensation Act not included in the occupations prohibited by the Child Labor Act (Hurd's Rev. St. 1917, c. 48, §§ 20-20a), and that this group embraced employment in the plant of defendant in error.

The act of 1897 to regulate the employment of children in Illinois (Laws of 1897, § 6, p. 91; Hurd's Stat. 1917, § 6, p. 1422) reads:

"No child under the age of sixteen years shall be employed, or permitted or suffered to work by any person, firm or corporation in this state at such extrahazardous employment whereby its life or limb is in danger, or its health is likely to be injured, or its morals may be depraved."

Defendant in error is not under and subject to the Workmen's Compensation Act by virtue of its election to provide compensation to its employés under the act, but because it is engaged in an occupation declared to be extrahazardous by section 3 of the statute. Paragraph 2 of section 5 of the Workmen's Compensation Act provides that "minors who

are legally permitted to work under the laws of the state" shall be considered the same and have the same rights as adults. It is immaterial to a decision of this case whether plaintiff in error is right or wrong in his contention that prior to 1917 the prohibition of sections 20c and 20j of the Child Labor Act did not apply to the occupation and business of defendant in error. It was declared by legislative enactment to be an extrahazardous business. Workmen's Compensation Act, § 3. By section 6 of the Child Labor Act, above quoted, it is made illegal to employ a child under 16 years of age in any such employment. If plaintiff in error was an employé of defendant in error, his employment was illegal, and the Workmen's Compensation Act does not apply to minors who are illegally employed. *Roszek v. Bauerle & Stark Co.*, 282 Ill. 557, 118 N. E. 991, L. R. A. 1918F, 207; *Messmer v. Industrial Board*, 282 Ill. 562, 118 N. E. 993. As in our view this is a complete bar to an award under the Workmen's Compensation Act in favor of plaintiff in error, it is unnecessary to decide the other questions raised and discussed in the briefs.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(283 Ill. 388)

WILSON v. HARROLD et al. (No. 12626.)

(Supreme Court of Illinois. June 18, 1919.)

1. TRUSTS ⇐9—TRUSTEE AS BENEFICIARY—INVALIDITY.

A deed to the grantee "in trust during his natural life and at his death to his lawful heirs, it being expressly understood that but a life estate is hereby deeded * * *" and that the grantee is "to hold * * * absolutely in trust for his lawful heirs," with reservation of the control of the land, etc., to the grantor for his life, did not create a valid trust in the grantee.

2. TRUSTS ⇐140(1)—RULE IN SHELLEY'S CASE—APPLICATION TO TRUST ESTATES.

The rule in Shelley's Case applies to trust estates.

3. DEEDS ⇐128—LIFE ESTATE—RULE IN SHELLEY'S CASE.

Deed to grantee in trust during his life, at his death to his lawful heirs, reciting only a life estate was deeded, and that grantee could not make good title, but was to have use of land only and to hold it in trust "for his lawful heirs of De Witt county and state of Illinois," with reservation of control of land to grantor for life, etc., granted legal life estate to grantee, with remainder to his heirs, so that under the rule in Shelley's Case a fee simple vested in grantee despite use of word "lawful" qualifying "heirs" and their apparent designation as "of De Witt county and state of Illinois," which was surplusage.

4. DEEDS ⇨98—CONFLICT BETWEEN PRINT AND WRITING.

If there is any conflict in a deed between the printed part and the part written in, the written part, in construing it, will control.

5. DEEDS ⇨120—CONSTRUCTION—DISREGARD OF SURPLUS MATTER.

When the grantor in a deed has intermingled unnecessary and meaningless words with words of conveyance, and adds other language after the words of conveyance, serving only to confuse, cut down, or destroy the known legal estates conveyed by proper words, in construing the deed all superfluous and surplusage matter may be disregarded.

Appeal from Circuit Court, De Witt County; George A. Sentel, Judge.

Suit by Ira D. Wilson against William Harrold and others. From decree overruling exceptions to the master's report, and finding for plaintiff, respondents appeal. Decree affirmed.

George J. Smith, of Clinton, for appellants.

Herrick & Herrick, of Farmer City, for appellee.

CARTER, J. This was a bill filed by appellee in the circuit court of De Witt county to quiet the title to 20 acres of land and for the construction of a certain deed. After the pleadings were settled the cause was referred to a master, who found that Charley Harrold took a fee-simple title to said premises through a deed from Presley Williams and wife; that the trust estate created by said deed failed, and that therefore the rule in Shelley's Case applied in the construction of the deed, and that appellants here had no right, title, or interest in and to said land. A decree was entered overruling the exceptions to the master's report, and a finding was entered in accordance with said report. From that decree this appeal has been perfected.

Presley Williams was the owner of said 20 acres, and on January 7, 1895, executed, with his wife, the deed in question. After the usual opening, naming the grantors and their residence, the deed continues:

"For and in consideration of love and affection and five (\$5) dollars in hand paid, convey and warrant to Charley Harrold in trust during his natural life and at his death to his lawful heirs, it being expressly understood that but a life estate is hereby deeded to said Charley Harrold, and that he cannot make a good title by deed or other conveyance but is to have the use of the land to be conveyed, only, and is to hold it absolutely in trust for his lawful heirs of De Witt county and state of Illinois, the following described real estate, to wit: [describing it.] Hereby reserving the control of said land and the right to collect, have, hold and use the rents

and profits of said land to said Presley Williams for, and during his natural life; and it is hereby agreed and expressly understood by and between all the parties to this instrument that the title to and in the above-described land does not pass from said grantors, Presley Williams and Jemimah Williams, to the said Charley Harrold in trust as above until the death of the said Presley Williams, but at his death the title in said lands in trust is to pass to the said Charley Harrold, but only in trust, it being the intention of the said grantor to reserve and hold a life estate in the above-described land to and for the said Presley Williams."

The record shows that Presley Williams departed this life testate August 13, 1898, and his estate was duly probated; that Charley Harrold had born to him in lawful marriage three children, who are the appellants herein; that on May 4, 1912, Harrold and his wife conveyed and warranted to Ira D. Wilson, appellee herein, for a consideration of \$1,500, the fee-simple title in said 20 acres of land by deed, which was duly filed for record.

Counsel for the appellants argues that Charley Harrold took a life estate only in the deed from Mr. and Mrs. Williams, and that his three children took the fee under the designation of "his lawful heirs," contained in said deed; that whether this is true or not, the deed should be so construed as to exclude the rule in Shelley's Case from applying thereto; that it was plainly the intention of the grantors that Harrold should only take a life estate. Counsel for appellee argue that Charley Harrold took a fee-simple title under said deed; that as there was no legal separation of the legal and equitable estates in the conveyance to Harrold, there was a merger of the estates in him as sole trustee and beneficiary of the life estate, and therefore the rule in Shelley's Case applies to the remainder conveyed to the "lawful heirs," and Harrold took title to the entire fee.

[1] The first question to be considered is whether the attempt of Presley Williams and wife to create by their deed a trust in Charley Harrold failed. It has frequently been stated by the authorities that a person cannot both be a trustee and a beneficiary; that "this doctrine results from that of merger of estates rather than from any incompatibility of interest between the trustee and cestui que trust. It is undoubtedly true that the same person cannot be at the same time sole trustee and sole beneficiary of the same identical interest; but a cestui que trust is not absolutely prohibited from occupying the relation of trustee for his own benefit, and especially is this so when he is but one of several trustees, or where he is a trustee for himself and others." 39 Cyc 248, and authorities there cited. See, also,

28 Am. & Eng. Ency. of Law (2d Ed.) 955; 1 Perry on Trusts (6th Ed.) § 347, note (a), in which are cited, among other authorities, the decisions of this court in *Burbach v. Burbach*, 217 Ill. 547, 75 N. E. 519, and *Spengler v. Kuhn*, 212 Ill. 186, 72 N. E. 214. In 1 Perry on Trusts (3d Ed.) § 13, that author states:

"No person can be both trustee and cestui que trust at the same time, for no person can sue a subpoena against himself. Therefore, if an equitable estate and a legal estate meet in the same person the trust or confidence is extinguished, for the equitable estate merges in the legal estate."

This court has held that the trusteeship cannot be predicated of one who holds for life only, and for his or her sole use and benefit. *Dick v. Ricker*, 222 Ill. 413, 78 N. E. 823, 113 Am. St. Rep. 426. In *Thompson v. Adams*, 205 Ill. 552, 556, 69 N. E. 1, 2, this court, in construing a will, said:

"No trust is created by this will. The widow is to have the sole use and benefit of the real and personal property so long as she lives and remains unmarried, and upon her death or remarriage possession and the title in fee simple will unite at once in the same persons. The provision of the will creating her a trustee is therefore inoperative. 'A trusteeship cannot be predicated of one who holds for life only, and for his or her own sole use and benefit, and the instrument which gives the life estate also gives the remainder to others in their own right, and no duty other than those that grow out of their legal relation is imposed upon the life tenant.' *Schaefer v. Schaefer*, 141 Ill. 337 [31 N. E. 136]. The rights, duties, and obligations of the widow under this will, so long as she remains unmarried, are those of a life tenant only. The words used for the purpose of creating a trust may be rejected as surplusage."

These three decisions by this court can in no way be distinguished, on the facts or the law, from the case before us, and therefore the rule laid down in those cases must control here. It may be true that recent authorities are holding more liberally, and the courts are becoming more and more inclined towards carrying out the intention of the grantor or testator in regard to trusts, rather than attempting to defeat the intention by the application of strict rules as to merger or otherwise, as was said in *Irving v. Irving*, 21 Misc. Rep. 743, 47 N. Y. Supp. 1052, in accordance with the reasoning in *Lewin on Trusts* (11th Ed.) 914, but the rules laid down by this court must govern in matters of this kind rather than the reasoning in other jurisdictions.

Counsel for appellants relies on the reasoning of this court in *Hagan v. Varney*, 147 Ill. 281, 35 N. E. 219, as tending to uphold his argument that a trust was here created. The wording of the instrument there construed is entirely different from that in this

case, and is different from the wording of the instruments construed in the three cases in this court heretofore cited. If there is anything in that decision contrary to the conclusion here reached that no trust was created, it must be held that such reasoning was overruled in effect by the opinions of this court in *Schaefer v. Schaefer*, supra, *Thompson v. Adams*, supra, and *Dick v. Ricker*, supra. The case of *Fowler v. Black*, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670, tends also to support the same conclusion.

[2] Counsel for appellants further argues that even though the trust has failed the rule in *Shelley's Case* will not apply and merge the fee in Harrold, for the reason, as we understand the argument, that this rule does not apply to trust estates. We find no authorities supporting this argument. In 1 Perry on Trusts (6th Ed.) § 358, this question is discussed, and the author says, among other things:

"As trusts are wholly independent of tenure they ought not to be affected by the rule, and a few cases have seemed to indicate that they were withdrawn from the operation of it; but it is now established that the same rule shall apply to the same limitation, whether it is of an equitable or a legal estate"

—citing numerous authorities, all apparently upholding the doctrine of the text, and this seems to be the general conclusion reached by the authorities. It is, however, stated by some writers that the rule does not apply to executory trusts, using the word "executory" in a limited sense; that all trusts which are not dry or passive are executory in some sense, but that a trust, to be subject to the rule, must be such a one that its limitations are left to the court to frame, the writing only giving general directions to guide the court in finding what estate is created. For a full discussion of this doctrine see *Lewin on Trusts* (11th Ed.) pp. 120-130, inc.; 1 Perry on Trusts (6th Ed.) § 359; *Tiedeman on Real Property* (3d Ed.) § 322, note 16. So far as we are advised, this court has always assumed that the rule in *Shelley's Case* applied to trust estates. See *Bennett v. Bennett*, 217 Ill. 434, 75 N. E. 339, 4 L. R. A. (N. S.) 470; *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012; *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N. E. 139; *Harvey v. Ballard*, 252 Ill. 57, 96 N. E. 558; *Carpenter v. Hubbard*, 263 Ill. 571, 105 N. E. 688; *Nowlan v. Nowlan*, 272 Ill. 526, 112 N. E. 259.

[3-5] There being no trust estate created, the instrument granted a legal life estate to Charley Harrold with remainder to his heirs. "If an estate for life is granted by any instrument and the remainder is limited by the same instrument, either mediately or immediately, to the heirs of the life tenant, the life tenant takes the remainder as well as the life estate." *Bails v. Davis*, 241 Ill. 536,

89 N. E. 706, 29 L. R. A. (N. S.) 937. This instrument, therefore, in granting the legal life estate to Harrold and the remainder to his heirs, brings the wording squarely within the rule in Shelley's Case, and therefore a fee simple was vested in Harrold. Winter v. Dibble, 251 Ill. 200, 95 N. E. 1093, Deemer v. Kessinger, 206 Ill. 57, 69 N. E. 28, Aetna Life Ins. Co. v. Hopplin, 249 Ill. 408, 94 N. E. 669, and Fowler v. Black, supra, all tend to support this conclusion. This rule must control even though the intention of the grantor is shown clearly by the instrument to have been otherwise.

Counsel for appellants argues that the above rule should not apply because the instrument, instead of leaving the remainder simply to the heirs of Harrold, left it to his "lawful heirs." The qualifying adjective "lawful" before the word "heirs" does not in any way change the meaning of the word "heirs" to one of purchase rather than a word of limitation. Deemer v. Kessinger, supra; Webbe v. Webbe, 234 Ill. 442, 84 N. E. 1054, 17 L. R. A. (N. S.) 1079; Stisser v. Stisser, 235 Ill. 207, 85 N. E. 240. See, also, Pease v. Davis, 225 Ill. 408, 80 N. E. 249.

It is further argued by counsel for appellants that the rule should not apply because the instrument not only provides that the land shall go to the lawful heirs of Harrold, but still further particularizes by saying that it should go to "his lawful heirs of De Witt county and state of Illinois," and that these words as used can still be said to make a particular description of the heirs the same as if the instrument had used the word "children"; that if the word "heirs" is used as meaning "issue" or "children," then the rule in Shelley's Case would not apply. Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589; Dick v. Ricker, supra; Stisser v. Stisser, supra. Apparently the original deed from Presley Williams and wife to Charley Harrold was drawn upon a printed form, and the proper erasures were not made in preparing the deed so as to erase the words "De Witt county and state of Illinois," and these words referred to the place of the residence of the grantee, and have no relation to the word "heirs." They form no part of the words of the conveyance and are really surplusage. Counsel for appellants does not deny that these words were a part of the printed form, and that this explanation might be a reasonable one as to how they came to be in this instrument. Counsel for appellee argue that no sane man would limit an estate to his heirs of De Witt county only; that in the course of nature, affection, and love for his donees he would follow rules of consanguinity and not geographical maps or municipal boundaries. If there is any conflict in a deed between

a printed part and the part written in, the written part will control in construing it. Miller v. Mowers, 227 Ill. 392, 81 N. E. 420, and cases there cited. When the grantor in the instrument has intermingled unnecessary and meaningless words with words of conveyance, and adds other language after the words of conveyance which only serve to confuse, cut down, or destroy the known legal estates conveyed by proper words used, then all superfluous and surplusage matter may be cut out and disregarded. 13 Cyc. 619; 8 R. O. L. 1038, 1044. The words "of De Witt county and state of Illinois" are no part of the grantor's description of the estate granted. This being so, the rule in Shelley's Case applies, and the decree rightly held that the fee-simple title was conveyed by this deed and vested in Charley Harrold.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(238 Ill. 327)

MITCHELL v. LOWDEN, Governor, et al.
(No. 12695.)

(Supreme Court of Illinois. June 18, 1919.)

1. STATUTES \S 35½ — SUBMISSION TO POPULAR VOTE—PUBLICATION.

Provisions for publication in Laws 1917, p. 696, providing for the construction of a statewide system of durable, hard-surfaced roads and for a bond issue of \$60,000,000 which, under Const. art. 4, § 18, had to be published and ratified by a vote of the people before becoming effective are sufficient, and no separate law for publication is necessary.

2. CONSTITUTIONAL LAW \S 12 — CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Constitutional provisions must be construed like a statute with reference to the object to be accomplished, and when the real purpose is apparent, the language must be construed so as to carry the purpose into effect; mere words yielding to the intent.

3. CONSTITUTIONAL LAW \S 12 — STATUTES \S 212—CONSTRUCTION.

It is not to be presumed that a provision was inserted in a Constitution or statute without reason, or that a result was intended inconsistent with the judgment of men of common sense guided by reason.

4. STATUTES \S 181(2)—CONSTRUCTION.

When the words of a statute, followed literally, lead to an absurd consequence, there is a sufficient reason to depart from the language.

5. STATUTES \S 35½—REFERENDUM—NUMBER OF VOTES.

Under Const. art. 4, § 18, providing that the Legislature shall create no debt unless the law authorizing the same shall have been submitted to the people and received a majority of

the votes cast for members of the General Assembly at such election, Laws 1917, p. 696, providing for a state-wide system of hard-surfaced roads and for a \$60,000,000 bond issue, in favor of which were cast over 600,000 votes, must be deemed ratified, for nearly three-fourths of the voters expressed themselves in favor of the act, and this is so though the total number of votes cast for members of the General Assembly exceeded 2,000,000, each voter being entitled to 3 votes; for any other construction would require for ratification a greater vote than all the electors were entitled to cast.

6. STATUTES \Leftrightarrow 35 $\frac{1}{2}$ —INDEBTEDNESS—OEEATION—REFERENDUM.

Under Const. art. 4, § 18, requiring that, where a law authorizing the contracting of a debt shall be submitted to the people, provision shall be made at the time for the payment of interest annually as it shall accrue, two separate acts are not required, one authorizing the debt and the other levying the tax, so Laws 1917, p. 696, providing for a \$60,000,000 bond issue for hard-surfaced roads, and for payment of interest in the single act, is valid.

7. STATUTES \Leftrightarrow 19—PASSAGE—YEA AND NAY VOTE.

Const. art. 4, § 12, requiring a yea and nay vote upon each bill separately upon the final passage, does not require a separate vote upon each section or provision of a bill; therefore Laws 1917, p. 696, providing for a \$60,000,000 bond issue for hard-surfaced roads and for the payment of interest on the bonds, etc., is not invalid because there were no separate yea and nay votes on its various provisions.

8. STATUTES \Leftrightarrow 123(4)—TITLE—SUFFICIENCY—HIGHWAYS.

Laws 1917, p. 696, entitled "An act in relation to the construction by the state of Illinois of a state-wide system of hard-surfaced roads upon public highways of the state and the provision of means for the payment of the cost thereof by an issue of bonds," which authorized a \$60,000,000 bond issue and provided for the levy of an annual tax sufficient to pay the interest, provided that no tax should be levied in any year in which a sufficient amount had been appropriated from other sources of revenue to pay the interest and principal of the bonds falling due that year, *held* not invalid on ground that it included provisions not expressed in its title, such as appropriations from the road fund created by the Motor Vehicle Law, etc., for the act makes no such appropriation, though the Motor Vehicle Law provides that the moneys in the road fund created shall first be appropriated to payment of bonded indebtedness for construction of permanent highways.

9. CONSTITUTIONAL LAW \Leftrightarrow 205(2), 291—BONDS FOR HIGHWAY IMPROVEMENTS—PAYMENT IMPOSED ON MOTOR VEHICLE OWNERS—IMMUNITIES—DUE PROCESS.

Though the Motor Vehicle Law provides that the road fund so created shall be first applied to payment of bonded indebtedness for construction of permanent highways, *held*, that Laws 1917, p. 696, providing for a state-wide

system of hard-surfaced roads and for a bond issue of \$60,000,000, is not invalid under Const. art. 2, § 2, as imposing upon owners of motor vehicles burdens not imposed upon the owners of other kinds of property, or granting immunity to owners of other kinds of property in violation of article 2, § 14.

10. HIGHWAYS \Leftrightarrow 99 $\frac{1}{4}$, New, vol. 14 Key-No. Series—REVENUE—CONSTITUTIONAL REQUIREMENTS.

Though the Motor Vehicle Law provides that the road fund so created shall be applied first to payment of bonded indebtedness for construction of permanent highways, *held*, that Laws 1917, p. 696, providing for a state-wide system of hard-surfaced roads and for a bond issue of \$60,000,000 is not invalid as imposing upon owners of motor vehicles the entire cost of constructing such roads in violation of Const. art. 9, § 1, requiring the General Assembly to provide needful revenue by levying a tax by valuations.

11. STATES \Leftrightarrow 119—ASSUMING DEBTS OF COUNTIES—RELEASE TO COUNTIES FOR SHARE OF TAXES.

Laws 1917, p. 696, providing for a state-wide system of hard-surfaced roads and authorizing a \$60,000,000 bond issue which provides in section 10 that the department of public works and buildings to which the work is confided may make use of any paved road which may have been constructed by any county, and in such case shall allot to the county a sum of money equal to the actual cost of such paved road, is not invalid as violating Const. art. 4, § 20, prohibiting the assumption of debts of a county, or article 9, § 6, declaring that the General Assembly shall have no power to release any county from its proportionate share of taxes to be levied for state purposes.

12. STATES \Leftrightarrow 131—APPROPRIATION STATUTES—VALIDITY—BOND ISSUE.

Laws 1917, p. 696, providing for a state-wide system of hard-surfaced roads, and authorizing a \$60,000,000 bond issue, is not invalid under Const. art. 5, § 16, requiring appropriation bills to specify the amounts and purposes in distinct items and sections, for the act authorized the department of public works and buildings to carry out the road building, and the Legislature could not specify in minute detail each expenditure, and in the very nature of things each contract for the purchase of material or tools cannot be considered an item for specification.

13. HIGHWAYS \Leftrightarrow 165—LEGISLATURE—POWER OF.

Subject to constitutional limitation, the power of the Legislature over public highways is absolute, and it may give jurisdiction over them to such authorities as it may see fit and change the control of them at pleasure.

14. STATUTES \Leftrightarrow 97(2)—LOCAL LEGISLATION—HIGHWAYS.

Laws 1917, p. 696, providing for a state-wide system of hard-surfaced roads on public highways, which placed highways under the control of the Department of Public Works and Buildings, is not invalid as local legislation in

violation of Const. art. 4, § 22; for, while the act does not include all highways in the state, it includes a comprehensive system.

15. CONSTITUTIONAL LAW §50, 67—"LEGISLATIVE POWER"—"JUDICIAL POWER."

"Legislative power" is the power to enact laws or to declare what the law shall be; while "judicial power" is the power which adjudicates upon the rights of citizens, and to that end construes and applies the law.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, Judicial Power; Legislative Power.]

16. CONSTITUTIONAL LAW §62, 80(2) — DELEGATION OF LEGISLATIVE AND JUDICIAL AUTHORITY.

Laws 1917, p. 696, providing for a state-wide system of public roads which named the termini, etc., of the principal highway systems and in a general way directed the course they were to follow. *held* not invalid as delegating, in violation of Const. art. 3, legislative and judicial power to the department of public works and buildings, which was given authority to carry the act into effect.

Appeal from Circuit Court, Sangamon County; Elbert S. Smith, Judge.

Bill by John M. Mitchell against Frank O. Lowden, Governor, and others. From a decree dismissing the bill, complainant appeals. *Affirmed*.

Green & Risley, of Mt. Carmel, for appellant.

Edward J. Brundage, Atty. Gen., Albert D. Rodenberg, of Springfield, Edward C. Fitch and Noah C. Balnum, both of Chicago, and Arthur R. Hall, of Danville, for appellees.

DUNN, O. J. The Fiftieth General Assembly passed an act entitled "An act in relation to the construction by the state of Illinois of a state-wide system of durable hard-surfaced roads upon public highways of the state and the provision of means for the payment of the cost thereof by an issue of bonds of the state of Illinois." Laws of 1917, p. 696. By this statute it was enacted that a state-wide system of durable, hard-surfaced roads be constructed by the state upon its public highways, and that, for the purpose of providing means for the payment of the cost of such construction, the state, through its officers, be authorized to issue, sell, and provide for the retirement of bonds to the amount of \$60,000,000. The sum of \$60,000,000 to be derived from the sale of bonds was appropriated to the department of public works and buildings, and the act provided for the levy of an annual tax of an amount sufficient to pay the interest as it should accrue and the principal of the bonds at maturity, provided that no tax should be levied in any year in which a sufficient amount had been appropriated from other sources of rev-

enue to pay the interest and principal of the bonds falling due that year. The construction of the state-wide system of roads was placed under the general supervision and control of the department of public works and buildings, which was authorized to cause the roads to be constructed at the earliest possible time consistent with good business management. It was declared that the general location of the routes upon which the proposed roads were to be constructed should be substantially as described in section 9, so as to connect with each other the different communities and principal cities of the state, provided that the department of public works and buildings should have the right to make such minor changes in the location of the routes as might become necessary in order to carry out the provisions of the act. Section 9 described the general location of 46 routes by naming the termini of each, giving the general direction of the road from one terminus to the other, and stating that such route afforded certain named places and the intervening communities reasonable connections with each other, covering the state with a network of roads reaching every county in the state. On February 19, 1919, John M. Mitchell, a citizen and taxpayer residing in Wabash county, filed a bill in the circuit court of Sangamon county against the Governor, secretary of state, auditor of public accounts, state treasurer, director of public works and buildings, and other officers of that department, the purpose of which was to have the act declared unconstitutional and the defendants enjoined from enforcing it. Objections were alleged to the manner of its adoption, to its title, and to its contents. The defendants answered, a replication was filed, the cause was heard upon the pleadings and evidence, and the court found the issues for the defendants and entered a decree dismissing the bill for want of equity, from which the complainant has appealed.

The cause was submitted at the April term, and, an early decision being desired on account of the public interest involved, a judgment was rendered at that term affirming the decree of the circuit court for the reasons now to be stated.

The objections made to the adoption of the act were that it was not constitutionally submitted to the people as required by section 18 of article 4 of the Constitution, and did not receive the majority of votes as required by that section.

Before the debt of \$60,000,000 created by this act could be contracted, section 18 of article 4 of the Constitution required that the law authorizing it should have been submitted to the people at a general election and have received a majority of the votes cast for members of the General Assembly at such election; that the General Assembly

should provide for the publication of the law for three months, at least, before the vote of the people should be taken upon the same; that provision should be made at the time for the payment of the interest annually as it should accrue, by a tax levied for the purpose or from other sources of revenue; and that the law levying the tax should be submitted to the people with the law authorizing the debt to be contracted. The act itself provided that before it should go into full force and effect it should, at the general election in November, 1918, be submitted to the people and receive a majority of the votes cast for members of the General Assembly at that election, and it directed that the secretary of state should cause publication of the act to be made once each week for three months, at least, before the vote of the people should be taken upon the act, in at least two daily newspapers, one published in Springfield and one in Chicago. The act was published in all respects in accordance with this direction, and the law was submitted to the people and voted on at the election in accordance with the terms of the act. The canvass of the vote by the state canvassing board showed the whole number of votes cast at the election was 975,545, the whole number of votes cast for members of the General Assembly was 898,821, the whole number of votes cast for the act was 661,815, and the whole number against the act was 154,296, and that the majority in favor of the act was 212,404. The appellant insists that the finding by the state canvassing board of this majority in favor of the act is erroneous, for the reason that the canvassing board had regard to the number of voters (898,821) who voted for members of the General Assembly instead of the number of votes cast by such voters for members of the General Assembly, which number of votes was three times the number of voters, and that by a proper construction of the law the majority of the votes cast at the election for members of the General Assembly was not cast for the act.

[1] The objection to the submission of the act is based upon the requirement of the Constitution that "the General Assembly shall provide for the publication of said law for three months at least before the vote of the people shall be taken upon the same," and the argument is that only by the enactment of a statute can the General Assembly cause publication of the law to be made. There is no basis for this argument. The General Assembly may provide in the act itself, by separate resolution or by an independent law, for the publication. The object of the publication is to give notice to the people that they may have an opportunity to express their will by their votes. While the publication, if not authorized by the General Assembly, is of no validity, a statute is not

necessary to confer authority. A vote directing it is sufficient. The statute which was enacted by the Legislature was really a law submitting to the people a proposition to be voted upon at the general election for a law on the subject of state roads, to become effective upon an affirmative vote by the people. The law submitting the proposition became effective on July 1st, and bound every one to comply with its provision to submit the proposal to a vote, and the secretary of state was bound to publish the law.

[2-5] It is seriously contended, however, that the votes cast for members of the General Assembly were three times the number taken by the state canvassing board as the basis of its finding—that is, 2,696,463 instead of 898,821. The latter is the number of voters who cast votes for members of the General Assembly, and while the votes cast in favor of the law numbered nearly three-fourths of all the voters, it is argued that the language of the Constitution, and the law itself, is not obscure or uncertain, but is definite and unambiguous and leaves no room for construction; that the total number of votes cast for members of the General Assembly was 2,696,463; that nothing less than 1,348,232 is a majority of that number; and that less than half that number of votes were cast in favor of the law. This is literally true, but it is perfectly clear that it is not the meaning of the Constitution that the law did not, therefore, receive a constitutional majority; for such meaning involves the absurdity of holding that the framers of that instrument, and the people in adopting it, intended to prohibit the creation of a debt, with the exception specified in section 18, unless the proposition for its creation should receive at an election a greater vote than all the electors were entitled to cast. It is conceivable that they might have desired to prohibit the creation of a debt, but not that they would take this indirect method of prohibiting while appearing to permit. A constitutional provision must be construed like a statute with reference to the object to be accomplished, and when the real purpose is apparent the language must be construed so as to carry the purpose into effect. It is not to be presumed that a provision was inserted in a Constitution or statute without reason or that a result was intended inconsistent with the judgment of men of common sense guided by reason. Not the letter of the law only, its mere words, but its spirit and object, must be taken into consideration, and when a particular intent to effect a specific purpose is manifest, respect must be paid to that intent. When the words of a statute, followed literally, lead to an absurd consequence, there is sufficient reason to depart from the language. *Perry County v. Jefferson County*, 94 Ill. 214. The intention of section 18 of article 4 of the Constitution was to restrict

the General Assembly in imposing an indebtedness upon the state to cases where a majority of the voters at an election for members of the General Assembly should vote in favor of the act incurring the liability, and that is the construction which we give to its language.

[6] Section 18 of article 4 requires that, where a law authorizing the contracting of a debt shall be submitted to the people, provision shall be made at the time for the payment of the interest annually as it shall accrue, by a tax levied for the purpose or from other sources of revenue, and that the law levying the tax shall be submitted to the people with the law authorizing the debt to be contracted. It is argued that this requires two separate acts—one authorizing the debt; the other levying the tax. There is no basis for this argument. Since provision for the payment of interest must be made at the same time as provision for incurring the debt, the natural way would be to include both in one act; but, whether contained in one act or not, the Constitution requires all to be submitted to the people at the same time.

[7] In connection with this last objection, and based upon the proposition that section 18 requires two acts—one for incurring the debt, the other for levying the tax to pay the interest—the argument is made that the statute violates section 12 of article 4 of the Constitution, which requires a ye and nay vote upon each bill separately upon the final passage. This section does not require a separate vote upon each section or provision of the bill. The bill may contain many provisions creating new rights and duties, and so establishing new laws applicable to the conditions which are the subject of the enactment, but it is not necessary that each of these provisions be voted upon separately. For instance, section 4 of the Local Option Law (Hurd's Rev. St. 1917, c. 43, § 28) creates the crimes of forgery and perjury which may be committed in connection with the filing and verification of the petition for a vote, but the fact that a law for the creation of anti-saloon territory and a law creating a new criminal offense of forgery or perjury were included in the single enactment did not invalidate the act. *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994.

[8] The appellant contends that, even if the act was constitutionally submitted and approved, its terms violate several provisions of the Constitution. One of them is section 13 of article 4, in regard to the title which is set out in the beginning of this opinion. It is insisted that the act contracts a debt on behalf of the state, levies a tax for the payment of bonds, appropriates money from the state treasury, from the road fund created by the Motor Vehicle Law (Hurd's Rev. St. 1917, c. 121, §§ 269a-

269v), and from other sources of revenue, and provides for making compensation to certain counties of the state, and that none of these subjects are expressed in the title. The title of an act is not intended to be an index of its contents. The object of the constitutional restriction is to prevent the inclusion in an act of provisions foreign to the subject of legislation which have no legitimate tendency to accomplish the purpose of the act as expressed in the title. Provisions, however diverse, which tend to make effectual the purpose so expressed, may be included in the act, though not expressed in the title. *People v. McBride*, supra.

The main purpose of the act in question is the construction of a state-wide system of durable, hard-surfaced roads. Incidental to that purpose, and necessarily connected with its accomplishment, is the means of payment, which the act provides, in accordance with its title, shall be by an issue of bonds by the state. The money arising from the sale of bonds must be paid into the state treasury, and, under section 17 of article 4 of the Constitution, can only be drawn from the treasury in pursuance of an appropriation made by law. Before bonds can be sold it is necessary to make provision for their payment, and this can be done only by the levy of a tax for that purpose or from some other source of revenue. Therefore, in order to accomplish the purpose of the act and the construction of the roads to which it refers, it was proper, if not necessary, to include in it the appropriation of money, the issue of bonds, and the levy of a tax for their payment. The act makes no appropriation of the road fund created by the Motor Vehicle Law. Section 19 of that law directs that the fund shall, if and when the state shall incur any bonded indebtedness for the construction of permanent highways, be set aside and used for the purpose of paying and discharging annually the principal and interest on such bonded indebtedness then due and payable, and for no other purpose. The act under consideration, in providing for the payment of the principal and interest of the bonds by a tax levied for the purpose or from other sources of revenue, as required by the Constitution, has provided that the moneys in the road fund created by section 19 of the Motor Vehicle Law shall first be appropriated to the payment of the principal and interest of the bonds, and only in case of a deficiency of that fund to pay the interest and bonds shall any tax be levied for that purpose in any year. The only means provided in the act for the payment of the cost of the roads is that mentioned in the title—an issue of bonds—to which is incidental the levy of a tax for the payment of them in case the funds already provided for that purpose prove insufficient.

[9, 10] The claim that the act violates section 2 of article 2 of the Constitution by imposing upon the owners of motor vehicles and their property burdens not imposed upon the owners of other kinds of property, and in so doing also grants an immunity to owners of all other kinds of property, in violation of section 14 of article 2, fails, for the reason that the act neither imposes such burden nor grants any immunity. For the same reason the argument also fails that the act imposes upon the owners of motor vehicles the entire cost of the roads, and so violates section 1 of article 9 of the Constitution, which requires the General Assembly to provide such revenue as may be needful by levying a tax by valuations, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property. The Motor Vehicle Law provides for the registration of motor vehicles and requires every owner of a motor vehicle to pay a fee to the state annually, but the amount, time, and manner of such payment are in no way affected by the act now under consideration.

[11] Section 10 of the act provides that the department of public works and buildings may make use, in the construction of the roads, of any paved road of a proper, durable, hard-surfaced type which may have been constructed by any county and the state, or by the county alone and accepted by the state, and in such case an amount of money equal to the share of the actual cost of such paved road paid by the county shall be allotted to the county, to be used, at the option of the county, either in the payment of any bonds issued by the county and used to improve its state-aid roads, or in the improvement of its state-aid roads by the construction thereon of a durable, hard-surfaced road under the direction and to the satisfaction of the department of public works and buildings. The objection is made that this section is an assumption of the debts of the counties whose roads are so used and discharges their inhabitants from their proportionate share of the state taxes, and so violates section 20 of article 4 and section 6 of article 9 of the Constitution. Section 10 merely provides for the payment by the state of the cost of a road of which it takes control as a part of the state-wide system. The state assumes no debt, but pays in cash for what it purchases, and the county may use the money to construct or improve its other roads, or, at its option, in the payment of its bonds issued to improve its state-aid roads. The taxes of the inhabitants of the county for the construction of a state-wide system of roads will not be affected in any way. The county will merely be paid for the cost it has paid for the road taken.

[12] The appellant contends that the ap-

propriation of \$60,000,000 to be derived from the sale of the bonds violates section 16 of article 5 of the Constitution, because it fails to specify the objects and purposes for which the appropriation is made, appropriating to such objects and purposes, respectively, their several amounts in distinct items and sections. The appellant does not indicate the several objects and purposes for which the several amounts should be appropriated in distinct items and sections. The act requires all contracts for construction to be let to the lowest responsible bidder. It authorizes the department of public works and buildings to purchase and supply any labor, tools, machinery, supplies, and material needed for the work, to make all final decisions affecting the work and all regulations it may deem necessary for the proper management and conduct of the work and for carrying out all the provisions of the act to the best interest and advantage of the people of the state. The single purpose for which the money appropriated is to be used is the construction of the system of roads. There will, perhaps, be many contracts for the construction of parts of the roads, but each contract is not an item which can be separately stated and for which a definite amount can be appropriated. There will, perhaps, be many contracts for the purchase of material and tools, but each contract of purchase is not an item which can be separately stated and for which a definite amount can be appropriated. Nor is the purchase of all of one kind of material such an item. All are items of the aggregate, but the Constitution does not require an itemization in minute detail of every expenditure of money in connection with the general purpose for which an appropriation is made. The Legislature could not know at the time of making the appropriation, even approximately, the amount required for each of the various contracts or purchases. A similar objection was made to three acts appropriating sums of money in gross for "building and maintaining state-aid roads" in *Martens v. Brady*, 264 Ill. 178, 106 N. E. 266, and was held invalid. The original section 16 of article 5 made no special reference to appropriations. So much of the section as now refers to bills making appropriations of money was adopted as an amendment in 1884. At the next session after the adoption of this amendment the Legislature made an appropriation of \$200,000 for the purchase of a site and constructing buildings thereon for the soldiers' and sailors' home and for fitting the same for occupancy, without separating the amount into items. Laws of 1885, p. 16. The same Legislature made a similar appropriation of \$73,000 for the construction and completion of the main building of the Eastern Illinois Hospital for the Insane (Laws of 1885, p. 13) and numer-

ous other like appropriations. It has been the customary, if not the uniform, method of making appropriations for the construction of buildings and other public works, and the Supreme Court building was constructed and the Centennial Memorial building is in process of construction by means of appropriations so made. Laws of 1895, p. 76; Laws of 1907, p. 24; Laws of 1917, p. 66. This legislative construction while not obligatory upon the court, is entitled to consideration, and we regard it as according with the Constitution.

[13, 14] The contention is made that the act violates the prohibition of section 22 of article 4 of the Constitution against local or special laws for laying out, opening, altering, and working roads or highways, and that it delegates legislative and judicial powers to the department of public works and buildings, in violation of article 3. Subject to constitutional limitation, the control of the Legislature over the public highways is absolute, and it may give jurisdiction over them to such authorities as it may see fit and change the control of them at pleasure. *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; *Illinois Malleable Iron Co. v. Lincoln Park Com'rs*, 263 Ill. 446, 105 N. E. 336, 51 L. R. A. (N. S.) 1203. By general laws it has delegated to municipal authorities of cities and villages, to park commissioners, to the commissioners of highways of towns and counties, as governmental agencies, certain authority and control over highways. By the present act it changes this authority and control, so far as the highways coming within its terms are concerned, and brings them under the authority and control of another governmental agency—the department of public works and buildings. The act is not local; for, while it does not include all the highways in the state, it does provide a system of highways affording reasonable connection with one another to practically all parts of the state. The basis upon which the location of the routes established by the act was made is declared to be the connection with each other of the different communities and the principal cities of the state. It is not argued, and cannot well be after a consideration of the routes established, that this basis has been disregarded. A substantially similar basis of classification of roads was held reasonable in *Martens v. Brady*, *supra*, and it was also held that the objection that the statute was local because only a part of the roads in the state would be brought under its provisions was untenable.

[15, 16] There is no delegation of either legislative or judicial power to the department of public works and buildings. It is true that many questions—the material to be used, the width of the roadways, the char-

acter of the construction and the plans and specifications therefor, the terms and conditions of contracts, the acceptance or rejection of work done, and the numberless details in carrying out the provisions of the act—are left to the determination of the department of public works and buildings, which is authorized and required to make all final decisions. The decision of such questions is ministerial. Legislative power is the power to enact laws or declare what the law shall be. *People v. Roth*, 249 Ill. 532, 94 N. E. 953, Ann. Cas. 1912A, 100. Judicial power is the power which adjudicates upon the rights of citizens, and to that end construes and applies the law. *Owners of Lands v. People*, 113 Ill. 296. Assessors and boards of review in valuing property for taxation, clerks of courts and sheriffs in taking and approving bonds, city councils in granting or revoking licenses to keep dramshops, superintendents of schools in granting or revoking teachers' certificates, boards of examiners in granting and revoking licenses to practice medicine or pharmacy, fish commissioners in granting permits to take fish for propagation at times and by means otherwise prohibited, all exercise discretion and judgment in the performance of their duties, but they do not, while executing the law under which they act, make or declare, construe or apply any law, and the acts which respectively confer upon them the powers which they exercise do not delegate either legislative or judicial power. *People v. Roth*, *supra*; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995. The selection of the public highways to be affected is not left to the arbitrary discretion of the department, as the appellant's bill avers. It is true, as the bill alleges, that the act fixes the routes upon which the roads are to be constructed in a general way, by naming the termini, which are in some cases hundred of miles apart, with no direct public highway leading from one to the other, and with many public highways intervening, and the power is delegated to the department of public works and buildings to determine the exact public highways between the termini upon which the roads shall be constructed. The determination is not, however, left to an arbitrary discretion. While the termini are the only points fixed by the statute, the roads are to be constructed between the termini substantially upon the routes described, so as to connect with each other the different communities and principal cities of the state, and so as to afford the different places named and the intervening communities reasonable connection with the termini and with each other.

We are of the opinion that the act is not subject to the constitutional objections made to it, and the decree of the circuit court is affirmed.

Decree affirmed.

(283 Ill. 310)

PEOPLE v. PAISLEY et al. (No. 12043.)

(Supreme Court of Illinois. June 18, 1919.)

1. PARTNERSHIP ⇨175 — JOINDER OF DEFENDANTS—PARTNERS.

Where copartners are jointly guilty of the same offense, it is proper to indict them jointly as individuals, not to indict the firm or copartnership as an entity.

2. CRIMINAL LAW ⇨124(6)—JOINDER OF DEFENDANTS—ACCESSORIES.

It is always proper to include all persons in an indictment who are jointly guilty of the same offense, including those who are accessories before the fact.

3. INDICTMENT AND INFORMATION ⇨124(4)—JOINDER OF DEFENDANTS.

That the statute prohibiting receiving bank deposits after insolvency describes the persons who may be guilty in the singular number does not prevent the indictment of two or more persons jointly for the commission of that offense.

4. INDICTMENT AND INFORMATION ⇨119—MISDEMEANOR—SURPLUSAGE.

An indictment for a misdemeanor is not vitiated by charging that an act was unlawfully and feloniously committed; the word "feloniously" being regarded as surplusage.

5. CRIMINAL LAW ⇨444—EVIDENCE—BOOKS—AUTHENTICATION.

In a prosecution for receiving bank deposits after insolvency, books identified as defendants', the entries being made by defendants or at their instance, introduced as declarations against interest, are properly admitted, without further proof of their accuracy or correctness.

6. CRIMINAL LAW ⇨393(1) — COMPELLING ACCUSED TO GIVE EVIDENCE—BOOKS.

Books procured from receiver in bankruptcy of an insolvent bank may be used in a prosecution for receiving deposits after insolvency, without violating Const. art. 2, § 10, providing that no person shall be compelled in any criminal case to give evidence against himself.

7. CRIMINAL LAW ⇨393(2) — COMPELLING ACCUSED TO GIVE EVIDENCE—ILLEGAL SEIZURE.

Notwithstanding Const. art. 2, § 10, providing that accused shall not be compelled to give evidence against himself, papers and documents illegally seized from his possession are admissible against him, if otherwise competent.

8. CRIMINAL LAW ⇨695(2) — GENERAL OBJECTIONS—SECONDARY EVIDENCE.

It was not error to permit, over general objection, secondary evidence of book entries to establish the date of undisputed loans, where there was no specific objection that the evidence was secondary.

9. CRIMINAL LAW ⇨338(1) — EVIDENCE—VALUE.

In a prosecution for receiving bank deposits after insolvency, evidence as to the cost of

constructing a building on a leasehold owned by defendants, and the revenues which might be derived therefrom, is not admissible to establish the value of the leasehold; defendants being entitled to prove only the market value of the leasehold.

10. CRIMINAL LAW ⇨825(1) — REQUEST FOR FURTHER INSTRUCTIONS.

Though the instructions given in a prosecution for violating Cr. Code, § 25a, for which defendants shall be fined and in addition may be imprisoned, might have confused the jury as to their discretion to impose imprisonment or not, defendants cannot complain, where they tendered no correct instruction on the issue, as further instruction would have removed the error.

11. BANKS AND BANKING ⇨85(3)—RECEIVING DEPOSITS AFTER INSOLVENCY — REQUESTED INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where there was evidence that accused had been compelled, by threats of their creditors that their banks would be closed, to surrender, without consideration, bank stock of value, it was error to refuse their requested instruction that, if they were induced to surrender their interests in the stock by such threats, the surrender was void, and in determining their insolvency when they received deposits the jury should consider the value of the stock at the time of surrender as an asset.

12. CRIMINAL LAW ⇨369(1) — RECEIVING DEPOSITS WHEN INSOLVENT — EVIDENCE—OTHER OFFENSES.

In a prosecution of bankers for receiving deposits after insolvency, it was error for the court to admit evidence in detail of three embezzlements and obtaining money by false pretenses, which were in no way connected with the offense charged.

13. CRIMINAL LAW ⇨470—EVIDENCE—OPINION OF EXPERT—INSOLVENCY OF DEFENDANT.

In a prosecution for receiving deposits when insolvent, it was improper to permit an expert to give his opinion that defendants were insolvent, which was an ultimate issue for the jury.

14. CRIMINAL LAW ⇨450—RECEIVING DEPOSITS AFTER INSOLVENCY—OPINION EVIDENCE—LOSS OF DEPOSITS.

In a prosecution for receiving deposits after insolvency, it was improper to permit depositors to testify that they had lost their deposits, which was one of the ultimate facts to be found by the jury.

15. CRIMINAL LAW ⇨338(7)—EVIDENCE TO PREJUDICE DEFENDANT.

In a prosecution for receiving bank deposits after insolvency, where the amount of the deposits had been established by the bank's books, it was error to admit testimony of certain depositors as to the nature of the deposits and the effect of their loss, where such evidence was clearly offered to prejudice the jury against defendant.

16. CRIMINAL LAW — 706—MISCONDUCT OF ATTORNEY—COERCION OF WITNESS—IMPROPER REMARKS.

It was misconduct of the prosecuting attorney to coerce a witness, in interviews before the trial, to testify prejudicially to defendant by threats of arrest, and to remark at the trial, when the witness claimed his privilege, that, if the witness wanted some incriminating done, they could give it to him.

17. CRIMINAL LAW — 1165(1)—PREJUDICIAL ERROR—EFFECT ON SENTENCE.

Errors which deprived defendants of a fair and impartial trial cannot be held harmless, though their guilt was clear, where the jury, having discretion to imprison or not, in addition to the fine, imposed the maximum imprisonment permitted.

Carter, J., dissenting.

Error to Appellate Court, First District, on Error to Criminal Court, Cook County; George Kersten, Judge.

Oliver F. Paisley and another were convicted of unlawfully receiving a deposit at a bank, knowing themselves to be insolvent, and they bring error. Reversed and remanded.

For opinion of Appellate Court, see 209 Ill. App. 295.

Marshall Solberg and Harry L. Shaver, both of Chicago (Colin C. H. Fyfe, of Chicago, of counsel), for plaintiffs in error.

Edward J. Brundage, Atty. Gen., and Mac-lay Hoyne, State's Atty., and Edward C. Fitch, both of Chicago (Edwin J. Raber and Edward E. Wilson, both of Chicago, of counsel), for the People.

DUNCAN, J. Plaintiffs in error, Oliver F. Paisley and James T. Paisley, brothers (hereinafter referred to as defendants), impleaded with William H. Paisley, their father, were convicted in the criminal court of Cook county of unlawfully receiving a deposit of \$700 from Mrs. Margaret Basch at the North Shore Savings Bank, in Chicago, on September 16, 1916, then knowing themselves to be insolvent. Defendants were sentenced May 21, 1917, to the penitentiary for a term of three years each and were each fined in the sum of \$1,400. William H. Paisley was sentenced to the penitentiary for one year, but was not fined in any sum, and the jury by their verdict recommended clemency in his case. A writ of error was prosecuted to the Appellate Court for the First District, where the judgment was affirmed as to the defendants, but was reversed, and the cause remanded, as to William H. Paisley. Defendants have sued out a writ of error to have the record reviewed by this court.

Defendants had been engaged in the real estate and banking business in Chicago since 1908, when they organized the Edgewater

Bank. This bank was dissolved, and its assets and liabilities were taken over by the Edgewater State Bank, organized by the Paisleys and others, April 11, 1914, with a capital stock of \$200,000 and \$50,000 surplus. The capital stock was divided into 2,000 shares, for which defendants and their father subscribed for 1,350 shares. The Paisleys completely severed their connection with this state bank June 30, 1915. At this time they were also conducting, as partners, their private bank, known as the Summerdale Savings Bank, at 5302 North Clark street, organized in 1912. When convicted, the three Paisleys were operating this private bank and two other private banks—the North Shore Savings Bank, at 5545 Broadway, and the Grace Street Branch, at Broadway and Grace streets—organized by them July 1, 1915, and August 1, 1916, respectively, and all three about a mile apart. These banks were not conducted as separate and distinct banks, but as one entity. These banks had 1,123 commercial and 2,037 savings depositors when they finally voluntarily closed, September 19, 1916. Oliver F. Paisley managed the North Shore Savings Bank, James T. Paisley the Summerdale Savings Bank, and Joseph B. Donahoe the Grace Street Branch. On September 20, 1916, Oliver F. Paisley filed a bill in the superior court of Cook county against his brother and father to dissolve the copartnership and to liquidate and for the appointment of a receiver. A day or two later a petition in involuntary bankruptcy was filed in the United States District Court for the Northern District of Illinois, and the Chicago Title & Trust Company was appointed receiver in bankruptcy, took charge of the property, and was later elected trustee in bankruptcy.

[1] The indictment charges the defendants jointly as individuals, and is not an indictment of their firm or copartnership as an entity. There was an averment that they were doing a banking business, as partners, under three different firm or bank names, but the offense was not charged against any firm or bank as an entity. That is the usual and proper way in which to indict individuals who are copartners. *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 999, 35 L. R. A. 176, 54 Am. St. Rep. 447.

[2, 3] It is always proper to include all persons in an indictment who are jointly guilty of the same offense, including those who are accessories before the fact. The fact that the statute describes the persons in the singular number who may be guilty and be punished for this offense furnishes no sufficient ground for the contention that only one and not two or more persons can be properly indicted for the offense. Such a construction would be a strained and unnatural one of a statute clearly leveled against any and

all persons who may, singly or jointly, violate it. The crime described is not such as only one person can commit, but one which two or more persons, as partners or as individuals acting jointly may commit. *State v. Smith*, 62 Minn. 540, 64 N. W. 1022. In the case cited a similar statute was so construed.

[4] Neither was the indictment vitiated by charging that the act was unlawfully and "feloniously" committed. The offense is only a misdemeanor, and by the use of the word "feloniously," as made in this indictment, a felony is not charged. The word "feloniously" may be regarded as surplusage. *Wharton's Crim. Pl. & Pr. § 261*; *1 Bishop's New Crim. Proc. § 537*; *State v. Slagle*, 82 N. C. 653; *Commonwealth v. Philpot*, 130 Mass. 59; *State v. Sparks*, 78 Ind. 186; *Staeger v. Commonwealth*, 103 Pa. 469; *State v. Crumme*, 17 Minn. 72 (Gil. 50). Other courts of high standing hold otherwise, but the more numerous authorities are the other way and their reasoning more convincing.

[5] The court properly permitted the books of all three of the defendants' banks to be used in evidence, and without further proof of their accuracy or correctness. They were introduced as declarations against interest, and were properly identified as defendants' books and their entries, or entries made at their instance. Further proof of correctness was not necessary for such purpose. *Loewenthal v. McCormick*, 101 Ill. 143.

[6] These books were secured by the state's attorney's office from the receiver in bankruptcy, who had gotten them from defendants' receiver, appointed on their bill. Consequently section 10 of article 2 of our Constitution, providing, "No person shall be compelled in any criminal case to give evidence against himself," was not violated. *People v. Hartenbower*, 283 Ill. 591, 119 N. E. 606. The rule is the same in this respect, whether the bankruptcy proceedings are voluntary or involuntary. Defendants were not compelled by the court to produce books or papers in their possession, and the cases of *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781, and *Manning v. Mercantile Security Co.*, 242 Ill. 584, 90 N. E. 238, 30 L. R. A. (N. S.) 725, are not in point.

[7] Even papers and documents illegally seized from a defendant's possession are admissible in evidence against him in a criminal case, if otherwise competent. Courts will not take notice of how they were obtained. *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Trask v. People*, 151 Ill. 523, 38 N. E. 248. Other states having similar constitutional provisions have made similar holdings upon the question now before us. *State v. Strait*, 94 Minn. 384, 102 N. W. 913; *Commonwealth v. Ensign*, 228 Pa. 400, 77 Atl. 657. In affirming the judgment in the latter case the Supreme Court of the United States held that the Fifth Amendment to the

federal Constitution, providing that no person "shall be compelled in any criminal case to be a witness against himself," was not violated by such admission of evidence, and that, if they were, said amendment was not obligatory upon the governments of the several states, and regulates the procedure of the federal courts only. *Ensign v. Pennsylvania*, 227 U. S. 592, 33 Sup. Ct. 321, 57 L. Ed. 658; *Johnson v. United States*, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263.

[8] The complaint that F. M. Zeller, of F. M. Zeller & Co., and W. M. Richards, of the Chicago Savings Bank & Trust Company, were permitted, over the objection of defendants, to introduce secondary evidence of the contents of certain book entries of their companies for the purpose of establishing the dates of certain loans to defendants, is not meritorious. It was not disputed that the loans were in fact made, and there was no specific objection made that the evidence offered was secondary evidence.

[9] Defendants sought to show the value of a certain leasehold, known as the 99-year school lease at Broadway and Clark streets, upon the supposition that a building to cost not less than \$100,000 had been completed on the property in accordance with certain plans and a contract entered into with the school district nearly two years before the banks closed; the building having never been built or begun. Proof of probable cost, probable rentals, and probable net income of the property was offered in this connection, and proof was also offered that certain of the floors or apartments had been contracted for, and the rentals to be paid therefor agreed on, in case the building should be completed. The court properly excluded this testimony, as speculative in its nature, and as evidence of the value of the property under conditions that did not exist, and might never exist while property of the defendants. Testimony of the probable cost of improvements to be placed on lands or lots, and the probable net rentals or income to be derived from such lands or lots when such improvements have been constructed, is uniformly held inadmissible to show present value of such lands or lots. *Burt v. Wigglesworth*, 117 Mass. 303; *Tallman v. Metropolitan Railway Co.*, 121 N. Y. 119, 23 N. E. 1134, 8 L. R. A. 173; *Hamilton v. Pittsburg, Bessemer & Lake Erie Railroad Co.*, 190 Pa. St. 51, 42 Atl. 369, 51 L. R. A. 319; 13 Ency. of Evidence, 436. They were only entitled to prove the market value of the leasehold for purposes to which it was adapted, and for which it would command the best price.

[10] The lower court, in its instructions to the jury, gave three like forms of verdict for each defendant, the last being for the verdict of not guilty. The other two forms were connected with the word "or"; the

first form as to Oliver F. Paisley being in this language:

"We, the jury, find the defendant Oliver F. Paisley guilty in manner and form as charged in the indictment, and we fix his punishment at imprisonment in the penitentiary for a period of ——— years and a fine of ——— dollars."

The second form of verdict was for a fine only. Section 25a of the Criminal Code (Hurd's Rev. St. 1917, c. 38) provides that upon conviction the defendant shall be deemed guilty of embezzlement, and shall be fined in double the amount of the sum so embezzled and fraudulently taken, and in addition thereto may be imprisoned in the penitentiary for not less than one year and not more than three, and the court so instructed the jury in its first instruction for the people.

We agree with defendants' counsel that under the instructions as given the jury were not only likely to be, but were, confused as to which punishment was mandatory and which was in their discretion. This appears from their verdict against William H. Paisley and their recommendations as to him. This may have occurred by the court putting imprisonment as the first punishment to be inflicted in the first form of verdict. It is equally clear, however, that defendants' counsel, by offering an instruction in their behalf making it clear that whether or not imprisonment should be fixed for each defendant was a matter of discretion with the jury, after fully and fairly considering all the evidence in the case, might have altogether removed all confusion and doubt. The confusion brought about, as aforesaid, must be attributed largely to the action of counsel for defendants in not guarding the point of danger by instructions. The court is not required to write instructions, but only to give those submitted to him, when proper. We would have been better satisfied with the instructions as to form of verdicts, had the court named the first punishment as a fine, and the second as both fine and imprisonment, as the statute so placed them. We are not, however, prepared to hold that it was error not to do so, as further instructions would have removed all erroneous impressions the jury may have received.

[11] The Edgewater State Bank assumed all liability of the Edgewater Bank to depositors of the latter bank when the former took over the assets of the latter. The Paisleys in turn, and in consideration thereof, signed a guaranty to the Edgewater State Bank on April 11, 1914, by which they guaranteed unconditionally and without reservation the full and prompt payment of the principal and interest to the Edgewater State Bank as the same comes due, or may become due under extensions and renewals given, of all loans, discounts, credits, and overdrafts held by the Edgewater Bank as an offset to its deposits and accepted by the Edgewater State

Bank, including all costs, attorney's fees, and other outlays in enforcing the same and the guaranty. The amount of their guaranty on their liability therein was not to exceed in amount \$198,398.44. The guaranty was to be a continuing one, and remain in full force and apply to all loans, discounts, credits, and overdrafts, and renewals and extensions thereof, until they were fully paid. The specific assets so guaranteed were not specifically set out, otherwise than as above set forth. The guaranty was sufficient in form and sufficiently definite as to the assets guaranteed. The assets so guaranteed were all that was taken over by the Edgewater State Bank from its predecessor, of the description aforesaid, and the limit of liability on all of them was the sum mentioned.

The total assets thus taken over by the Edgewater State Bank, including notes of the Paisleys to the Edgewater Bank, loans, discounts, overdrafts, bonds, deposit accounts with other banks, and cash, were \$345,184.06. This amount was further increased by another item—building, vaults, and grounds—fixed at \$50,000, and which it was conceded is not covered by said guaranty. A state bank examiner in December, 1914, informed the other officers of the Edgewater State Bank that the defendants were insolvent, and that that bank ought not to continue longer with the Paisleys as officers thereof. The result was that the Paisleys resigned as officers of the bank December 12, 1914, and were only nominally connected with the bank from thence up to June or July following when all their connection with it ceased. In May, June, and October, 1914, the Paisleys had taken up \$20,895.30 of the bad assets so guaranteed, and on December 22, 1914, they took up \$21,303.48 more of the guaranteed assets; as shown by the testimony of the cashier of the Edgewater State Bank. About April, 1914, the Paisleys borrowed of various banks in Chicago \$120,000 or more, and put up as collateral security therefor certificates of stock of the Edgewater State Bank owned by them. This borrowed money, as appears from the record, was paid in to the Edgewater State Bank on their subscriptions for stock. These loans in 1916 had been reduced by the Paisleys to about \$100,000 by payments. On March 20, 1916, a state bank examiner required an assessment of \$120,000—\$60 per share of stock—to be levied and paid by the stockholders of said bank to make good the bad assets still held by it. The undisputed evidence given by one of the state's witnesses, the former cashier of the bank, is that of said sum of bad and depreciated assets \$50,000 was assets taken over by it from the Broadway State Bank on July 23, 1915, referred to as one of the Lorimer banks. Another \$15,000 thereof was for depreciation on the item carried by it as building, grounds, fixtures,

etc. It is also undisputed that the remainder (about \$55,000) of that assessment is all that is chargeable to defendants under their guaranty. The proof also shows that \$1,088.79 of those bad assets of defendants has been collected by the Edgewater State Bank since the assessment was made. So the entire claim under the guaranty of the Edgewater State Bank could not have exceeded, under the proof in this record, the sum of \$55,000 when the banks of the defendants finally closed.

On April 21, 1916, representatives of the Edgewater State Bank, and of the various other banks from whom the Paisleys borrowed money on their stock, met at the Continental & Commercial National Bank of Chicago and deliberated until after 12 o'clock that night. The Paisleys were called in at the conclusion of the conference, but were not present during much of the deliberations of the same. The result was, according to the testimony for the defendants, that the Paisleys, being unable to pay the assessment on their stock, were forced by threats of litigation and of throwing them into bankruptcy and closing their other banks to transfer and deliver up between 1,100 and 1,200 shares of their stock without receiving therefor any consideration—not even so much as a credit upon any of their indebtedness to the members of said conference—and to make new notes to said banks for the money they had borrowed, with agreements to pay thereon \$500 monthly thereafter. Three of said banks surrendered their certificates of stock held as collateral (650 shares) to a syndicate of the Edgewater State Bank, refusing to pay the assessment. Four of those banks retained their certificates, paid the assessments, and now claim to own the stock absolutely. The Edgewater State Bank sold the stock so transferred to their other stockholders or others who would purchase the same, and now claim that the Paisleys own no interest therein, or in the bank, and are entitled to no credit by reason of said stock. One of the interested witnesses styles this deal as an unconditional sale of the Paisleys of all right, title, and interest in the stock. There is no claim that the Paisleys received anything for such transfers. It was proved on the trial that the Edgewater State Bank requires \$32,000 to get out whole on the Broadway State Bank deal, and that the book value of the Edgewater State Bank stock was on April 21, 1916, more than \$105 per share, and more than \$104 per share when defendants' banks closed. Defendants held also about 30 other shares of stock of said bank when their banks closed, upon which the assessment had not been paid. A great part of the evidence for the state was devoted to defendants' connection with the State Bank, and the greater part of the debts of defendants are shown

to have grown out of their relation to said bank and as aforesaid.

Whatever may be said as to the transactions of the Paisleys, it is apparent that their stock surrendered was of very considerable value, and that the demand on them for the surrender of this stock, without even a credit given them as a consideration, was a very unconscionable act upon the part of the banks who thus obtained it, whether by duress or otherwise. Not a witness in this case ever offered to swear that the value of that stock was ever less than par. The testimony of the state's witnesses even shows that its actual value at the time of the trial was equal to the par value. It was a question for the jury to determine what the truth was as to just how and in what manner this alleged sale was made.

Upon the foregoing evidence the defendants asked the court to instruct the jury, in substance, that no person has a legal right to compel another, by threats or by duress, to surrender his interests in his property, and that if they believed from the evidence that the defendants were induced to surrender their interests in the capital stock by reason of threats made to them that, unless they did so, the persons making such threats would take such action that the banks of defendants would be closed, then such surrender was without consideration and void; and in determining the question in this case, whether or not the defendants were insolvent, they are entitled to have the jury take into consideration the value shown of their said stock at the time of surrender, and as an asset or property of the defendants. It was therefore error in the court to refuse to give this instruction. There is no objection pointed out by the state to this instruction. It is practically conceded that defendants were entitled to credit for said stock in some sum, and counsel for the state say:

"The defense offered no instruction controlling this evidence. The jury had the entire matter, and it is presumed that, if defendants had any interest in such stock, the jury would have taken it into consideration in determining whether or not they were solvent."

These statements must be the result of an oversight. Two instructions were offered by defendants in substance as above set forth. Both were refused, and no instruction of similar import was given.

[12] The court also committed serious error in permitting the state's attorney to prove four other distinct crimes against these defendants with the same minutiae and detail as if the defendants were on trial for those offenses, the commission of which had no tendency to prove the offense charged in the indictment. The first three of these offenses were embezzlements; the first one being embezzlement of the proceeds of a col-

lection for O. O. Anderson of a certificate of deposit for more than \$2,300 issued by a bank in Sweden. The second was the embezzlement of the proceeds of a note for \$800, secured by a trust deed in favor of one Russell, and who placed it in one of the defendants' banks for collection for him. This matter was entirely settled up with Russell in July, 1915, and was not even an indebtedness against the defendants when the banks closed. The third was the embezzlement of a certain note and mortgage for \$2,400, the property of the mother of Clarence H. Wright, placed in defendants' banks for sale and payment to her in the summer of 1915. Defendants did not sell the same, but pledged the securities to secure a loan of O. F. Paisley at the Philip State Bank. The witnesses in this case and in the first case were permitted to state that they called for the money on their securities several times, and that false statements were made to them in regard to the collection or sale of said securities, and that the defendants had not settled for the proceeds of the first collection, which had long since been collected, and had not made it known that the other securities were pledged, until after the banks were closed. The fourth offense was one of obtaining money by false pretense from the Western Union Telegraph Company by means of a false statement of the financial condition of the North Shore Savings Bank at the commencement of business June 10, 1916, and which statement said company had requested of that bank, with a view to carrying a deposit account with it. Every detail of this matter was gone into by the witnesses, including the further statement that in this account, obtained as aforesaid, there was \$453.28 unpaid when the banks closed. The only part of this evidence that could under any circumstances have been material or admissible was simply the fact that when the banks closed the defendants owed those parties, or three of them, certain amounts of money that had not been paid, and that said parties were not indebted to them. There was no pretense of using this evidence for that purpose, because they had already proved those matters by the books, and by the evidence in connection with the books, and did not introduce over a sixtieth part of the more than 3,000 depositors that had deposits in the banks when they closed. Upon trial of parties charged with embezzlement, it is not competent for the prosecution to prove that defendants had committed other and distinct acts of embezzlement or other crimes in no way connected with the commission of the crime charged. *Kribs v. People*, 82 Ill. 425.

[13] Frank M. Spohr, an expert accountant, in his examination, while expressly stating that he did not know the value of certain assets of defendants, testified, over the

defendants' objections, that in his opinion the defendants were insolvent. Regardless of the question whether or not he was thoroughly posted upon the values of all the assets and other matters necessary to determine the question of solvency of the defendants, it is not permissible in such a case for a witness to express his opinion on the question of solvency, because that was one of the ultimate facts upon which the jury had to make their finding. No witness can thus invade the province of the jury, expert or otherwise. This court has so frequently ruled upon this question that it hardly seems necessary to refer to the decisions. The opinion of a witness should form no part of the verdict of a jury. *Hoenner v. Koch*, 84 Ill. 408; *Fellows-Kimbrough v. Chicago City Railway Co.*, 272 Ill. 71, 111 N. E. 499. Other states have made the same holdings on the same character of offenses as the one now before us. *State v. Stevens*, 16 S. D. 309, 92 N. W. 420; *State v. Myers*, 54 Kan. 206, 38 Pac. 296; *Freeman v. State*, 108 Miss. 818, 67 South. 460.

[14] Twenty-two witnesses—12 women, 1 newspaper boy and 9 men—were called to testify that they had deposits in the defendants' banks when they closed, and that they never had been paid their deposits and owed defendants nothing. Some of the women were working women, and some of them testified to their children having small deposits there for Christmas and for various purposes, all detailed. One of them told about her boy saving his money to buy an American flag, and 2 others testified about two children saving their money for their graduation day, and that none of them got their money back. Three of the men were janitors and 4 others were men working at various trades. A number of these witnesses testified to receiving letters from the defendants inclosing notes for their deposits, with promises to pay in the future. Some of these witnesses testified, in answer to direct questions and over the objections of the defendants, that they had lost their deposits. Whether the deposits were lost or not was one of the ultimate facts to be found by the jury as to the deposits in question, and it was not proper for any witness to testify in express terms that his deposit was lost.

[15] All of the foregoing evidence should have been excluded after it became manifest that it was used or to be used for no legitimate purpose, except to unnecessarily prejudice the jury. Had the state in good faith desired to introduce all the depositors, or any considerable number of them, for the purpose of showing the amount of debts owed by the defendants, to do so it would have been proper to prove only that the defendants owed the depositors and that they owed the defendants nothing, and the

amount of such debts. It is claimed by the state that the letters and notes of the defendants were introduced in evidence for the purpose of proving a partnership. The partnership was already proved by other evidence, and was not denied, and the debts were proved by the books and the witnesses testifying concerning the same, and were not denied. Objections were not made to all of the testimony of these witnesses, but only to a few of them towards the last, when the purpose of the examinations became manifest, and such objections were therefore made in apt time. Not over 40 or 50 witnesses of the 3,000 or more who had deposits in the defendants' banks were called to testify, and it is apparent that the testimony of the witnesses now under consideration could be of no aid in determining the whole amount of the deposits, or in determining any issue in the case.

[16] The defendants rightly complain of the misconduct of E. J. Raber, the attorney who examined and cross-examined witnesses for the state, in the examination of the witness Oscar Miller, an employé of the North Shore Savings Bank when defendants' banks closed. This witness testified positively, and he is not contradicted by any evidence in the record, that he was called for consultation a number of times, before this trial, to the office of Raber, who at those times called him a three year old, a rummy, and a fool, in language too vile to be here repeated. Raber also told him that, when any witness did not want to come to his office, they would simply send a policeman after him, and also told him the grand jury had threatened to indict him twice, and that he saved him on both occasions. He apparently had this witness drilled as to how he should answer questions on the trial. More than 20 different times in his examination Miller was asked to state from what moneys the salaries of the Paisleys and other employés, and various checks drawn by the Paisleys on their banks, were paid, and he invariably answered, over the defendants' objections, that they were paid by the depositors' money, or from moneys deposited by them. This testimony was clearly erroneous and unfair to defendants, but objections to it were promptly overruled in every instance. Those salaries and checks were paid, as a matter of fact, from the cash in the banks, which came from all sources, as any and all checks were paid. This witness refused to testify about the incidents relating to the C. O. Anderson collection on the bank in Sweden, on the ground that it would incriminate him. In the discussion that arose on this question Raber said in the presence of the jury:

"I will say, further, that if this witness wants some incrimination done, as far as that is concerned, we can give it to him."

[17] It is as clear as any proposition can well be made that the defendants have not had a fair and impartial trial in this case, and that the judgment should be reversed and the cause remanded for the errors in the rulings of the court and for the misconduct of the state's attorney. It is repeatedly urged in the brief and argument of the state that the defendants' guilt is so clearly established that they are not entitled to a new trial, even if it be conceded that all the errors assigned are well founded. This assertion must come from a misconception of the law of this case, wherein the jury are judges, not only of the question of guilt or innocence, but of the amount and character of punishment that should be imposed. The defendants in this case have been given the greatest penalty in the way of imprisonment that is fixed by the statute, when it was entirely a discretionary matter with the jury as to whether or not imprisonment should be imposed as part of the penalty. No fair-minded man can say, it seems to us, that the errors in this record are not such as to demand a reversal of the judgment.

The judgments of the Appellate and criminal courts are reversed and the cause remanded to the criminal court.

Reversed and remanded.

CARTER, J., dissents.

(233 Ill. 522)
PEOPLE v. CLEVELAND, C., C. & ST. L.
RY. CO. (No. 12640.)

(Supreme Court of Illinois. June 18, 1919.)

1. MASTER AND SERVANT ¶12—REQUIREMENT OF WASHROOMS FOR EMPLOYÉS—CONSTITUTIONALITY.

Laws 1913, p. 359, requiring owners and operators of coal mines, steel mills, foundries, etc., to provide washrooms for their employés, is constitutional and valid as a police regulation applied to the conditions of such places of employment where employés become so dirty and sweaty as to necessitate washing and change of clothing after work, for the protection of their own and the public health.

2. MASTER AND SERVANT ¶17—REQUIREMENT OF WASHROOM FOR EMPLOYÉS—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to bring defendant railroad's roundhouse and machine shop within the terms of Laws 1913, p. 359, providing that every owner or operator of a coal mine, steel mill, foundries, machine shop, etc., in which employés become covered with grease, smoke, dust, and perspiration so as to endanger their or the public health if they do not wash and change their clothing after work, shall provide a washroom for employés.

Thompson, J., dissenting.

Error to Appellate Court, Third District, on writ of Error to Circuit Court, Vermillion County; Walter Brewer, Judge.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company was convicted of an offense, and it brought error to the Appellate Court, which affirmed (212 Ill. App. 557), and defendant brings error. Judgments of the Appellate Court and circuit court reversed, and cause remanded.

George B. Gillespie, of Springfield (Rearick & Meeks, of Danville, and F. L. Littleton, of Cincinnati, Ohio, of counsel), for plaintiff in error.

Edward J. Brundage, Atty. Gen., John H. Lewman, State's Atty., of Danville, and Sumner S. Anderson, of Charleston (Samuel Levin and B. H. Snyder, both of Danville, of counsel), for the People.

CARTWRIGHT, J. A complaint was made before a justice of the peace of Vermillion county against the plaintiff in error, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, charging a violation of the act entitled "An act to provide for washrooms in certain employments to protect the health of employes and secure public comfort." Laws of 1913, p. 359. There was a conviction before the justice of the peace and an appeal to the circuit court, and upon a trial there the jury found the defendant guilty and fixed the penalty at \$50. Judgment was rendered on the verdict, and a writ of error was sued out from the Appellate Court for the Third District. The Appellate Court affirmed the judgment, and the record has been brought to this court by writ of error to the Appellate Court.

[1] Section 1 of the act on which the prosecution is based is as follows:

"That every owner or operator of a coal mine, steel mill, foundry, machine shop, or other like business in which employes become covered with grease, smoke, dust, grime and perspiration to such extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing, will endanger their health or make their condition offensive to the public, shall provide and maintain a suitable and sanitary washroom at a convenient place in or adjacent to such mine, mill, foundry, shop or other place of employment for the use of such employes."

The purpose of the act as declared by the title is to protect the health of employes and secure the public comfort, and it was enacted under the police power, with suitable provisions against liability to disease or offense to those with whom the employes come in contact after leaving their places of employment. The act applies to all places of employment where the prescribed conditions exist, and as a police regulation and applied to such conditions it is constitutional and valid. People v. Solomon. 265 Ill. 28, 106 N. E. 458. The

conditions so prescribed are that the employment is one in which employes become covered with grease, smoke, grime, and perspiration to such an extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing will endanger their health or their condition be offensive to the public. If the evidence showed that these conditions existed in the place of employment provided and maintained by the plaintiff in error, the judgment was right; if it did not, the judgment was wrong.

[2] The evidence proved these facts: The plaintiff in error is a railroad company and maintains a semicircular roundhouse containing 25 stalls, 23 of which are used for engines and 2 at one end are separated from the others by a wooden partition and used as a machine shop. In front of the roundhouse there is a turntable, upon which engines are swung around to the different stalls into which they are run. An engineer and fireman are employed on each engine, but they have a bucket with them on the engine and wash and change their clothes there and do not go into the roundhouse. There are from 20 to 25 engines, including switch engines, in the roundhouse every 24 hours. About 60 men are employed in the winter and about 50 in the summer. There are two grease-cup men—one working in the daytime and the other at night—and two supply men working in a similar way. The grease-cup men carry oil in a can and grease in a bucket and fill the headlights with oil and clean the classification lamps and lamps in the engine cabs. They take grease out of the buckets with a putty knife and put it in the grease cups and screw down the caps with a monkey wrench. The supply men oil the engines and fill the lubricators and gauge lamps inside the cabs and take the tools and other things from the engines to the storehouse and bring them back to the engines. These men wear overalls and gloves in their work. The other men are hostlers, firing-up men, boiler washers, machinists, and machinists' helpers, who do necessary work on the engines. The men perspire in warm weather about the same as men do at other work. There are 80 steel lockers, and sometimes the men change their clothes before going out and sometimes do not. Sometimes they wear overalls and sometimes do not. The men get more or less dirt and oil on their clothes or overalls and more or less coal smoke on their faces. A deputy factory inspector on August 3, 1916, found some of the men greasy, dirty, and sweaty. Each man is furnished with a two-gallon bucket for washing, and there are spigots where they can draw hot or cold water for that purpose, but no washroom is maintained. There is some smoke and a little dust in the roundhouse, and the grease-cup men and supply men get some grease and oil on the overalls and gloves which they wear.

The act does not apply to every place of employment in which men become dirty or perspire but only to those where they become covered with grease, smoke, dust, grime and perspiration to the extent specified in the act. In warm weather all persons perspire, whether at work or play, and there are numerous kinds of employment in which the employes get grease on their clothing or become dirty with smoke or dust, but not to the extent specified in the act. Neither their health nor the public comfort is involved. That is true of the ordinary blacksmith shop, the garage or the supply house for farm machinery. There was no justifiable inference to be drawn from the evidence that the employes of the plaintiff in error were in such a condition after leaving their work that without washing and cleansing their bodies and changing their clothing their health would be endangered or their condition be offensive to the public. This is not saying that there must be opinion or expert evidence of such probable consequences, nor that a jury may not determine that question from the facts proved in the light of common experience, but the evidence must be sufficient to justify the inference of fact. The evidence did not bring the roundhouse and machine shop within the terms of the statute.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

THOMPSON, J., dissenting.

(283 Ill. 289)

AMERICAN CAN CO. v. EMMERSON, Secretary of State. (No. 12684.)

(Supreme Court of Illinois. June 18, 1919.)

1. CORPORATIONS \S 637 — CONSTITUTIONAL LAW \S 130 — VIOLATION OF CONTRACT — REGULATION OF FOREIGN CORPORATIONS.

Where a foreign corporation was licensed to do business when Corporation Act, \S 26, providing that foreign corporation shall be subjected to all liabilities, restrictions, and duties imposed upon similar domestic corporations, was in effect, such act was part of its contract, and, if a later act accorded such corporation different treatment than that accorded similar domestic corporations, such act would be void, as violating the corporation's contract.

2. CORPORATIONS \S 637 — CONSTITUTIONAL LAW \S 130, 240(1), 296(1) — COMMERCE \S 57 — FOREIGN CORPORATION.

As respects a foreign corporation, licensed in 1901 to do business in the state after payment of a fee based upon the proportion of its capital stock represented by its property and business in the state, under Corporation Act 1897, as amended by Laws 1899, p. 119, section 3 of which requires prompt report of any in-

crease or decrease of the proportion of its capital stock represented in the state, and which corporation had later transferred a greater proportion of its property and business to the state, Laws 1917, p. 306, \S 5b, making it the duty of the secretary of state, from time to time, to ascertain by interrogatories to foreign corporations the proportion of capital stock actually represented by property and business at the time of such interrogatories, is not invalid, as violating the corporation's contract, as requiring an additional payment for a vested right, as discriminating against foreign in favor of domestic corporations, as denying the equal protection of the laws, as taking property without due process of law, nor as a burden upon interstate commerce.

3. CORPORATIONS \S 637 — CONSTITUTIONAL LAW \S 130 — FOREIGN CORPORATION — LICENSE FEES — IMPAIRMENT OF CONTRACT.

The 1917 amendment to the Corporation Act, in basing the fees required of a foreign corporation on an average of the percentage of Illinois assets to total assets and of its Illinois business to total business, does not make a new basis for computing fees, in violation of contracts with foreign corporations previously licensed under the act as it existed in 1901, since such method might legally have been used under the previous law.

4. COMMERCE \S 69 — TAXING FOREIGN CORPORATIONS.

While the state may not regulate interstate commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect, in the tax imposed, to burden commerce of that character.

5. CORPORATIONS \S 648 — FOREIGN CORPORATIONS — "CAPITAL STOCK."

Under Corporation Act 1897, as amended by Laws 1899, p. 119, \S 3, and as amended by Laws 1917, p. 306, requiring a statement of "the proportion of capital stock" of a foreign corporation represented in the state, and requiring payment of license tax thereon, the capital stock to be considered in arriving at the proportion upon which the license tax is to be based, is the capital stock authorized by the charter, whether issued or not.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Capital Stock.]

Appeal from Circuit Court, Sangamon County; E. S. Smith, Judge.

Suit by the American Can Company against Louis L. Emmerson, Secretary of State. From decree dismissing the bill, complainant appeals. Affirmed.

Tenney, Harding & Sherman, of Chicago (Horace Kent Tenney and Harry A. Parkin, both of Chicago, of counsel), for appellant.

Edward J. Brundage, Atty. Gen., and Clarence N. Boord and James W. Gullett, both of Springfield, for appellee.

STONE, J. This cause is brought to this court on appeal from a decree of the circuit court of Sangamon county sustaining the demurrer of the appellee to the bill of complaint of the appellant and dismissing the bill for want of equity. By the bill of complaint the appellant seeks to restrain the secretary of state of Illinois from paying over to the state treasurer the license fee collected from the appellant by the secretary of state under the amendment to the Corporation Act approved June 22, 1917 (Laws 1917, p. 306). Upon demand by the secretary of state the appellant, under protest, paid the fees under said act as amended in the amount demanded. A stipulation was entered into that the money should be retained by the secretary of state pending the determination of this cause, and a temporary injunction was ordered by the court continued pending this appeal.

The appellant is a foreign corporation organized under the laws of New Jersey. On July 8, 1901, it filed an application on the form provided by the secretary of state for a license as a foreign corporation to do business in the state of Illinois, and fully complied with the statute then in force and with the requirements of the secretary of state. A license was issued to the appellant under the provisions of the act of May 26, 1897, as amended by the act of April 22, 1899, entitled:

"An act to amend an act entitled 'An act to require every foreign corporation doing business in this state to have a public office or place in this state at which to transact its business, subjecting it to a certain condition, and requiring it to file its articles or charter of incorporation with the secretary of state, and to pay certain taxes and fees thereon.'" Laws 1899, p. 118.

Section 8 of said act reads in part as follows:

"Such corporation, by its president, secretary or any officer thereof, shall make and forward to the secretary of state, with the articles or certificate above provided for, a statement duly sworn to of the proportion of capital stock of the said corporation which is represented in the state of Illinois by its property located and business transacted therein and such statement shall further show the name and address of the agent or representative of said corporation in this state; and such corporation shall be required to pay into the office of the secretary of this state, upon the proportion of its capital stock represented by its property and business in Illinois, fees equal to those required of similar corporations formed within and under the laws of this state. Upon a compliance with the above provisions by said corporation, the secretary of state shall give a certificate that said corporation has duly complied with the laws of this state, and is authorized to do business therein, stating the amount of its entire capital and of the proportion thereof which is represented in Illinois; and such certificates shall be taken by all courts in this state as evidence that the said corporation is entitled to all the rights and benefits of this act, and such corporation shall enjoy

those rights and benefits for the time set forth in its original charter or articles of association, unless this shall be for a greater length of time than is contemplated by the laws of this state, in which event the time and duration shall be the limit of time set out in the laws of this state. Such corporations having complied, as aforesaid, shall be required to promptly report to the secretary of state any change in the name and address of its agent or representative in this state, and any increase or decrease in its capital stock, and any increase or decrease of the proportion of its capital stock represented in this state by its property and business therein, by filing in the office of the secretary of state a statement properly sworn to, setting forth the facts."

The application thus filed with the secretary of state set forth the authorized capital stock at \$88,000,000, and the proportion of the stock represented by the property located in and the business transacted in Illinois at the time the application was placed, at \$1,000,000. The fee was based upon one eighty-eighth of its authorized capital stock, and was fixed at \$1,045, which was paid by the applicant and a license issued to it under the seal of the state of Illinois, setting forth that appellant had filed a copy of its charter and had in all respects complied with the law governing foreign corporations, and that—

"said American Can Company is from the date hereof duly authorized to do business in the state of Illinois for a term of ninety-nine years and is entitled to all the rights and privileges granted to foreign corporations under the laws of this state; that the amount of capital stock of said corporation is \$88,000,000 and the amount of capital stock represented in the state of Illinois is \$1,000,000."

Thereupon the appellant began transacting business in the state of Illinois, and has been carrying on a large volume of intrastate and interstate business, invested large sums in factories, having an appraised value of several million dollars, including real estate, plants, machinery, etc., and employed a large number of persons in its business. In March, 1918, the secretary of state submitted to appellant interrogatories under the amendment of June 22, 1917, to which appellant filed answers, showing in detail the total value of all its property, both real and personal, the assessed and appraised value of its tangible property in Illinois, the total amount of its entire business for the preceding year, both in and out of Illinois, the location of its principal places of business in the different states, its authorized capital stock to be \$88,000,000, of which \$82,468,600 had been issued, the estimated annual business transacted by appellant at and from places of business in Illinois, including sales to residents of Illinois, to be \$19,536,930.37, and the amount of sales made to residents of Illinois to be \$10,029,000. On receipt of these answers

submitted by appellant the secretary of state wrote to appellant as follows:

"From the answer to the interrogatories it would appear that .09745 of the tangible property and business of the corporation is represented in Illinois. This will require the corporation to pay upon \$8,578,000 of the capital stock, or a fee of \$8,621. Allowing a credit of \$1,045 (the fee paid heretofore), there is a balance of \$7,576 due the state, which you will please remit in accordance with section 5c of the Foreign Corporation Act."

The only change in the situation of appellant since the license was issued is in the amount of its property and business in the state of Illinois, upon which it has paid to the state the taxes regularly assessed.

It is contended by the appellant that the license issued to do business in this state under the Corporation Act in force at the time is a contract between the state and appellant, which cannot be changed or modified to require appellant to make further payments, unless by a general law similar payments are required of domestic corporations under the same circumstances; that the amendment of 1917 impaired the obligations of this contract and imposed a tax, which amounted to an interference with interstate commerce, denied appellant the equal protection of the laws, and took its property without due process of law, and that the act of 1917 is void under the state and federal Constitutions; that the fee should be based upon the capital stock actually issued, and not upon the authorized capital stock; that the amendment of 1917 creates a different basis for the license fee than was fixed by the statute at the time the license was issued.

It is contended by the appellee that the words "capital stock" in the Foreign Corporation Act at the time the license was issued to appellant, as well as in the amendment of 1917, mean the authorized capital stock fixed by the charter, and not the capital stock actually issued at the time the license was granted; that foreign corporations are subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and that said tax is not a discrimination; that the charging of additional fees in case of change in the capital stock represented in this state was permitted under the law in force at the time the license was issued to appellant; that the amendment of 1917 is not a new basis upon which the fees shall be based, but is a method or rule whereby to compute and determine the capital stock represented.

Section 5b, as amended in 1917, is the section of the act complained of. That section made it the duty of the secretary of state from time to time to ascertain by interrogatories propounded to foreign corporations doing business in this state—

"the proportion of capital stock actually being represented by property located and business transacted in the state of Illinois, which proportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this state. If no tangible property is used in the business of the corporation, the proportion of capital stock represented shall be determined with reference only to the percentage of the total business of the corporation transacted in Illinois." Laws 1917, p. 306.

It is admitted by appellee that the license granted to appellant in 1901 is a contract, and that, if the amendment of 1917 were to be held to violate said contract, such amendment would be unconstitutional, as an impairment of the obligations of a contract; but it is insisted that the act is not open to this objection. In support of the contention of the appellant that this amendment violates its contract, as evidenced by the license issued in 1901, it is urged that the original license fixed the amount of the fee, on the basis of facts existing at that time, for 99 years, and recited that a full compliance had been made with the statutes; that when this fee was paid it represented the entire fee required or to be required of appellant.

An examination of the laws in effect at the time this license was given discloses the following: Section 26 of the Corporation Act of 1872 provided as follows:

"Foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." Hurd's Rev. St. 1917, c. 32.

This section was in force July 9, 1901, and is still in force. The fees required of all corporations organized under the laws of this state were fixed by the act of 1895. Hurd's Stat. 1917, par. 10a, p. 1504. That act was in force July 1, 1901, and is still in force. Section 26 of the act of 1872, as herein quoted is re-enacted in section 1 of the act of 1897, as amended in 1899, under which appellant's license was issued.

[1] It will be seen that these several acts upon which the contract of appellant was based provided that foreign corporations shall be subjected to all liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the general laws of this state. This act was a part of the contract of appellant. The law also provided, as we have seen, that a foreign corporation which has complied with section 2 of the act of 1899, and to which a license has been issued, shall be required to report to the secretary of state, on inquiry, among other things, any increase or

decrease in its capital stock and any increase or decrease of the proportion of its capital stock represented in this state by its property and business therein. This provision was also a part of the contract of appellant when the license was issued. It is and has been an underlying principle in the policy of this state in its treatment of foreign corporations that they shall be subjected to the same rights and liabilities as domestic corporations of like character. This provision has been enacted in practically every corporation law since 1872, and the inquiry here is whether or not this contract, based as it is upon this provision of the statutes, is being violated by this act. If treatment is thereby accorded appellant not accorded domestic corporations, then the act is void, as by section 26 foreign corporations are not to be subjected to greater liabilities or restrictions than domestic corporations under like circumstances. On the other hand, if they are accorded such treatment, the act is not invalid for the reasons urged. *Stevens v. Pratt*, 101 Ill. 206; *Granite State Provident Ass'n v. Lloyd*, 145 Ill. 620, 34 N. E. 142.

[2] It is urged that this payment at this time is an additional payment for a vested right, such as is not required of domestic corporations, and in support of this contention *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393, 9 Ann. Cas. 978, is cited. In that case the American Smelting & Refining Company had paid a fee based upon its entire capital stock at the time of its admission to the state. Thereafter the Legislature passed a law levying an annual license tax of 2 cents on each \$1,000 of the capital stock of domestic corporations and 4 cents on each \$1,000 of the capital stock of foreign corporations. Colorado had on its statute books at that time an act in substance identical with section 26 of the act of 1872 herein referred to. The United States Supreme Court in that case held, in view of the fact that the American Smelting & Refining Company had paid all fees assessed by that state against domestic corporations, that the new law was in violation of the contract of that state with said company, based upon the statute making foreign corporations subject only to the same restrictions, liabilities, and duties imposed upon domestic corporations, and was therefore void. That case is to be distinguished from the case at bar in this: That there the foreign corporation had paid a fee based upon its entire capital stock, while here the fee paid by appellant was based upon one eighty-eighth of its entire capital stock. Therefore, instead of being discriminated against by the payment of this further fee, it is apparent that appellant has not yet paid the amount of fee which a domestic corporation of like character, with like capital stock, must pay before it is allowed to do business.

While the license granted to appellant was a vested right, it was vested subject to the terms of the contract, and the laws in existence in this state at the time of the issuance of the certificate of license must be incorporated therein. We have seen that its contract, as represented by the law, provided that it should report on interrogatories, from time to time, touching the proportion of its stock represented here by its property and business; also that it was to be subjected to the same liabilities that domestic corporations are subjected to. The only purpose which the Legislature could have had in requiring further reports on increase or decrease of the proportion of the capital stock represented by the business and assets of foreign corporations within the state was that such reports might form a basis for according to such foreign corporations the same treatment accorded to domestic corporations in regard to fees to be paid. It follows, that, while the license to do business is a vested right it is not a right for which appellant paid in full at the time the license was issued. It can hardly be urged as consonant with the policy of this state of equal treatment of foreign and domestic corporations that a foreign corporation with a large capital stock, but with little or no business or property in this state, might gain a license to do business here on a minimum fee, and thereafter transfer the bulk of its property and business to the state, without paying any further fee, while a domestic corporation of like character and like capital stock is required to pay the fee on its entire capital stock before it is allowed to do business. It was the evident intention of the Legislature, by requiring these reports and these additional fees, to conform to the policy of this state of equal treatment of foreign corporations and domestic corporations, and, instead of being a discrimination against a foreign corporation, it is but a just method of equalizing, as far as it may be equalized, the liabilities of the foreign corporation and those of the domestic.

In the case of *Tarr v. Western Loan & Savings Co.*, 15 Idaho, 741, 99 Pac. 1049, 21 L. R. A. (N. S.) 707, this same question was raised. It was there urged that, as the foreign corporation in that case had complied with the statute in force at the time the license to do business was issued, it was not within the power of the Legislature to add additional requirements with which it must comply in order to continue doing business. In that state the statute likewise provided that foreign corporations should have all the rights and privileges of like domestic corporations. It was held that, since the act there in question required a foreign corporation to pay to the secretary of state the same fees as are required to be paid by like domestic corporations, the exactions made of foreign corpo-

rations were not different from those made of domestic corporations, and that there was no discrimination and no impairment of contract obligations.

[3] It is contended by appellant, however, that the amendment of 1917 makes a new basis for computing fees, for the reason that it based the fees on an average of the percentage of Illinois assets to total assets and of its Illinois business to total business, and that an average of two figures must necessarily be different from either. The general law gives no method for the computation of the proportion of capital stock represented in the state. What method was adopted by the secretary of state is not material, as such would not be binding on the Legislature. Whether or not the Legislature by the amendment of 1917 changed the basis of computing the fees depends on whether the method therein prescribed might legally have been used by the secretary of state under the law as it existed in 1901, when the license was issued to the appellant. We are of the opinion that the law in effect at the time the license was issued herein would have permitted the use by the secretary of state of the method, in arriving at the same matter, which is prescribed in the amendment of 1917. That which is to be sought as the basis of the fees in this case is the proportion of the capital stock represented in this state by the property and business of the corporation within the state. Previous to the amendment of 1917 the statute was silent as to the method of computing such proportion. The amendment provides that the secretary of state shall, from interrogatories and answers thereto, ascertain—

“the proportion of capital stock actually being represented by property located and business transacted in the state of Illinois, which proportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this state.”

It is not pointed out wherein this method would work an injury to appellant over any method used in the past. In fact, a computation based upon this method appears, on demonstration, to be more favorable to appellant than that based on the method previously used by the secretary of state. However, that is not the test. The test is whether the present method could have been used previous to the amendment of 1917. We are of the opinion that it could. In any event, the object was to ascertain the proportion of the capital stock represented in this state by business and property. It was upon that proportion that the fee was and is based.

It is urged that this is a discrimination against foreign corporations, for the reason that an increase of Illinois business and a decrease of the business outside of the state

each results in an increase of the fees. While this is true, it does not argue that such a basis is therefore illegal. Those are circumstances which affect the amount of the fee required to be paid, but do not, however, affect the rule, which is, that a fee shall be paid in proportion to the amount of stock represented in the state. Any method of computing the proportion of representation of stock in the state would be open to the same argument. Nor does this work a discrimination against a foreign corporation in favor of a domestic corporation of a like character, for the reason that in no event could the foreign corporation be required to pay more fees than the domestic corporation pays, even though such foreign corporation transfers all its business and all its property to this state, as it would then be paying no more fees than the domestic corporation, which must pay the same fees on its entire capital stock before it commences business.

It is also urged that the amendment of 1917 is invalid, as contravening the federal Constitution, in that it denies appellant the equal protection of the laws and seeks to take its property without due process of law. As we have seen, this act does not result in discrimination against foreign corporations, and therefore it follows that appellant is not being denied the equal protection of the laws. An examination of the authorities cited by counsel discloses that in each case the effect of the statutes there in question was to put upon foreign corporations a greater burden than upon domestic corporations of like character.

It is also urged by appellant that the tax here in question is an unlawful interference with interstate commerce, on the ground that the tax assessed is measured by the percentage of its authorized capital stock, and that the tax imposed is a tax upon not only its capital, property, and business represented in Illinois, but likewise its capital, property, and business in other states. It will be seen that the amount of this fee or tax required to be paid by appellant is measured, as provided by the act, by a percentage of that proportion of its entire capital stock which is represented in the state by its property and business within the state. Such fee is not computed upon the entire capital stock, but upon a fraction of that stock, and that fraction such as is represented within this state. It is evident that the only circumstances under which the Legislature intended that a foreign corporation should be taxed upon all of its capital stock would be where it had transferred all its business and property to this state. If, from the mere fact that this license fee or tax must be paid out of the earnings of the company, it should be held that it was therefore a tax upon the whole capital stock of the corporation, then it would be impossible to levy any fee on a

foreign corporation for privilege to do business in this state, as any such fee or tax, because paid out of the earnings of the corporation, would be a burden upon interstate commerce. Such is not the law. The right of states to levy such fee has been universally recognized.

In support of their contention that this amendment places a burden upon interstate commerce, counsel for appellant cite numerous cases, which will be found, upon examination, to differ from the facts in this case, and none of which hold, as we understand them, that a license fee required of a foreign corporation to do business in a state is a burden upon interstate commerce. The most recent case cited by the appellant is that of *Union Pacific Railway Co. v. Public Utilities Com. of Missouri*, 248 U. S. 67, 39 Sup. Ct. 24, 63 L. Ed. —. The state of Missouri passed a law fixing a tax by a percentage upon the total issue of bonds contemplated by said railroad company. The railroad company was a foreign corporation having over 3,500 miles of railway, of which about six-tenths of one mile of main track was in the state of Missouri. It had a total property in the state of Missouri of a little over \$3,000,000, out of a total average of \$281,000,000. The business done by the road in Missouri was wholly interstate. The court there says:

"On these facts it is plain, on principles now established, that the charge which, in accordance with the letter of the Missouri statutes, was fixed by a percentage on the total issue contemplated, was an unlawful interference with commerce among the states."

In the case at bar there is no attempt to fix taxes on the entire capital stock of appellant. All that is sought is that appellant shall pay, as a license fee to do business, the same fee on the proportion of its stock represented in this state that would be paid by a domestic corporation of like character on the same amount of stock. Such has been held valid by the Supreme Court of the United States. In *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459, it was held that while a state does not have the right to burden interstate commerce by taxing it, yet such interstate commerce may be used as a measure of the value of the property of a corporation engaged in interstate commerce. The court in that case says:

"In *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994, this court sustained a tax which required every railroad operated within the state to pay an annual tax for the privilege of exercising its franchises therein, determined upon a proportion of gross transportation receipts, which in that case were shown to be those of a railroad partly within and partly without the state, such gross receipts being derived from its entire business, state and interstate. The resort to the gross receipts, in the opinion of the court, was merely

a means of ascertaining the business done by the corporation, and thus measuring the tax, which was held to be within the power of the state. In *Wisconsin & Michigan Railway Co. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229, a tax was sustained which made the income of the railway company within the state, including interstate earnings, the *prima facie* measure of the value of the property within the state for the purpose of taxation. In the course of the opinion this court said [191 U. S. 387, 24 Sup. Ct. 109, 48 L. Ed. 229]: 'In form the tax is a tax on "the property and business of such railroad corporation operated within the state," computed upon certain percentages of gross income. The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994.'

[4] The rule adopted by the United States Supreme Court is that, while the state may not regulate interstate commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. *Kansas City Railroad Co. v. Stiles*, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176; *Northwestern Mutual Co. v. Wisconsin*, 247 U. S. 132, 38 Sup. Ct. 444, 62 L. Ed. 1025; *United States Glue Co. v. Oak Creek*, 247 U. S. 341, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; *Baldwin Tool Works v. Blue* (D. C.) 240 Fed. 202.

[5] Appellant also urges that the act is invalid, in that the fee there required is based upon the entire capital stock of the company, including the unissued, as well as the issued, capital stock. The statute refers to the proportion of the capital stock of the corporation. Section 3 of the Corporation Act, as amended in 1899, required a statement of "the proportion of the capital stock" represented in this state, and required the payment of the license tax thereon. This same provision appears in the amendment of 1917. As we have seen, this license tax is not a burden upon interstate commerce, and is not a tax on the entire capital stock of the corporation, but only upon that portion represented within this state. The whole of the capital stock is used merely as a method of determining what proportion of the same is so represented. Again, domestic corporations are required to pay a tax or fee upon the authorized capital stock, regardless of the amount issued. Under the policy of equal treatment, therefore, it is evident that the Legislature intended that the capital stock to be considered in arriving at the proportion upon which the license tax is to be based is the capital stock authorized by the charter. The term "capital stock" has been defined as a term used to indicate the amount

of capital stock which the charter provides for. State v. Fire Ass'n, 23 N. J. Law, 195. While, for purposes of levying an ad valorem tax, the term has in some states been defined to mean the amount of capital paid in, we are of the opinion that for the purposes for which used here the term "capital stock" refers to the capital stock authorized.

We are therefore of the opinion that the amendment of 1917 is not open to the objections urged against it. The decree of the circuit court, sustaining the demurrer and dismissing appellant's bill for want of equity, will therefore be affirmed.

Decree affirmed.

(238 ILL. 405)

OGREN v. ROCKFORD STAR PRINTING CO. (No. 11944.)

(Supreme Court of Illinois. June 18, 1919.)

1. PLEADING §193(6) — DEMURRER — GROUNDS.

It is good cause for demurrer in actions at law under the common-law system of pleading that two or more causes of action are joined in the same count of the declaration.

2. PLEADING §52(2)—DECLARATION—JOINER OF CAUSES OF ACTION.

Declarations for libel follow the usual rule as to joinder of two or more causes in the same count, and, while two or more causes for separate libels or slanders may be united in one declaration, they should be stated in separate counts.

3. APPEAL AND ERROR §1040(8)—REVIEW—HARMLESS ERROR.

Where any defenses which could have been raised by the third replication could be presented under issues previously made, plaintiff cannot complain that a demurrer to the third replication was sustained.

4. LIBEL AND SLANDER §94(1) — PLEA OF JUSTIFICATION.

In a libel suit the plea of justification must be as broad as the charge and requires certainty of averment.

5. LIBEL AND SLANDER §55 — DEFENSES — PARTIAL JUSTIFICATION.

If one is guilty of publishing the whole of alleged defamatory matter, he cannot justify by showing that some part, though divisible from the rest, was true.

6. LIBEL AND SLANDER §48(3)—CRITICISM OF CANDIDATE—WORDS LIBELOUS PER SE.

In view of Cr. Code, § 177, defining "libel" as a malicious defamation expressed by printing, etc., tending to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one living, and thereby expose him to public hatred, ridicule, or financial injury, publications referring to plaintiff, who was a candidate for mayor on the Socialist tick-

et, as being the rankest of Socialists and favoring the blowing up of tenement houses, etc., held libelous per se, although not charging the commission of crime.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Libel.]

7. LIBEL AND SLANDER §123(1, 2)—ACTIONS — JURY QUESTION.

Where words are ambiguous or equivocal in meaning, the question of the meaning to be ascribed to them is for the jury, although the question whether any particular meaning is libelous is for the court; but, where there is a controversy as to whether the words were spoken concerning plaintiff, the question is for the jury.

8. LIBEL AND SLANDER §100(1)—DEFENSE ADMISSIBLE UNDER GENERAL ISSUE.

The defense that portions of the alleged libelous articles were not applicable to plaintiff is one admissible under the general issue.

9. LIBEL AND SLANDER §105(4)—EVIDENCE — PERSON DEFAMED.

Where the language of alleged libels was clear and unambiguous, and there can be little or no doubt they applied to plaintiff, evidence that the language was intended by defendant to apply to plaintiff is inadmissible in the first instance; but, if defendant disputes the fact and offers evidence that the language was intended to apply to another, plaintiff may rebut such contention.

10. LIBEL AND SLANDER §105(3)—EVIDENCE — LIBELOUS ARTICLE.

In an action for libel the exclusion of all of the alleged libelous article as set out in the declaration save an excerpt of an alleged speech by plaintiff was error, as it was admissible to show the meaning of the article.

11. WITNESSES §240(6) — EXAMINATION — LEADING QUESTIONS.

In an action for libel, where the alleged libelous publications contained what was claimed to be an excerpt of a speech by plaintiff, it was improper to allow defendant to deliver to witnesses the publications, and, after calling to their attention the excerpt, ask them if plaintiff spoke such words; for such course of questioning was plainly leading.

12. EVIDENCE §318(6) — ADMISSIBILITY — HEARSAY—SOCIALISTIC PUBLICATIONS.

Where the alleged libelous articles concerning plaintiff, a candidate for mayor on the Socialist ticket, charged that Socialism would destroy the home, the church, etc., evidence that writers on Socialism had declared that the church must go and excerpts from Socialistic books attacking the indissolubility of marriage were improperly admitted, being hearsay.

13. LIBEL AND SLANDER §103—EVIDENCE.

In an action for libel brought by a candidate for mayor on the Socialistic ticket, evidence that the President during the World War refused to grant passports to American Socialists was inadmissible; there being no suggestion even of the grounds of the President's refusal.

14. CONSTITUTIONAL LAW §29—SELF-EXECUTING CONSTITUTIONAL PROVISION—STATUTE.

As the provision of Const. art. 2, § 4, relating to the defense of truth in libel suits, is clear and unequivocal, it is self-executing, and needs no statute to put it in force.

15. LIBEL AND SLANDER §54—DEFENSES—TRUTH.

Under Const. art. 2, § 4, declaring that in all trials for libel the truth, when published with good motives and for justifiable ends, shall be a defense, truth alone is not a complete defense in a civil action for libel, and, if defendant justifies on that ground, he must further allege and prove that he published the defamatory matter with good motives and for justifiable ends.

16. LIBEL AND SLANDER §49—PRIVILEGE—NEWSPAPERS.

The publisher of a newspaper has no more right or privilege in regard to publishing libelous matter against a candidate for public office than has an individual.

17. LIBEL AND SLANDER §48(3), 50, 51(5)—PRIVILEGE—CANDIDATES FOR OFFICE.

When any one becomes a candidate for a public office, he is considered as putting his character in issue, and every one may freely comment on his conduct and actions, but to the malicious publication of libelous matter against a candidate for public office there is no defense on the ground of privilege, and it is not a defense that the libelous charge was mistakenly and honestly made.

18. LIBEL AND SLANDER §95, 100(4)—ACTIONS—PLEADING.

Matters of mitigation only in a libel action are admissible under the general issue, and should not be mixed up with matters of justification in the same plea.

19. TRIAL §217—INSTRUCTIONS—DUTIES OF JURY.

In an action against a newspaper for libel, where the case was one of great notoriety and interest, the alleged libels having been published during plaintiff's campaign for office, it is the duty of the court to instruct the jury so firmly that no juror would be likely to see newspapers printing matters of evidence or the comments on the proceedings, and may take whatever steps are necessary to the extent of holding the jury together, etc., to prevent it.

Error to Circuit Court; Winnebago County; Claire C. Edwards, Judge.

Action by Oscar H. Ogren against the Rockford Star Printing Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

Roy F. Hall, of Rockford, for plaintiff in error.

Fisher, North, Welsh & Linscott, of Rockford (R. K. Welsh, of Rockford, of counsel), for defendant in error.

DUNCAN, J. Oscar H. Ogren, plaintiff in error (hereinafter known as plaintiff), began suit in the circuit court of Winnebago county against the Rockford Star Printing Company to recover damages for the publication of three alleged libels. The jury returned a verdict of not guilty, and judgment was entered against plaintiff. This writ of error is sued out of this court and jurisdiction invoked on the ground that a constitutional question is involved.

The plaintiff had lived in Rockford for many years, was married, and had one daughter about ten years old. His father's family also lived in Rockford. Plaintiff had worked at different occupations, served two terms in the city council, and had been at a previous election a candidate for mayor of Rockford, and was at the time of the publications alleged to have been libelous a candidate for mayor on the Socialist ticket. In the election in question he had as his only opponent W. W. Bennett. The alleged libelous articles were published by the defendant in the manner of advertisements during this campaign, one at a time on three different days, April 15, 16, and 17, 1915, in its newspaper, the Rockford Morning Star. Each article was made the subject of a count in the plaintiff's declaration. So far as they are made a part of the declaration and appear in the abstract they are here copied verbatim in the order in which they were published, and are numbered, respectively, 1, 2 and 3, to wit:

1. "The real issue is *Socialism*. Rockford faces a calamity. Without evasion or digression, the real, impending and fearful cloud hanging over Rockford to-day is, *The Menace of the Red Flag*. Do you want to turn Rockford over to that emblem? * * * This is a typical expression of Socialistic thought. Do not be deceived by sugar-coated and misleading speeches being made on the stump now by Mr. Ogren to get votes. *Stop and Think*. Find out what Socialism really is. Meet the issue without passion or prejudice. Before you decide how you will vote next Tuesday, inform yourself. A vote for Oscar Ogren will be a straight vote for Socialism."

2. "Twenty-five new industries have been established in Rockford during the past four years. Will one industry locate here if we elect a mayor who, upon taking his seat in the council, made this statement? Statement by alderman Oscar Ogren on taking his seat in council May 3, 1909: 'I have been elected by the Socialist party of my ward. All my votes and my actions while in this council will be in direct opposition to all corporations, regardless of what the question or the issue is. That is why I am here—that is my mission in the council.' * * * Honest workmen want work. Gab, dynamite, and blowing tenement houses to hell do not produce work. Socialism would destroy the American home. A vote for Ogren is a vote for Socialism."

3. "Socialism means terror, unrest, and finan-

cial ruin. None of these citizens want the red flag: The workingman—who values a steady job. The home owner—who wants it protected. The man with a savings account—who wants it to grow. The young man—who is looking to the future. The minister—whose calling should be honored. The doctor—who is serving humanity. The merchant—who deserves a square deal. The lawyer—who stands for human rights. The plain, substantial citizen—who puts patriotism and civic pride before class prejudice and sectional hatred.

"No woman can be true to herself and her home and vote for Socialism. No mother—who has a son or daughter. No first voter—who regards the ballot justly. No housewife—who loves her home and family. No club woman—who knows the needs of womanhood. No woman wage-earner—who knows the evils of business unrest. No professional woman—who knows the danger of epidemics. No church member—who appreciates the sanctity of her church. No school teacher—who wants sanity to prevail. No student—who understands American tradition. Not one of these women would be spared were the wild dreams of Socialists given official sanction. A vote for *Ogren* is a vote for Socialism. Vote for Bennett and preserve the peace and good will of Rockford.

"Rockford's Socialism is the rankest of all. Not one of the writers in all the Socialist propaganda could be more violent than this one. A vote for *Ogren* is a vote for this platform. * * * Do you want Rockford to become the testing ground for every wild scheme which might be presented by men who urge the use of dynamite and blowing tenements to hell? *Rockford is in danger. It needs every vote. A vote for Ogren is a vote for Socialism.*"

The three articles all contained the following words and sentences at the respective places in the articles as above copied where the stars or asterisks occur and are to be considered as inserted in each article at the places thus indicated, to-wit:

"Read what Oscar Ogren, now candidate for mayor, said at a public meeting at the Majestic Theater February 12, 1915: 'We don't want work. What we want is a division of those profits that have already been made. I am a rebel. There are men out there in this audience that are just as big rebels as I am, but they haven't the gift of gab that I have. If you really want work I know where to make it, and I am in favor of going into Chicago and taking dynamite and blowing those tenement houses to hell!'"

The words just quoted were printed near the center of the newspaper article first printed, with a heavy border around it, with a hand pointing towards it from either side. In the second article both speeches of Ogren, in the council and in the theater, were printed near the center of the article, side by side, with a light border around each. In the third article the words of Ogren alleged to have been spoken at the theater are near the center of the article or page, with a light border around it and with

a hand on the left pointing to it and these words printed under the hand and immediately at the left of the left-hand border: "A vote for Ogren is a vote for this platform."

[1, 2] There was a fourth count to the declaration which combined the charges in all three of the other counts, or, rather, made the three publications as the basis of that count. It is a good cause of demurrer in actions at law under the common-law system of pleading that two or more causes of action are joined in one and the same count of the declaration. When they are so joined, the count is double, and for that reason demurrable. Declarations for libel follow the same rule. Two or more causes for separate libels or slanders may be united in one declaration but should not be blended in one and the same count. 13 Ency. of Pl. & Pr. 60. The publications are all distinct publications, and the latter two are not continuations of an incompleting publication or charge.

The defendant filed the general issue and three special pleas, one to each of the other three counts of the declaration. The substance of the first special plea is that the plaintiff was a candidate for mayor of Rockford on the Socialist ticket, and that there were other Socialist candidates for other offices of the city on said ticket; that there then existed in said city a political and propagandist organization known as the Socialist party, which was devoting itself to the alleged principles, doctrines, and proposals of Socialism; that plaintiff, as such candidate, represented that party and all its alleged principles, doctrines, and proposals; that, as publisher of its daily newspaper, it was defendant's privilege and duty to publish for the information of its patrons and the city of Rockford the alleged principles and doctrines and proposals of any political party nominating candidates for said offices and report the attitude and beliefs of any such candidates upon governmental, municipal, civic, and social questions; that, in accordance with its right and duty, defendant did on said date publish in its newspaper of and concerning Socialism, but not of and concerning the plaintiff, certain matters, the certain matters being all of said article except the alleged words spoken by plaintiff at the theater and the last sentence of said article and one other sentence. In the same plea the defendant justified by averring that Ogren did in a public speech utter the words alleged to have been spoken at the theater, and also by averring that it was true that plaintiff was then making sugar-coated and misleading speeches to get votes, as charged in said article. The last sentence of said article was not covered by any averments in the plea. A similar plea was filed as to the

second and third counts, wherein the defendant likewise averred that it published certain parts of the second and third articles of and concerning Socialism and justified as to certain other parts in the same plea, and failed to plead at all as to other sentences in the article.

[3] Plaintiff by leave replied doubly to the special pleas, after joining issue on the plea of the general issue. By his second replication plaintiff denied the allegations in all the special pleas. His third replication was to the effect that, even though the defendant published certain matters of and concerning Socialism only, yet persons who read the articles understood such parts to have been published of and concerning the plaintiff. It is sufficient to say that plaintiff shows no ground for complaint at the court's sustaining a demurrer to his third or special replication. If any such matters are proper at all, they were admissible under the issues previously found. It is not insisted that the demurrer should have been carried back to any of the special pleas, and no such motion or action appears to have been insisted on by plaintiff in the lower court.

[4, 5] The plea of justification must be as broad as the charge and requires certainty of averment. 17 R. C. L. 400. It should contain no other averments except the matters justified. If one is guilty of publishing the whole of the alleged defamatory matter, he cannot justify by showing that some part of the defamatory matter, though divisible from the rest, was true. 17 R. C. L. 401.

[6] The articles published as aforesaid are libelous per se. It will be observed that none of the articles charge plaintiff with a crime. The most that can be said in that regard is that they charge him with favoring crime—that is, blowing up tenement houses with dynamite. It is by the language of the articles clear that they do charge him with being one of the rankest of Socialists. In the third article it is charged that Rockford's Socialism is the rankest of all, and that not one of the writers in all the Socialist propaganda could be more violent than this one. The declaration charges that the words "this one" mean or refer to plaintiff, and there can be no doubt that this is true. The plaintiff was the main subject of the article. It was his election as mayor that was referred to as the great menace to the citizens of Rockford. The article did refer to Socialism also as the danger, but further charged that a vote for plaintiff was a vote for Socialism, and evidently means Rockford's Socialism, "the rankest of all"—the Socialism that "means terror, unrest, and financial ruin" to men and women of Rockford—and recommended as the only remedy a vote against Ogren or for Bennett to "preserve the peace and good will of Rockford." It would seem that there

is no escaping it that such words were spoken of and concerning the plaintiff, and, by charging him with making the two speeches or alleged statements at the council meeting and at the theater building, the second article in substance charged that he himself had declared himself as a man who would by his official acts be opposed to and decide against corporations, right or wrong, upon all questions; that he was in favor of a division of profits already made and without further work—a rebel against the present system and in favor of blowing up tenement houses, etc. There can be no question that such charges tend to impeach the honesty, integrity, and reputation of plaintiff and to expose him to public hatred, contempt, and ridicule. Section 177 of our Criminal Code (Hurd's Rev. St. 1917, c. 38) defines libel as a malicious defamation, expressed by printing or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury. Under such a statute it is not necessary to charge one with a crime to make the charge libelous per se. *Cerveny v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864; *Dowie v. Priddle*, 216 Ill. 553, 75 N. E. 243, 8 Ann. Cas. 526; *People v. Fuller*, 238 Ill. 116, 87 N. E. 336.

[7-9] Where the words are ambiguous or equivocal in meaning, the question of the meaning to be ascribed to them is for the jury, although the question as to whether or not any particular meaning is libelous is for the court. Where there is a controversy as to whether or not words were spoken of and concerning the plaintiff, the question whether they were so spoken is for the jury. *Ball v. Evening American Publishing Co.*, 237 Ill. 592, 86 N. E. 1097. In this case the defendant by its special pleas denies that certain portions of the articles were spoken of plaintiff—a defense which is admissible under the general issue. Plaintiff offered witnesses to prove that by the language of the articles they understood the words in question to be spoken of and concerning plaintiff, but on objection the court refused to admit the evidence. We think the better rule is that, where the language is clear and unambiguous, as it is in this case, and such as there can be little or no doubt of its being spoken of and concerning plaintiff, no such evidence is admissible for plaintiff in the first instance, but, if the defendant disputes the fact and offers evidence to prove it, where, as here, the evidence also refers to another person or object, then it would be proper for the plaintiff to offer proof on the question in rebuttal. No such evidence was given for the defendant, and

we hold the court did not err in this particular.

[10] The court committed error in excluding all of the first article except the alleged words of plaintiff spoken by him at the Majestic Theater. The whole article set out in the declaration should have been admitted, so that the meaning of the same could be fully and properly understood.

[11] The defendant, in introducing its proof under the pleas of justification, submitted the matter sought to be justified in each instance by delivering the published articles to the witnesses, and, after first calling their attention to these matters, asked the witnesses if the plaintiff spoke those words at the council meeting and at the Majestic Theater. After reading the matters thus offered, the witnesses answered in each instance "Yes," over the objection of the plaintiff that the question was leading. This was error. The question could not well be more leading and more suggestive of just what answer was wanted, which is one of the real tests of whether or not a question is leading. The question furnished the witnesses in advance the full information as to what the defendant's claim was that plaintiff did say on those occasions, and relieved the witnesses of testifying as to what they really remembered to have been spoken.

[12, 13] It was also error to admit evidence, in substance, that a number of writers on Socialism had declared that the church as it exists is a capitalistic institution and under Socialism must go. It was for similar reasons absolutely improper to introduce certain passages in certain books, one by Bernard Shaw, another by Morris and Bax, and still others, who were foreigners who had lived in Europe, and also an article from a Socialist newspaper. Most all of these books contained very radical chapters attacking the indissolubility of marriage and our marriage laws, and advocating that a man should be allowed to discard his wife when he is tired of her, and the wife the husband when she is tired of him. There was no proof that plaintiff was a believer in that doctrine or had ever advocated it or had ever read those books. The defendant's own witness who identified the books expressly testified that the Socialist party of America had never adopted such books, and was quite sure that the Socialist party of Rockford never had adopted any of the sentiments contained in the extracts read from said books. They were hearsay evidence of a low order, and the rule has ever been that such books and newspapers are inadmissible as original evidence in trials before courts. 3 Jones' Commentaries on Evidence, §§ 578-582. Of the same character of objectionable evidence, and of the most prejudicial character, was the proof admitted that President Wilson refused passports to Europe to Berger, of Milwaukee, and

to Lee and Hillquit, of New York, American Socialists. The grounds of the President's refusal were not proved or even suggested, and if such proof had been made, the evidence had no tendency to prove any issue in this case and could only serve to prevent a fair and impartial trial.

[14, 15] Section 4 of article 2 of the Constitution of Illinois provides:

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."

This section clearly and unequivocally lays down the full and correct rule for this state, when the truth is a defense to a libel, in both civil and criminal suits. It appears this is the first time the question has been raised in a civil suit since our last Constitution was adopted, but there is no mistaking the meaning of that section, which is that the truth is a defense in both civil and criminal suits only when published with good motives and for justifiable ends. The above section of the Constitution is clear and unequivocal, and states a sufficient and definite rule by means of which a defendant may establish a defense to a publication that is libelous in its character. It is, therefore, self-executing, and needs no statute to put it in force. Cooley's Const. Lim. (4th Ed.) § 82, p. 101. Our statute does not make any provision on the question except to provide that it shall be competent for the defendant to establish the truth of the matter charged by a preponderance of testimony. Our attention has been called to the decision of *Castle v. Houston*, 19 Kan. 417, 27 Am. Rep. 127, which, it is claimed, holds otherwise. The Constitution of Kansas is differently worded, and that decision is based on the ground that the word "accused" has reference to a party indicted or charged criminally, and not to a defendant in a civil suit. The language construed is:

"In all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

The Nebraska Constitution is exactly like ours, and in *Wertz v. Sprecher*, 82 Neb. 834, 118 N. W. 1071, 17 Ann. Cas. 758, the court construed the Constitution, and held that truth alone is not a complete defense in a civil action for libel, and, if the defendant justifies, he must further allege and prove that he published the defamatory matter with good motives and for justifiable ends. The Supreme Court of Florida makes a similar holding upon a similar provision in its Constitution in *Taylor v. Tribune Publishing Co.*, 67 Fla. 361, 65 South. 3. At common law the rule was that truth of the alleged li-

bel, when established, was a defense, and that was the law in this state before our last Constitution was adopted.

[16, 17] It is not the privilege or duty of one publishing a newspaper to publish libelous matter against any candidate for public office. Such person has no more right or privilege in that regard than any other person in the same community. The liberty of free speech and of free press is the same in that regard. When any one becomes a candidate for a public office, conferred by the election of the people, he is considered as putting his character in issue, so far as it may respect his fitness and qualifications for office, and every one may freely comment on his conduct and actions. His acts may be canvassed and his conduct boldly censured. But the publication of falsehood and calumny against public officers or candidates for such offices is an offense most dangerous to the people and the subject of punishment, because the people may be deceived and reject the best citizen, to their injury. An intention to serve the public good in such a case cannot authorize or justify a defamation of private character. *Rearick v. Wilcox*, 81 Ill. 77; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *Jones v. Townsend's Adm'r*, 21 Fla. 431, 58 Am. Rep. 676. To a malicious publication of libelous matter against a candidate for public office there is no defense on the ground that it is privileged, and it is not a defense that it is mistakenly and honestly made. Such matters go only in mitigation of damages.

A number of instructions are challenged and discussed as erroneous as given by the court. We have virtually settled all those questions in the holdings already made, and we deem it of no value to further discuss the instructions in detail, as the errors, where error is committed, may be avoided on another trial.

[18] In view of what has already been said it seems to us proper to suggest that the pleas of the defendant ought to be redrawn and the issues correctly presented according to the views herein expressed. Matters of mitigation only are admissible under the general issue, and should not be mixed up with matters of justification in the same plea. The same is true of matters which amount only to a denial of the charge. As indicated, the case will have to be reversed for the errors already pointed out in this opinion.

[19] It is finally called to our attention by various affidavits and admissions of the jurors and of the defendant that the entire jury, or about all of them, were each treated to a box of cigars and given six months' free subscription to the defendant's paper after the trial was over. While this may not have affected the verdict of the jury, we feel constrained to say that no litigant owes any

jury one penny or any unusually friendly acts or demonstrations of any kind for an honest verdict. Presents should not be given to or be received by a juror in any case. Such acts must necessarily produce bad impressions, no matter how good the intentions may be and however harmless they may in fact be to the loser. It does appear, however, that one or two of the jurors saw, and may have read, the comments of the defendant made in its newspaper during the progress of the trial, and in which it was also related how the judge rescued the jury from confinement by overruling plaintiff's motion to have the jury kept together and not allowed to separate, etc. It is the absolute duty of the court to instruct the jury so positively and so firmly in a case of so much notoriety and feeling that no juror would be likely to see newspapers printing matters of evidence or other comments on the proceedings. It has full power to take whatever steps are necessary to the securing of a fair trial, by instructing the jury, holding it together, removing newspaper reporters from the courtroom, if necessary, or by such other acts as will prevent a recurrence of matters of which complaint is here made, and it should do so without either party being censured by the jury for the court's actions.

The judgment of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

(238 Ill. 506)

FOLLETT v. ILLINOIS CENT. R. CO.
(No. 12592.)

(Supreme Court of Illinois. June 18, 1919.)

1. APPEAL AND ERROR §1094(1)—REVIEW—EVIDENCE.

Whether a verdict was contrary to the weight of the evidence is for the trial court and the Appellate Court, and such questions should not be considered by the Supreme Court.

2. NEGLIGENCE §136(19) — QUESTIONS FOR JURY—PLACES ATTRACTIVE TO CHILDREN.

In an action for death of a seven year old girl, struck by a train at an abandoned depot, the question whether an unlocked push car with which she was playing was a device attractive to children *held* for the jury.

3. NEGLIGENCE §23(1)—ATTRACTIVE DEVICE—LIABILITY.

One who places on his premises a device attractive to children is bound to use reasonable precaution to prevent them playing with the device, where it is dangerous in itself, or it is located at such a point that they are liable to be brought into danger.

4. NEGLIGENCE §139(1)—INSTRUCTIONS.

Where it was claimed that a push car kept at an abandoned depot was attractive to chil-

dren, and that a child struck by a train was drawn there by the attraction of such car, an instruction that defendant had "ordinarily" the right to place the car on its premises, was improper, as likely to mislead.

5. DEATH §58(1) — ACTION FOR DEATH OF CHILD—NEGLIGENCE.

In an action for the death of a child, struck by a train at a point where a push car was kept, the burden was on the administrator to show that the parents, who would participate in the recovery, exercised the required degree of care.

6. NEGLIGENCE §59 — ATTRACTIVE DEVICE —PROXIMATE CAUSE.

A railroad company is not liable for the death of a child, struck by a train while playing with a push car left at an abandoned depot, unless the circumstances were such that it should have anticipated children would be attracted to the premises and might be injured.

7. NEGLIGENCE §140—INJURIES TO PERSONS ON TRACKS—INSTRUCTIONS.

In an action for the death of a child, struck by a train while playing with a push car, where declaration alleged that defendant knew that children were in the habit of playing with the car and that one playing with it might come in contact with trains, it was error to refuse to charge that defendant was not liable, unless it should have anticipated that deceased or other children would have been attracted to the premises by the car and would have been injured by trains.

Farmer, J., dissenting.

Error to Appellate Court, Second District, on Appeal from Circuit Court, La Salle County; Edgar Eldredge, Judge.

Action by Frank F. Follett, administrator, against the Illinois Central Railroad Company. A judgment for plaintiff was affirmed on appeal to the Appellate Court, and defendant brings certiorari. Reversed and remanded.

Woodward & Hibbs, of Ottawa (John G. Drennan, of Chicago, of counsel), for plaintiff in error.

R. C. Donoghue, of La Salle, and Butters & Clark and H. H. Bayne, both of Ottawa, for defendant in error.

CARTWRIGHT, J. The plaintiff in error, the Illinois Central Railroad Company, maintained on the west side of its single main track, running northerly and southerly, a depot in the north part of the city of Oglesby until December, 1912, when it abandoned that depot for a new one half a mile or more south, near Walnut street, and the old depot was kept locked and used only by the section men for their tools. The depot was on the west side of the track and was 48 feet long, and between it and the track there was what is called a platform, about 150 feet

long and 14 feet wide, made of cinders covered with crushed stone, and there was a wooden curbing around it. The platform was 8 or 10 inches higher than the rail, and south of it there was a passing track on the east side of the main line, leaving that line at a switch point about 250 feet south of the depot. The railroad company kept an ordinary push car with a platform about 8 feet long and about 5 or 6 feet wide, at the depot, and it was sometimes locked or fastened and sometimes not. On the evening of June 23, 1913, the push car was not locked or fastened and could be pushed about. Shortly after 7 o'clock on that evening a freight train headed north, consisting of 28 cars loaded with cement and 8 empty coal cars at the rear, without a caboose, stood on the passing track waiting for a passenger train to go south. The passenger train went by, and the switch was then lined for the main track, so that the freight train could go north. When the last car went out of the switch, the rear brakeman lined the switch for the main line, gave the go-ahead signal, and climbed on the rear coal car. The train was moving 3 or 4 miles an hour, and it then increased its speed to about 7 or 8 miles an hour in passing the depot. Cassie Kosinski, a girl 7 years and 9 months of age, lived with her parents about 700 feet from the depot. The family had supper about 6:30, and afterward Cassie went to the depot platform, and as the train passed she was run over and fatally injured, so that she died the next day. Her administrator brought suit for damages in the circuit court of La Salle county, and the cause was tried upon the original declaration of one count and three additional counts, charging defendant with liability on the grounds that the push car was attractive and enticing to children; that trains frequently passed the platform, and Cassie was induced to go to the place to play by the fact of the push car standing there unlocked; that children, while playing with the push car, would be liable to be struck by passing trains, or slip or fall down the abrupt edge of the platform, or be drawn under the wheels of a passing train by air suction; that the defendant knew, or had a reasonable opportunity to know, that children had been in the habit of going to the platform to play and pushing the push car about on the platform; and that Cassie, while playing with the push car, was unavoidably struck by the freight train, run over, and injured so that she died. The plea was not guilty.

[1,2] The controverted questions of fact were whether the defendant was guilty of negligence in leaving the push car unlocked; whether the parents of the child exercised ordinary care with respect to her going to the depot; whether she was at the time play-

ing with the push car and pushing it about; and, if so, whether it was the proximate cause of her injury and death. There was a verdict, followed by a judgment for \$3,500. and on appeal to the Appellate Court for the Second District the judgment was affirmed. The record has been brought from the Appellate Court by writ of error, in pursuance to a certiorari allowed by this court.

There was no witness testifying who saw the accident. A witness who lived east of the depot testified that he went to the depot and crossed the track to the platform; that as he went over the platform he saw Cassie Kosinski pushing the push car north near the south end of the depot, a foot or a foot and a half west of the track; that there were other children there, but not close to her, and she was the only one pushing the car; that he passed the engine of the freight train south of the platform and the train was not going fast; that he walked a little distance and heard somebody scream, and turned around and saw a brakeman pick up the child about 5 or 6 feet north of the place where he saw her pushing the car; and that the car then stood near the edge of the platform, about the same distance as when he passed it before. He was a Lithuanian, and testified at the trial through an interpreter, and he had been examined in English by an agent of the defendant concerning what he knew. His answers to questions at that time were taken down by a stenographer, who testified that he spoke English and the witness understood what he said. There were differences in the statement then made from his testimony at the trial, the chief material difference being that there were lots of "kids" pushing the car, and there were somewhat different statements at the trial as to the place where the child was picked up; but, of course, some difficulty in speaking English when the statement was given must be taken into account. On the part of the defendant the rear brakeman, who had set the switch and climbed on the last car, testified that he gave a stop signal when he heard some one scream, and ran and picked up the child, and afterward gave her to her mother; that he saw the push car at that time, and it was about a foot from the depot and 12 or 15 feet from the railroad track; and that when he picked up the child he saw a woman and baby right north of the depot, but she disappeared all of a sudden, and he did not see her go. The engine foreman in charge of the train, who was forward brakeman, testified that after the passenger train went through he lined up the switch for the main track, to let the freight train out of the passing track, and after a few cars had passed he got on top somewhere between the engine and the eighth or tenth car and stood up on a box car; that the train was going 3 or 4 miles an hour, and

in passing the depot he saw some children and a woman with a baby in her arms; that there were three girls there, running around playing at the south end of the depot; that he did not see any push car, and did not see anybody pushing the car; that he started for the Kosinski home to call the parents; that when he came back the push car was standing north of the depot, 4 or 5 feet from it, and probably 24 feet from the railroad track.

Two employes of the Marquette Cement Company testified that they used to get on the cars in going back from their work when the "Q" work train was late, and that they climbed on top of a car about the middle of this freight train while it was standing on the passing track and sat down, facing west. One of them testified that when they passed the depot he saw a woman with a child in her arms sitting on the push car, a few feet from the north end of the depot, and saw a little girl running along the side of the box car with her hand extended towards the train. The other one testified that as they passed the platform he did not see any push car or see any one pushing the car back and forth; that there were three or four children standing near the depot; that he did not see a woman there holding a baby; and that he did not see the platform near the cars, and could not have seen the push car, if it was down close to the train. A witness for the plaintiff said that the platform was a foot or 18 inches from the west rail of the track, and the station agent testified that it was about 3½ feet. Whether the push car was near the edge of the platform or not, it was undisturbed, and not struck by the train. A witness for plaintiff testified that she saw Cassie at the depot about 7 o'clock, and also saw a woman there at that time sitting on the push car, facing the railroad tracks.

At the close of the evidence the defendant moved the court to direct a verdict of not guilty, and the motion was denied. This recital of the evidence as to the controverted facts sufficiently shows that the court did not err in denying the motion. The court did not err in submitting the issue to the jury, and whether the verdict was contrary to the greater weight of the evidence was for the trial court and the Appellate Court.

[3] The law fixes a different standard of liability in case of injury to children, going upon premises where there is a dangerous agency, than that which applies to adult persons. Where an owner creates upon his premises a dangerous thing, which from its nature has a tendency to attract children, who from childish instincts are drawn into danger, the law requires such reasonable precautions as the circumstances admit of to prevent them from playing with the thing, or to protect them from injury while playing with it. The cases fall into two classes:

First, where the injury results from some dangerous element a part of or inseparably connected with the alluring thing or device, as in the turntable cases, where children may be killed or injured while playing with the thing on account of its dangerous nature; second, where the attractive device or thing is so located or situated that in yielding to its allurements the child, without such intervention of another element as breaks the relation of cause and effect, is brought directly in contact with danger from some independent source which occasions the injury. *Seymour v. Union Stock Yards Co.*, 224 Ill. 579, 79 N. E. 950. The push car was entirely harmless in itself, and had no dangerous element which was a part of or inseparably connected with it, and therefore it did not come within the first class. Any charge of negligence against the defendant would rest on the fact that the childish instincts of children would naturally attract them to play with the push car, which might bring them into contact with means of danger to which the defendant exposed them by not locking or fastening the push car.

[4] The push car was kept at the depot for the use of the section men in handling railroad ties, and the defendant asked the court to give the jury this instruction:

"The court instructs the jury that the defendant company had the legal right to place and maintain the push car in question on its own premises."

The court modified it to make it read that the defendant company had the legal right "ordinarily" to place and maintain the push car in question on its own premises. Perhaps it would not have been error to refuse the instruction, because no question as to the right to keep the push car at the depot for the handling of ties had been raised before the jury, and the only question related to its being unlocked or unfastened; but to say that the defendant had ordinarily the right would naturally raise an inference that under some circumstances it had no such right. As instructions are to be applied by the jury to the case, the jury, in making the application, might except the keeping of the push car there from the right which the defendant ordinarily had. The instruction should not have been given as amended by the court.

[5] There was evidence relating to the degree of care exercised by the parents of the child with regard to her going from her home to the depot and the circumstances of the family, and the defendant asked the court to instruct the jury that it was the duty of the parents to exercise the same degree of care concerning the child as an ordinarily prudent person would exercise under like circumstances, and to find the defendant not guilty unless they believed, from a preponderance of the evidence, that at the time of the injury the child's parents, and each of them,

did exercise that degree of care. The court modified the instruction so as to read as follows:

"The court instructs the jury that it was the duty of the parents, and each of them, of said Cassie Kosinski to exercise the same degree of care concerning the said child as an ordinarily prudent person would exercise under like circumstances, and if you believe, from the preponderance of the evidence, that at the time of the injury to said Cassie Kosinski that such parents, and each of them, did not exercise the same degree of care concerning their child as an ordinarily prudent person would exercise under like circumstances, and that such want of ordinary care on the part of the parents contributed in any degree to the injury and death, then you must find the defendant not guilty."

The defendant had a right to have the law given to the jury that the burden was on the plaintiff to prove the exercise of ordinary care on the part of the parents, who were to participate in any recovery, and the instruction was changed by the court, so as to place that burden upon the defendant, and require it to prove, by a preponderance of the evidence, that the parents did not exercise the required degree of care.

[6, 7] The defendant asked, and the court refused to give to the jury, the following instruction:

"The court instructs the jury that the defendant is not liable in this case unless you find, from a preponderance of the evidence, that the defendant should have anticipated, prior to June 23, 1913, that plaintiff's intestate or other children would have been attracted to defendant's premises by means of said push car standing on or near the platform, and would have been injured or killed by a railroad train when such children were playing with said push car."

The declaration charged that the defendant knew, or had reasonable opportunity to know, that for three months prior to the accident children were in the habit of resorting to the platform, playing and pushing the car about, and by nearness of the track to the platform children were liable to be struck by passing trains, or to fall down by playing with and pushing the car about, and be killed or injured by passing trains. The defendant would only be liable if the circumstances were such that it should have anticipated that children would be attracted to the premises by means of the push car standing on the platform, and would have been injured or killed by a railroad train when playing with the push car. The justification offered for the refusal of the instruction is that it was not necessary for the defendant to have anticipated that a child might be injured or killed by a railroad train, but it was sufficient if it had an opportunity to know that some sort of injury might result to children playing with the car. The courts have been called upon to determine whether an act of negligence was the proximate cause of a resulting injury, and have formulated rules for

determining what is a proximate cause. It is not necessary to make a negligent act the proximate cause that the particular injury could reasonably have been foreseen; but if the consequences follow in unbroken sequence from the wrongful act to the injury, without an intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might, by the exercise of ordinary care have foreseen that some injury might result from his act or neglect. Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; City of Dixon v. Scott, 181 Ill. 116, 54 N. E. 897; Chicago Hair & Bristle Co. v. Mueller, 203 Ill. 558, 68 N. E. 51; Illinois Central Railroad Co. v. Siller, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819, 11 Ann. Cas. 368. The connection of a negligent act with actual consequences does not depend upon the question whether the precise injury complained of or the manner of its occurrence ought to have been foreseen, but it is sufficient that a person of ordinary prudence would have foreseen that his negligence would probably result in consequent injury of some kind. Courts, however, in the trial of issues of fact, do not deal merely in abstractions, and both by the pleadings and the evidence in this case there was no question but that, if a child was brought in contact with the train by pushing the car about, any negligence of the defendant was the proximate cause. The push car was not a dangerous agency, and in itself contained no element of danger. There was no other possibility of injury that the defendant could have anticipated, except that in playing with the push car a child might be brought into a dangerous place, and the only danger was the existence of the railroad track and passing trains. Besides that fact, the declaration alleged as the ground of liability that the defendant knew, or had reasonable opportunity to know, that one playing with the car might come in contact with trains and be injured, and it was error for the court to refuse to advise the jury that plaintiff was bound to prove his declaration.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

FARMER, J., dissents.

(238 Ill. 537)

MIEDEMA et al. v. WORMHOUDT et al.
(No. 12862.)

(Supreme Court of Illinois. June 18, 1919.)

1. SPECIFIC PERFORMANCE §8 — RIGHT TO REMEDY—DISCRETION OF COURT.

The right to the specific performance of a contract is not absolute, but rests in the dis-

cretion of the court, controlled by settled principles of equity.

2. SPECIFIC PERFORMANCE §51—CONTRACT FOR SALE OF LAND—FAIRNESS.

Where a valid contract exists for a sale of land, a court of equity will enforce it as a matter of right, where it was fairly and understandingly entered into, and no circumstances of oppression or fraud appear.

3. SPECIFIC PERFORMANCE §64—RIGHT TO REMEDY—CONTRACT FOR SALE OF LAND.

The object of courts being the enforcement of contracts rather than their evasion, ordinarily the specific performance of a contract to convey land is as much a matter of course as an action of damages for its breach.

4. SPECIFIC PERFORMANCE §16—ENFORCEMENT OF LAND CONTRACT—HARDSHIP.

Where defendants, in order to convey title to plaintiffs under a contract for the sale of land, would be compelled to obtain title to maintain the land in question under a contract with a third party at a price which would yield a profit of \$37.50 an acre, specific performance would be decreed; defendants knowing, at the time of their contract with plaintiff, that it was necessary to obtain title in such manner.

5. SPECIFIC PERFORMANCE §19 — VENDOR AND PURCHASER §54—ENFORCEMENT OF CONTRACT FOR SALE OF LAND—EQUITABLE OWNERSHIP.

The vendor of the land contracted to be sold is regarded as a trustee for the vendee, who is regarded as the equitable owner of the land, and can dispose of his interest in the land, either by an assignment of his contract for a deed or by the execution of a new contract to convey, and a court of chancery will decree a specific performance of the contract by the beneficial owner or the vendor, who holds the title for his benefit.

Error to Superior Court, Cook County; Charles M. Foell, Judge.

Suit by N. Miedema and others against H. D. Wormhoudt and others, for specific performance. Decree for complainants, and certain defendants bring error. Affirmed.

Fred B. Silsbee, of Chicago, for plaintiffs in error.

John A. McKeown, of Chicago, for defendants in error.

DUNN, C. J. On August 28, 1916, plaintiffs in error, H. D. Wormhoudt and A. J. Kuyper, entered into a contract with E. R. Tallmadge for the exchange of about 2,073 acres of land which Tallmadge owned in Kankakee county for 2,720 acres which the plaintiffs in error owned in Manitoba, Canada. In consideration of the conveyance to them of the lands in Kankakee county the plaintiffs in error agreed to convey to Tallmadge the Canada lands and to pay in addition the sum of \$200,000—\$20,000 on or before two years after

the date of the agreement, and the remainder in installments thereafter. Tallmadge agreed, as soon as the payment of \$20,000 had been made, to convey the Kankakee county lands to the plaintiffs in error and accept notes and trust deeds from them for the unpaid balance of the purchase money. It was provided that, as the plaintiffs in error desired to sell and colonize the lands in Kankakee county and might desire to have portions thereof conveyed by Tallmadge, under the contract, before the payment of the \$20,000, and might after the execution of the trust deed desire to have portions of the lands released from the lien thereof, for the purpose of such conveyance and release the lands might be divided into seven parcels, and that on receiving in cash the amount per acre placed opposite the parcels, respectively, Tallmadge would convey any one of the parcels. All of the lands were situated in town 30 north, range 11 west, and the north half of the northeast quarter of section 10 was designated as "Parcel C," opposite which the amount per acre was \$150.

On October 5, 1916, the plaintiffs in error entered into a contract with the defendants in error, whereby the plaintiffs in error, agreed to convey to the defendants in error 40 acres of "Parcel C" for \$7,500, of which \$25 was paid in cash, \$475 was to be paid on December 1, 1916, and the remainder in installments falling due at later dates. This contract provided that a warranty deed should be delivered as soon as \$3,500 of the purchase price had been paid in cash and notes secured by a trust deed had been delivered to the vendors. On March 19, 1918, the defendants in error tendered to the plaintiffs in error the balance payable under the terms of the contract, except \$4,000, and offered to give a note secured by a trust deed for this sum, and demanded that the plaintiffs in error convey the premises to them. The plaintiffs in error refused to accept the money and the note, and refused to execute a deed. Thereupon the defendants in error filed a bill in the superior court of Cook county to compel the specific performance of the contract by plaintiffs in error. Tallmadge was made a defendant to the bill, and answered, admitting its allegations, stating that he was able and willing to comply with the terms of his contract with the plaintiffs in error, and to convey to the plaintiffs in error the lands described in the bill together with the other lands which the plaintiffs in error agreed to purchase from him by their contract. The cause was heard, the court entered a decree for the specific performance of the contract, and the plaintiffs in error have sued out a writ of error.

The objection of plaintiffs in error to the decree is that the court, in decreeing specific performance, did not exercise a wise discretion, because the defendants did not have title to the 40 acres of land in controversy, and

could not obtain title without purchasing the whole of "Parcel C," which consisted of 80 acres, and that under the circumstances the decree of specific performance produced hardship and injustice to the defendants. The defendants in error did not pay the \$475 which was due on December 1, 1916, but they paid \$275 of that amount, and are also entitled to a further credit of \$60 on the contract. They took possession of the land on March 1, 1917, and have ever since been in possession of it, have improved and cultivated it, and the defendant in error N. Miedema has continuously resided on it.

[1, 2] It is not argued that the rights of the defendants in error were forfeited by reason of their failure to comply with the contract, or that their tender of performance on March 19, 1918, was not sufficient. The defense is based wholly on two propositions: First, that the decree of specific performance does not subserve the ends of justice, but produces hardship and injustice to the defendants; second, that the defendants had no title to the land. It has been often said the right to a specific performance of a contract is not absolute, but rests in the discretion of the court. This discretion, however, is controlled by settled principles of equity, and where a valid contract exists for a sale of land a court of equity will enforce it as a matter of right, where it was fairly and understandingly entered into and no circumstances of oppression or fraud appear. *Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265, Ann. Cas. 1912C, 556; *Adams v. Larson*, 279 Ill. 268, 116 N. E. 658.

[3, 4] The object of courts of equity, as well as courts of law, is the enforcement of contracts rather than their evasion. Ordinarily the specific performance of a contract to convey land is as much a matter of course as an action of damages for its breach. *Cumberland v. Brooks*, 235 Ill. 249, 85 N. E. 197. The hardship of which the plaintiffs in error complain is that, in order to acquire the title to the 40 acres which they have agreed to convey to defendants in error for \$187.50 an acre, they would have to complete the purchase of the 80 acres of which it is a part at \$150 an acre, when there was nothing due on their contract for five months. The plaintiffs in error contracted to convey this 40 acres of land whenever they were paid \$3,500, and the remaining \$4,000 was secured by a note and mortgage on the premises. They knew when they made the contract that they could only acquire the title to the 40 acres, so as to comply with their contract, by obtaining a deed for the whole 80 acres for \$12,000. They sold the land to the defendants in error at a profit of \$37.50 an acre, and there is no hardship or oppression in compelling them to do what they agreed to do when they thought it was for their advantage. They were competent to contract, they did fairly contract, and they ought not to be relieved from their agree-

ment because it is not convenient to perform it.

[5] As far as the objection that the plaintiffs in error did not have the title to the land is concerned, the doctrine of equity is that the vendor of land contracted to be sold is regarded as a trustee for the vendee, who is regarded as the equitable owner of the land. The purchaser can dispose of his interest in the land, either by an assignment of his contract for a deed or by the execution of a new contract to convey, and a court of chancery will decree a specific performance of the contract by the beneficial owner or the vendor who holds the title for his benefit. *Waggoner v. Saether*, 287 Ill. 32, 107 N. E. 859.

The decree is affirmed.

Decree affirmed.

(288 Ill. 343)

HEINZE et al. v. INDUSTRIAL COMMISSION et al. (No. 12639.)

(Supreme Court of Illinois. June 18, 1919.)

1. MASTER AND SERVANT §405(4) — WORKMEN'S COMPENSATION ACT — INJURY IN COURSE OF EMPLOYMENT — TEAMSTER.

In a proceeding under the Workmen's Compensation Act, evidence held to show that a teamster's injury arose out of and in the course of his employment.

2. STIPULATIONS §18(1) — EFFECT — WORKMEN'S COMPENSATION — INJURY IN COURSE OF EMPLOYMENT.

In proceeding under the Workmen's Compensation Act, where the attorney representing the insurer and the attorney representing the employers agreed to a stipulation on the hearing that employe's injury arose out of and in the course of the employment, the employers are bound thereby.

3. MASTER AND SERVANT §375(1) — WORKMEN'S COMPENSATION ACT — INJURIES "ARISING OUT OF EMPLOYMENT."

If the employe is injured while in the performance of any of his duties, such injury arises out of his employment within the meaning of the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

4. MASTER AND SERVANT §398 — WORKMEN'S COMPENSATION ACT — CLAIM — EMPLOYERS DOING BUSINESS UNDER TWO PARTNERSHIP NAMES.

A claim under Workmen's Compensation Act against named individuals, copartners conducting two different lines of business under different partnership names, descriptive of the character of business, is not invalid because made orally to one of them, nor because claim stated they were doing business under such partnership names.

5. PARTNERSHIP §63 — DISTINCT ENTITY.

A partnership is not a legal entity separate and distinct from the persons composing it.

6. PARTNERSHIP §190 — PARTNERS CONDUCTING BUSINESS UNDER DIFFERENT PARTNERSHIP NAMES — NOTICE OF CLAIM.

Although the same parties conduct two different lines of business under different partnership names, there is in law but one partnership.

7. MASTER AND SERVANT §416 — WORKMEN'S COMPENSATION ACT — AWARD — PARTNERSHIP NAME — DESCRIPTIO PERSONÆ.

An award by the Industrial Commission against employers conducting two different lines of business under different partnership names, descriptive of the character of business, is not rendered invalid by the addition of a descriptive partnership name; it being merely descriptio personæ and surplusage.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings by Antonia Krings under the Workmen's Compensation Act for an award on account of the death of her husband, Fred Krings, opposed by Frederick G. Heinze and another, as copartners, employers, and the General Accident Liability Insurance Company, insurer. The Industrial Commission confirmed the findings and award of the arbitrator, and the employers and insurer sued out a writ of certiorari and took the record to the circuit court of Cook county, where the award was affirmed, and the trial judge certified the cause as one proper for review by the Supreme Court. Judgment of the circuit court affirmed.

Edward L. England, of Chicago (Samuel J. Nordorf, of Chicago, of counsel), for plaintiffs in error.

Shaeffer & Foster, of Chicago (George H. Foster, of Chicago, of counsel), for defendants in error.

DUNCAN, J. Antonia Krings filed an application on November 23, 1916, for an award under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) on account of the death of her husband, Fred Krings, resulting from injuries alleged to have been received by him arising out of and in the course of his employment on June 7, 1916. Frederick G. Heinze and Ernest Weinsheimer, copartners doing business as F. Heinze & Co., were named as defendants in the application. At the hearing before the arbitrator January 18, 1917, upon leave granted, the application was amended by adding as parties defendant Frederick Heinze and Ernest Weinsheimer, doing business as the Weinsheimer Teaming Company. The arbitrator dismissed as to Frederick Heinze and Ernest Weinsheimer, doing business as F. Heinze & Co., and entered an award against them as

copartners doing business as the Weinsheimer Teaming Company. The Industrial Commission confirmed the findings and award of the arbitrator, and plaintiffs in error sued out a writ of certiorari and took the record to the circuit court of Cook county. The award of the commission was affirmed, and the trial judge certified that the cause, in his opinion, is one proper to be reviewed by this court.

The deceased on the day of his injury was in the employ of plaintiffs in error, Frederick G. Heinze and Ernest Weinsheimer, as a teamster. Plaintiffs in error were engaged in business as commission merchants, and also had teams and wagons with which they did hauling for themselves and also for others. They operated as commission merchants under the firm name of F. Heinze & Co. They did their hauling for others under the firm name of Weinsheimer Teaming Company, kept the hauling account separate from the commission account, and paid all bills of the teaming department with checks drawn on the account of the Weinsheimer Teaming Company, except when there was no one present to sign checks, when payments would be made from the money drawer. Both lines of business were conducted from the same office, the same bookkeeper kept the accounts for both, and the reason the two lines were carried on under different names was to obtain hauling from other commission merchants who on account of business jealousy would not give them the hauling if they knew F. Heinze & Co. were doing the teaming. The check to pay for the liability insurance covering teamsters and their helpers was drawn against the account of the Weinsheimer Teaming Company and signed "F. Heinze." The teams were owned and the business carried on by plaintiffs in error, and no one else was connected with them. It was the duty of the deceased, as a teamster for plaintiffs in error, to go to firms on South Water Street, Chicago, and pick up business from customers. The injury from which his death resulted was caused by a fall in the doorway of G. W. Randall & Co., commission merchants, who were customers of plaintiffs in error's teaming department, on West South Water street. It was about noon when the deceased fell, having slipped on a runway at the door, having about a foot and a half incline to six feet in length. His kneecap was fractured. He was taken to a hospital, and medical aid was rendered by a physician of his own selection, and later by another chosen by his wife. An infection of the knee made an operation necessary. General septicemia developed, and the deceased died on July 12, 1916. Some time in October, 1916, Mrs. Krings and her attorney, George H. Foster, went to the business quarters of the plaintiffs in error, and the attorney told Heinze that they were making their claim against Frederick Heinze and

Ernest Weinsheimer, doing business as F. Heinze & Co. and as Weinsheimer Teaming Company, or in whatever name they were doing business.

[1-3] Plaintiffs in error's first contention is that the injury to and death of the deceased did not arise out of and in the course of his employment. This contention is without merit. It clearly appears that a part of the business of the deceased was to go to customers of his employers and pick up business; that Randall & Co. were such customers; that he was compelled to go through Randall & Co.'s building to reach Spahns, another customer of plaintiffs in error. The wagon and team that he was using had been left in the alley, and the reasonable inference to be drawn from the facts proven is in complete accord with Weinsheimer, who testified, "I suppose he went back there to see if he could get a load." The record in other striking particulars overthrows the contention made by plaintiffs in error. J. A. Bloomington, the attorney representing the General Accident & Liability Insurance Company, stipulated on the hearing before the arbitrator that the injury arose out of and in the course of the employment, and E. C. Ferguson, since deceased, who was then representing plaintiffs in error, agreed to that stipulation and thereby bound plaintiffs in error. Weinsheimer also testified that deceased was in the course of his duties when he was hurt. The rule has been announced and frequently applied that, if the employee is injured while in the performance of any of his duties, such injury arises out of his employment. *Mueller Construction Co. v. Industrial Board*, 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918F, 891, Ann. Cas. 1918E, 808. The evidence fairly tends to show that the injury arose out of the employment, and the stipulations of their counsel and the admission of Weinsheimer estop plaintiffs in error from now contending otherwise.

[4-7] It is next insisted that no claim for compensation was made in apt time. This contention is based upon the fact that the application against plaintiffs in error as the Weinsheimer Teaming Company was not made until January 18, 1917, more than six months after the injury and the date of the last payment of compensation, and that no claim had been made against them, as such teaming company, prior to that time. This contention is not supported by the record, but, on the contrary, is overcome by the positive testimony of Attorney Foster to the effect that he told Heinze that they were claiming against them as F. Heinze & Co., the Weinsheimer Teaming Company, or in whatever name they were doing business. The claim for compensation may be made orally, as in this case. *Suburban Ice Co. v. Industrial Board*, 274 Ill. 630, 113 N. E. 979; *Moustgaard v. Industrial Com.*, 287 Ill. 156, 122 N. E. 49. The claim for compensation

was against F. Heinze and Ernest Weinsheimer. A partnership is not a legal entity, separate and distinct from the persons composing it (*Abbott v. Anderson*, 265 Ill. 285, 106 N. E. 782, L. R. A. 1915F, 668, Ann. Cas. 1916A, 741); and it makes no difference that the same parties are engaged in two different lines of business under different partnership names, there is in law but one partnership (*Campbell v. Colorado Coal & Iron Co.*, 9 Colo. 60, 10 Pac. 248). The claim filed against the partners, therefore, was a valid claim, and the words describing the character of business done by them are merely words descriptio personæ and surplusage. For the same reason the contention that the award of the commission and the judgment of the court are erroneous because not against Frederick G. Heinze and Ernest Weinsheimer individually cannot be sustained. The legal effect of the award and the judgment is to bind plaintiffs in error as individuals, and the addition of words descriptio personæ cannot be held to render an award and judgment erroneous.

For the reasons above stated, the judgment of the circuit court is affirmed.

Judgment affirmed.

(288 Ill. 396)

OTIS ELEVATOR CO. v. INDUSTRIAL COMMISSION et al. (No. 12542.)

(Supreme Court of Illinois. June 18, 1919.)

1. STATUTES §181(1), 205—CONSTRUCTION—INTENTION OF LEGISLATURE.

In construing statutes, the intention of the Legislature is to be sought and to be given effect where it can be done without contravening established rules of law, such intention to be gathered from the entire act and from the necessity or reason for the enactment when such can be gathered from the act.

2. MASTER AND SERVANT §398 — WORKMEN'S COMPENSATION—NOTICE AND CLAIM OF INJURY.

In view of Workmen's Compensation Act, § 24, requiring notice of accident to be given within six months after the injury or cessation of payments, and section 8, par. (d), giving an employé who has returned to the employment wherein he was injured 18 months after his return to give notice of injury, an employé, who does not return to his former service within 6 months after the injury or cessation of payment, and who does not within such time claim compensation, can claim no benefit under paragraph (d), as by failing to claim compensation he has waived his rights thereto.

3. MASTER AND SERVANT §398 — WORKMEN'S COMPENSATION ACT—TIME FOR MAKING CLAIM FOR INJURY—RETURN TO EMPLOYMENT—STATUTES—CONSTRUCTION.

Workmen's Compensation Act, § 8, par. (d), giving an employé, who has returned to his

employment wherein he was injured, 18 months to make claim for injury, cannot be construed as applying only to those employées who remained in their former employment for a period of 18 months, or as meaning that, in case they cease to be so employed within that time, their claims must be filed within 6 months of the date of which such employment ceased.

4. CONSTITUTIONAL LAW §245 — EQUAL PROTECTION OF LAWS — WORKMEN'S COMPENSATION ACT.

Workmen's Compensation Act, § 8, par. (d), giving an employé, who has returned to his employment wherein he was injured, 18 months to make claim for injury, is not unconstitutional as denying equal protection of the law.

5. MASTER AND SERVANT §417(9)—WORKMEN'S COMPENSATION—REVIEW ON CERTIORARI—ENTRY OF MONEY JUDGMENT.

On review by certiorari of a proceeding under the Workmen's Compensation Act, the circuit court has authority only to affirm the findings and award of the Industrial Commission, or to set it aside and enter a decision justified by law, or to remand the case for further proceedings in view of Workmen's Compensation Act, § 19, but it cannot enter a money judgment and order execution to issue thereon.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by Ernest J. Wayner, opposed by the Otis Elevator Company, employer. An award was confirmed by the Industrial Commission, affirmed by the circuit court on certiorari, and the employer brings error. Reversed and remanded, with directions.

John Clark Baker, of Chicago, for plaintiff in error.

William R. Jordan, of Chicago, for defendant in error.

STONE, J. The circuit court of Cook county affirmed the award of the Industrial Commission of Illinois in favor of the defendant in error, Ernest J. Wayner, for injuries received by him while in the employment of the plaintiff in error.

The material facts in the case are stipulated by counsel for the respective parties in interest, to the effect that both parties were under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152h) and subject to its provisions, and that the injury on August 11, 1913, arose out of and in the course of the employment; that Wayner was under total disability, on account of said injury, from August 11, 1913, until March 15, 1914, at which time he returned to work for the plaintiff in error and continued to work thereafter for 6 weeks, at which time he was discharged; that compensation as provided by said act

was paid by the plaintiff in error for such disability to March 15, 1914; that after Wayner's return to work he was unfit and unable to perform his usual services, and for that reason was directed to do other kinds of work during said 6 weeks; that at the end of the 6 weeks following March 15, 1914, Wayner had not fully recovered. Formal claim for compensation was filed with the Industrial Commission July 23, 1915, which date is within 18 months after Wayner's return to work for his original employer, the plaintiff in error. An award was made by the arbitrator in his favor in the sum of \$1,500 for a period of total and a period of partial disability, which was confirmed, on review, by the Industrial Commission. The circuit court of Cook county on certiorari affirmed the award, entered judgment therefor, and directed the issuance of an execution for its enforcement.

It is contended by plaintiff in error that the claim for compensation, having been filed more than 6 months subsequent to the last payment of compensation, is barred by the limitation of the Workmen's Compensation Act; that the claimant was not continuously in the employment of the plaintiff in error for 18 months subsequent to his return to work, and therefore the limitation provision of the statute is not applicable under the facts in this case; that the circuit court erred in entering judgment on the award and directing that execution issue thereon. It is contended by the defendant in error, Ernest J. Wayner, that having returned to work for the original employer, even though at a different kind of work, the provisions of paragraph (d) of section 8 of the Workmen's Compensation Act apply to this case, although claimant did not continuously remain in the employment for the period of 18 months subsequent to such return.

It is urged by plaintiff in error in support of his first contention that the Legislature intended by paragraph (d) of section 8 of the Workmen's Compensation Act that the limitation of 18 months for filing claim, where the employé has returned to the service of the employer by whom he was employed at the time of the injury, should apply only to those cases where the employé remained in the employment of said employer during the period of 18 months, and in the event of his leaving such employment within that time that claim for compensation must be filed within 6 months from the date on which he left such employment, contending that under such circumstances section 24 of the act should apply. Section 24, in so far as it refers to said question, is as follows:

"No proceedings for compensation under this act shall be maintained unless notice of the accident has been given the employer as soon as

practicable, but not later than thirty days after the accident. In cases of mental incapacity of the employé, notice must be given within six months after such accident. No defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings by arbitration or otherwise by the employé, unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy. Notice of the accident shall in substance apprise the employer of the claim of compensation made and shall state the name and address of the employé injured, the approximate date and place of the accident, if known, and in simple language the cause thereof; which notice may be served personally or by registered mail, addressed to the employer at his last known residence or place of business: Provided, that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer, his agent or vice principal in the enterprise. No proceedings for compensation under this act shall be maintained unless claim for compensation has been made within six months after the accident, or in the event that payments have been made under the provisions of this act, unless written claim for compensation has been made, within six months after such payments have ceased."

Paragraph (d) of section 8, in so far as it applies to the question here, reads as follows:

"In the event the employé returns to the employment of the employer in whose service he was injured, the employé shall not be barred from asserting a claim for compensation under this act: Provided, notice of such claim is filed with the Industrial Board within eighteen months after he returns to such employment, and the said board shall immediately send to the employer, by registered mail, a copy of such notice."

Plaintiff in error contends that if a strict construction be given to the words, "In the event the employé returns to the employment of the employer in whose service he was injured," it would follow that such employé might return in 5 years and still have 18 months thereafter in which to make claim and start proceedings, and that if such construction be given to paragraph (d) it becomes unconstitutional, as denying equal protection of the laws by making an arbitrary distinction between an employé who returns to the employment with his former employer and an employé who does not return to said employment, by giving the former 18 months in which to file his claim while the latter has but 6 months; that such distinction is not based on any real difference in the circumstances.

[1] It is a fundamental rule of construction of statutes that the intention of the Legislature is to be sought and to be given effect where that can be done without con-

travelling established rules of law; that the intention is to be gathered from the entire act when all its parts are construed together, and from the necessity or reason for the enactment when such can be gathered from the act. As was said in the case of *People v. Harrison*, 191 Ill. 257, 61 N. E. 99:

"In determining the meaning of a statute the court will have regard to existing circumstances or contemporaneous conditions, and also to the objects sought to be obtained by the statute and the necessity or want of necessity for its adoption."

The purpose of construction is to find and give effect to such intention, and in seeking for such intention we are to consider, not only the language used by the Legislature, but also the event to be remedied and the object to be obtained. *People v. Flynn*, 265 Ill. 414, 106 N. E. 961; *Maiss v. Metropolitan Amusement Ass'n*, 241 Ill. 177, 89 N. E. 268.

[2] An examination of paragraph (d) of section 8, together with section 24, discloses that said paragraph is made an exception to the general provision in section 24, it being the evident intention of the Legislature to avoid any advantage being taken of the employé by reason of the relation reassumed with his former employer. In making this exception the Legislature has fixed the period of limitation for filing claims at 18 months. Counsel for plaintiff in error urges that this period is unreasonable, for the reasons: First, that the employé may have advantage of this provision even though he does not return to employment for a period of 5 years; and, second, because it gives to such employé a protection not given to one who does not return to such service. The first objection is untenable, for the reason that under section 24 the employé who does not return to his former service must file his claim for compensation within 6 months where no payments have been made or within 6 months after the last payment. It cannot be said that paragraph (d) should be held to apply to an employé who had neither returned to work nor made claim for compensation within 6 months after his injury or after cessation of payments. In other words, the employé who does not return to his former service within a period of 6 months after the injury or after the cessation of payments, and who does not within said period or periods make claim for compensation, can claim no benefit under paragraph (d), as he has by such failure to make claim for compensation waived all right thereto.

Counsel for plaintiff in error also contends that in the computation of time paragraph (d) is to be construed as applying only to those employés who remain in their former employment for a period of 18 months, and

that in case they cease to be so employed within that time their claims must be filed within 6 months of the date on which such employment ceased. In the first place, such a construction would be doing violence to the plain language of the act by reading into it a limitation of 6 months under certain conditions, neither limitation nor condition being contained or referred to in the act. As was said in *Wangler Boller Works v. Industrial Com.*, 287 Ill. 118, 122 N. E. 366:

"Courts have no power to put a limitation upon a right legally given by the Legislature, unless by a fair construction of the act it can be said such limitation was in furtherance of legislative intent."

[3] To construe paragraph (d) as limiting the right of the employé to a period of 6 months in which to file claim for compensation in case of his return to his employment with his previous employer would be reading into the act a provision which is nowhere in the act, and which neither the circumstances surrounding the same as shown in the act nor the purpose thereof would warrant. It might be added that such a construction, instead of being a benefit to the employer might well prove a detriment, as in a case where the employé remained, after his return to work, for a period of 17 months and then quit such employment. Under the construction contended for by plaintiff in error he still would have 6 months, or a total of 23 months, instead of 18 months, in which to file a claim.

[4] Nor can we agree with the contention of counsel for plaintiff in error that this question of the period of time in which claim may be filed renders said act unconstitutional, as denying equal protection of the law. The circumstances of the employé who does not return to his employment are not the same as those where one does so return, as the relation of employer and employé does not exist in the former case. The Legislature might well have conceived that, under circumstances affected by the fact that the employé has returned to service with his former employer, he is to be given an additional period of time in which to make claim. While it is true an employé may return to his employment, under paragraph (d), for a period of a few days or a few weeks, and thereby gain the advantage of additional time in which to file his claim, yet such is the plain provision of the act, and such act lies within the power of the Legislature to pass.

Plaintiff in error's second contention is that the circuit court erred in entering a money judgment and ordering execution to issue thereon. It appears from the record that the proceedings in the circuit court were by writ of certiorari to review the findings and award of the Industrial Commission, and these proceedings were brought

under clause 3 of paragraph (f) of section 19, which provides, in part, as follows:

"No such writ of certiorari shall issue * * * unless such one shall * * * file with the clerk of said court a bond conditioned that if he shall not successfully prosecute said writ * * * he will pay the said award, and the costs of the proceedings in said court. The amount of the bond shall be fixed by any member of the Industrial Board and the surety or sureties on said bond shall be approved by the clerk of said court."

Paragraph (g) of the same section provides for the proceedings by which a money judgment may be entered against the employer, and applies only where no proceedings for review of the decision of the Industrial Commission have been taken, and where there has been a refusal to pay an award upon which no review has been sought. Concerning proceedings under paragraph (g), it is provided:

"Judgment shall not be entered until fifteen days' notice of the time and place of the application for the entry of judgment shall be served upon the employer by filing such notice with the Industrial Board; which board shall, in case it has on file the address of the employer or the name and address of its agent, upon whom notices may be served, immediately send a copy of the notice to the employer or such designated agent; and no judgment shall be entered in the event the employer shall file with the said board its bond, with good and sufficient surety in double the amount of the award, conditioned upon the payment of said award in the event the said employer shall fail to prosecute with effect proceedings for review of the decision, or the said decision, upon review, shall be affirmed."

[6] The only authority which the circuit court had on review by certiorari was to affirm the findings and award of the Industrial Commission or to set aside the same and enter such a decision as is justified by law, or remand the cause to the commission for further proceedings. *Peabody Coal Co. v. Industrial Com.*, 287 Ill. 407, 122 N. E. 843. It is the intention and purpose of the Workmen's Compensation Act that a bond shall be given by the employer on petition for review by certiorari, as was done here, so that in case the findings and award of the commission are affirmed the employé shall be fairly protected by such bond, thereby rendering the entering of a money judgment unnecessary. If this were not true and a money judgment were entered against the employer, in cases where payments are to cover a period of years it would result in affecting the title to property held and owned by the employer, and subject him to an inconvenience and damage wholly unnecessary. The employé is amply protected by the bond.

The circuit court therefore erred in entering a money judgment and in ordering execution. That court should have entered an order affirming the award of the Industrial Commission, and that the cost of the certiorari proceedings be paid by the petitioner therein. For this error the judgment is reversed and the cause remanded, with directions to the court to enter a judgment in conformity with the views herein expressed.

Reversed and remanded, with directions.

(233 Ill. 351)

EICHHORN v. ST. LOUIS & O'FALLON
COAL CO. (No. 12547.)

(Supreme Court of Illinois. June 18, 1919.)

1. MASTER AND SERVANT ⇐124(2)—INJURIES TO SERVANTS—INSPECTION OF MINE.

The statute requiring inspection of coal mines imposes a liability only for a willful failure to comply with its terms, and where proper examination is made, and no dangerous condition is discovered, the employer is not liable for a miner's injuries, though the premises were not marked as dangerous.

2. MASTER AND SERVANT ⇐270(12)—INJURIES TO SERVANT—EVIDENCE—INSPECTION OF MINE.

Where it was contended that the employer of a coal miner killed by a fall of slate was liable because of a willful failure to inspect the working place and mark it as dangerous, testimony as to conditions several days before the examination by the mine examiner was inadmissible.

3. TRIAL ⇐253(9)—INSTRUCTIONS IGNORING EVIDENCE.

In an action for a coal miner's death by fall of slate from the roof, where plaintiff claimed that the inspection was insufficient and that the premises should have been marked as dangerous, propositions of law that if the mine examiner examined the place and the slate appeared solid, or if the roof was safe until after considerable coal had been loaded, plaintiff could not recover, were properly refused, as disregarding testimony that the slate roof was of a brittle or rotten character, liable to fall at any time without notice, though appearing solid.

Error to Appellate Court, Fourth District, on Appeal from Circuit Court, St. Clair County; George A. Crow, Judge.

Action by Marguerite Eichhorn against the St. Louis & O'Fallon Coal Company. A judgment for plaintiff was, on appeal, affirmed by the Appellate Court (212 Ill. App. 152), and defendant brings certiorari. Reversed and remanded.

Barthel, Farmer & Klingel, of Belleville, for plaintiff in error.

Webb & Zerweck, of Belleville, and T. M. Webb, of East St. Louis, for defendant in error.

CARTWRIGHT, J. A writ of certiorari was allowed to bring to this court the record of the Appellate Court affirming a judgment recovered by Marguerite Eichhorn, defendant in error, in the circuit court of St. Clair county, against the St. Louis & O'Fallon Coal Company, plaintiff in error, for damages occasioned by the death of her husband, Louis Eichhorn, from an injury received in the mine of the plaintiff in error.

The amended declaration contained two counts—the first charging a willful failure to enter the working place of Louis Eichhorn and inspect the same and make a conspicuous mark thereat as notice to all men to keep out, and to make a record of such condition in a book kept for that purpose; and the second charging a willful failure to observe the unsafe and dangerous roof in the working place, and willfully failing and omitting to place a conspicuous mark or sign thereon as notice to all men to keep out. The defendant's plea was not guilty, and the case was tried by the court without a jury.

In the coal mine of the defendant room 4 extended south from a stub entry about 250 feet, and was 37 feet wide. Room 3 was east of room 4 and parallel with it, and it was determined to open a cross-cut in the partition wall between the two rooms at the south end. The cross-cut was to be started from room 4, and to be between 21 and 23 feet in width. The vein of coal was 6½ feet thick, and above it there was a stratum of slate from 20 to 24 inches thick, and above that a limestone roof. Several days before the accident the machine runners went into room 4 and undercut the vein of coal in the space allotted for the cross-cut to a depth of about 6 feet. The shot firers afterward went into the room and fired a shot near the center of the undercutting, about 18 inches from the top, and blasted out the coal, leaving a V-shaped space in the center. The coal was cleaned up and removed, and on the day before the accident the shot firers again went into the place and prepared and fired two shots—one at the left and the other at the right of the center shot—blasting out the space and leaving the coal piled up in the face of the cross-cut to within about 2 feet of the slate. After this was done the mine examiner, at 3 o'clock in the morning of July 19, 1916, inspected the room and left his visitation mark on the left-hand side of the cross-cut, and did not make any mark of a dangerous condition. At 8 o'clock that morning Louis Eichhorn and his buddy, A. W. Dimmett, went into the room for the

purpose of loading out the coal that was brought down by the two shots the day before. They loaded four coal cars with the coal that had been blasted out in the cross-cut, and while loading the fifth a piece of slate fell and so injured Eichhorn as to cause his death. The fall was triangular in shape, about 6 or 8 feet in one direction and 6 or 7 in the other.

[1] There was no evidence tending to prove the charge in the first count of the declaration of a willful failure to enter the working place and inspect the same. It was proved, and not disputed, that the mine examiner went into the room and sounded the roof with the sounding rod which the statute requires a mine examiner to use, and his visitation mark appeared at the left of the cross-cut. In order to maintain her action it was essential that the plaintiff should prove two things: First, that a dangerous condition existed at the time of the visit of the mine examiner; and, second, that he willfully failed and omitted to make the mark required by the statute as a warning to all men to keep out. The Appellate Court, in effect, adopted a rule that, if the first fact was proved, the defendant could not excuse itself for a failure of the mine examiner to mark the place as dangerous by proving a proper examination and that no danger was discoverable by such an examination. Such a rule would substitute insurance against accidents in a mine in place of obedience to the requirements of the statute to make an examination to see whether dangerous conditions exist, and, if found, to mark the place. The statute imposes a liability for, and only for, a willful failure to comply with its terms, and to say that if a proper examination has been made, and no dangerous condition was discoverable by such examination, there has been a willful failure to make an examination and mark dangerous conditions, would be to pervert language and confound all distinctions between the meaning of words. It will not be presumed that the court has intentionally adopted false reasoning leading to such a result. A willful failure to comply with the act, as used in the statute, means a conscious failure to perform a duty enjoined by the act. *Catlett v. Young*, 143 Ill. 74; 32 N. E. 447; *Odin Coal Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45; *Donk Bros. Coal Co. v. Peton*, 192 Ill. 41, 61 N. E. 330; *Eldorado Coal Co. v. Swan*, 227 Ill. 586, 81 N. E. 691; *Davis v. Illinois Collieries Co.*, 232 Ill. 284, 83 N. E. 836. No question of good faith or bad faith, good intent or evil intent, is involved; but if there is a conscious failure to make the examination required by the statute, or to mark a dangerous condition when found, the owner or operator of the mine is liable for any resulting injury.

The question under consideration came be-

fore the court in the case of *Mertens v. Southern Coal Co.*, 235 Ill. 540, 85 N. E. 743, in which there was a slip in the roof on the evening of March 19, 1906, making the roof dangerous and liable to fall, and about 11 o'clock the next day a portion of the roof fell, and the plaintiff was severely and permanently injured. No mark had been placed in the room indicating the dangerous condition, and no minute or report of the same was made by the mine examiner. It was contended that these facts did not show a willful violation of the statute, but it was held that the jury was justified in finding that there was a dangerous condition at the time of the examination, and if the mine examiner had made a proper examination he must have discovered the dangerous condition, and therefore it was a fair inference that he did not examine the room, or, if he did examine it and discovered the condition, he failed to mark the same, and that in either case the failure to perform the duty was a conscious one. That case was cited, and the opinion quoted from, in *Peebles v. O'Gara Coal Co.*, 239 Ill. 370, 88 N. E. 166, where it was held not necessary for the plaintiff to prove that the defendant had actually discovered the dangerous conditions complained of, and that operators of mines are liable, not only when dangerous conditions have been discovered, but also where a proper examination required by the statute would have discovered the existence of such conditions. These decisions state a correct rule, since any other would permit a mine examiner to make only a casual or insufficient examination, and the operator excuse himself on the ground that some sort of examination was made. The law has not always been stated exactly in that way, but the facts of each case have brought it within the compass of the rule so stated.

In *Attitus v. Spring Valley Coal Co.*, 246 Ill. 82, 92 N. E. 579, 138 Am. St. Rep. 221, the mine examiner testified that he examined the place where the mule stable was to be built, and it was not dangerous; but this court thought the evidence tended to support the claim that the place was, in fact, dangerous. The court said the case was apparently tried by the defendant on the theory that good faith on the part of the owner or operator of the coal mine was a defense; but it was held that the owner or operator could not excuse himself in failing to properly examine the mine and mark dangerous places therein which are known to him, on the ground that his examiner or manager in good faith thought the place was not dangerous. The law was stated as follows:

"If the mine is in a dangerous condition, and the owner or operator has failed, with knowledge of its condition, to comply with the statute, he is liable, and he cannot excuse himself on the ground that he had the mine examined and in good faith thought it was not dangerous.

His liability does not rest upon the ground that in good faith or bad faith he thought there was no danger in the mine, but upon the ground that he has, knowing the facts which made the mine dangerous, failed to have the statutory marks properly placed in the mine. When the mine owner or operator is advised of the conditions in the mine, he must place in the mine, if it is dangerous, the statutory marks, and if he fails to do so he acts at his peril, and he cannot excuse himself because he or his examiner or manager may think the mine safe."

The opinion in every part contained the qualification that the owner or operator has knowledge of the dangerous condition, or is advised of such condition.

In *Cook v. Big Muddy-Carterville Mining Co.*, 249 Ill. 41, 94 N. E. 90, the trial court had given an instruction that if the jury found that a dangerous condition existed in defendant's mine, and such condition was known to the defendant, or by the exercise of ordinary care might have been so known, then they might find the violation was willful. It was held that this instruction applied the rule of mere negligence to an action under the statute for a willful violation of its provisions, which requires something more than mere negligence. The court said:

"If a dangerous condition exists in a working place in a mine, the mine examiner has no authority to determine that the place is not dangerous contrary to the fact, and the mine owner cannot excuse himself for a failure to mark the place on that ground"—citing *Eldorado Coal Co. v. Swan*, supra.

It was held that the instruction removed all distinctions between negligence and willfulness, contrary to the plain language of the statute.

In *Piazzi v. Kerens-Donnewald Coal Co.*, 262 Ill. 30, 104 N. E. 200, a clod attached to the roof at the side of a cross-cut fell, causing an injury, and the mine examiner testified that he saw the clod both before and after it fell; that a clod, when it becomes exposed and is not supported, is liable to fall in a certain length of time; and that a clod is treacherous and apt to fall. He said that he examined the clod and sounded it with his rod, but the evidence justified a conclusion that the appearance and condition of the clod showed to the mine examiner that it was dangerous. The duty to make an examination is enjoined by law, which contemplates a proper and sufficient examination to discover whether dangerous conditions exist, and if such an examination would have disclosed a dangerous condition, a jury is justified in concluding either that the examination was not made, or that it disclosed the actual condition, notwithstanding the testimony of a mine examiner to the contrary.

[2] To prove the existence of a dangerous condition in the roof of the mine, the plaintiff examined as a witness A. W. Dimmett, the "buddy," who was the only person there

during the forenoon of the day of the accident. He testified that they went into the room about 8 o'clock in the morning and looked at the roof, and there was some loose slate in the southeast corner of the room, which they took down; that they tested the slate with the mine picks used in mining coal, and it sounded solid. He did not remember how often they tested the slate, but he sounded the roof on his side two or three times or more. He did not know how many times Eichhorn sounded the roof, but when he sounded it he said it was all right. They tested the roof, after loading four boxes, before loading the last one, and it fell while loading that car. The material question was the condition of the roof when examined by the mine examiner, and the testimony of Dimmett was relevant to that question. The test for the admission of evidence is whether it tends to prove or disprove the fact in issue, and the court permitted the plaintiff, against the objection of the defendant, to prove by witnesses the condition of the roof in the room some days before the accident, and when the solid vein of coal was in place supporting the slate which fell. These witnesses testified to conditions of the slate along the east rib or partition between the rooms when the body of the slate which fell could not be seen, but was imbedded in the cross-cut over the coal, and they testified about slate extending beyond the partition wall at the southeast corner, where the loose slate was taken down by Eichhorn and Dimmett before they began work, and therefore was not the cause of the injury. This testimony did not tend to prove the condition of the roof and slate when examined by the mine examiner under changed conditions, some days afterward. In view of the testimony of the mine examiner and Dimmett tending to prove a safe condition at the time of the examination, the error in admitting this testimony was prejudicial.

[3] The defendant submitted two propositions of law, which were refused by the court, the substance of which was that if the mine examiner examined the working place, and it appeared from such examination, made by a sounding rod, to be safe and solid, and if it was solid and safe after four boxes of coal had been loaded up and within a short time before the slate fell, the plaintiff could not recover. There was evidence for the plaintiff by men experienced in mining that the slate was brittle, and of a kind, character, and composition which is liable to fall at any time without notice, although it appeared to be solid; that sometimes loose slate of that kind would fall after the coal had been taken out, and sometimes it would not; that this was what was called "rotten" slate, which might stay up for some time or fall without warning; and that there was

always danger of its falling. The propositions of law both stated that if the hypothesis of fact existed plaintiff could not recover, and the court did not err in refusing them, because they ignored the evidence which tended to prove that the examination showed a condition of the roof where the slate, although solid, was liable to fall at any time, and therefore the condition was dangerous.

The judgments of the Appellate Court and the circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

(283 Ill. 432)

SPIEGEL'S HOUSE FURNISHING CO. v.
INDUSTRIAL COMMISSION et al.
(No. 12503.)

(Supreme Court of Illinois. June 18, 1919.)

1. EVIDENCE \S 128, 817(18)—RES GESTÆ—
HEARSAY—STATEMENTS TO PHYSICIAN.

Where an employé died from an infected wound in his arm, evidence of his statements to his physician and his wife that he suffered the wound while in the service of his employer is incompetent in a proceeding under the Workmen's Compensation Act, being hearsay and not falling under the rule allowing evidence of declarations by one injured to his attending physician, when they relate to his suffering, etc.

2. MASTER AND SERVANT \S 417(7) — WORK-
MEN'S COMPENSATION LAW—REVIEW.

Under Workmen's Compensation Act, the circuit court and the Supreme Court can only pass on questions of law, and cannot reverse an award of the Industrial Commission for insufficiency of evidence, unless there was no competent evidence in the record tending to support the award.

3. CORONERS \S 8—JUDICIAL POWERS.

Under the laws of Illinois a coroner has no judicial power; such power being vested by the Constitution in courts thereby created.

4. JUDGMENT \S 707—CONCLUSIVENESS—PER-
SONS NOT PARTIES.

The most solemn finding or judgment of court is not admissible against a litigant, either as res judicata or estoppel by verdict, unless he was a party to that judgment.

5. CORONERS \S 22 — VERDICTS — EVIDENCE—
ADMISSIBILITY.

A coroner's verdict as to the cause of the death of a servant is not competent evidence in a proceeding against the employer for compensation under the Workmen's Compensation Act, for the employer is not a party to the coroner's investigation, nor is the coroner a judicial officer; hence in such proceeding an award against the employer must be reversed, where there was no competent evidence, other than the coroner's verdict, that the injury occurred in the course of employment.

6. COURTS — 90(6) — PRECEDENTS — STARE DECISIS.

Rulings on the admissibility of documents as evidence ought to be followed, unless they are manifestly wrong, in which case they may and should be changed.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Claim by Katherine Jarrett Cloyes, administratrix of the estate of Harry J. Cloyes, against the Spiegel's House Furnishing Company, employer, for compensation under the Workmen's Compensation Act for the death of her intestate. An award of the Industrial Commission was affirmed by the circuit court, and the employer brings error. Reversed and remanded.

Frank M. Cox and Albert N. Powell, both of Chicago, for plaintiff in error.

Norman G. Collins, of Chicago, for defendants in error.

DUNCAN, J. The circuit court of Cook county confirmed an award by the Industrial Commission under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152h), on the application of Katherine Jarrett Cloyes, administratrix of the estate of Harry J. Cloyes, deceased, and certified that the cause, in its opinion, is one to be reviewed by this court.

The evidence produced before the Industrial Commission was in substance the following: Harry J. Cloyes was a regular employé of Spiegel's House Furnishing Company. The last day he worked for his employer was Tuesday, June 20, 1916. The next day he was not feeling well, and remained at his home and took medicine for a cold. He had fever, his temperature being about 100 degrees, and it so continued until Thursday, when a physician was called for the first time. The physician thought probably that he had "grippe," but called again on Friday, when Cloyes showed him an abrasion on his arm, over which a scab had formed about the size of a nickel, and there was a slight redness of the skin around the scab. The doctor did not that day attribute the condition of his patient to the injury on his arm. On Saturday the doctor found the skin around the scab was much redder in appearance and that it had spread in every direction. He testified that it was apparent that the injury was caused by an external blow, and that the trouble was infection from the injury on the arm, and that the arm was swollen; that on Sunday the patient's condition was worse, and continued to grow worse until Monday, when he was sent to a hospital and an operation was performed on the same day; that he died two hours

after the operation, and that his death was caused by septicemia, produced by infection of the wound.

No one saw Cloyes receive the injury, and he did not tell his employer or any of his fellow employes about receiving it. The only proof that the injury arose out of and in the course of his employment was (1) the testimony of his widow and of his physician that he told them he received his injury at his employer's store, while passing through a narrow aisle, while showing customers goods in plaintiff in error's store, and by striking his arm, just above the elbow, against the sharp corner of a dresser; and (2) the coroner's verdict reciting that Cloyes came to his death June 26, 1916, from septicemia, due to an infected wound of the right arm, received at Spiegel's House Furnishing Company while in the employ of said company as a salesman, by striking his arm against a dresser. Plaintiff in error objected to the evidence of the widow and the physician and the coroner's verdict as hearsay evidence and as incompetent.

Cloyes left surviving him as dependents a minor son and his widow. He and plaintiff in error were both operating under the Compensation Act, and his widow gave plaintiff in error notice in apt time that Cloyes claimed to be injured and the time and manner that he claimed to be injured.

The plaintiff in error offered the transcript of the testimony taken before the coroner's jury for the sole purpose of showing that the verdict was based on the same hearsay evidence of the same witnesses heard before the Industrial Commission, and on no other testimony. That evidence clearly proved its contention that it was hearsay testimony, and the same, in substance, as the evidence of the widow and the physician, which was objected to as hearsay and as incompetent.

[1] The sole question raised in this case is whether or not there is any competent evidence in the record showing that the death of Cloyes was caused by an injury which arose out of and in the course of his employment. The oral testimony bearing upon that question, heard before the arbitrator, and the Industrial Commission over the plaintiff in error's objection, was hearsay and incompetent. That testimony consisted of statements of the witnesses of what the deceased told them about when, where, and how he received the injury, and what he was doing at that time. No one testified who had any knowledge of those facts, except from the statements made to them by the deceased. Declarations made by one injured, to his attending physician, are admissible when they relate to the part of his body injured, his suffering, symptoms, and the like, but not if

they relate to the cause of the injury. This rule is more rigorously enforced when applied to lay witnesses. *Chicago & Alton Railroad Co. v. Industrial Board*, 274 Ill. 336, 113 N. E. 629.

[2-5] If the coroner's verdict in this case is held to be competent evidence, it is as clear as any proposition can well be made that plaintiff in error is to be held liable upon the declarations of Cloyes, now deceased, made at a time when he was a real party in interest and in his own interest, and without the sanction of an oath, and under circumstances that the declarations could not possibly be met or refuted by plaintiff in error by other evidence, or even by the right of cross-examination. This is so because the circuit court and this court, under our Compensation Act, can only pass upon questions of law, and cannot reverse the order of the Industrial Commission for insufficiency of the evidence, unless we can say that there is no competent evidence in the record tending to support such order. It is equally clear that there was no competent evidence before the coroner's jury or the Industrial Commission showing or tending to show that the injury to the deceased arose out of and in the course of his employment, unless we hold that the unsupported verdict of the coroner's jury is competent evidence for such purpose. Plaintiff in error was not a party to the proceedings before the coroner's jury, was not present and had no right to be present or represented in that proceeding, had no choice or right of choice in the selection of the jury, did not cross-examine and had no right to cross-examine the witnesses before that jury, or to contradict the evidence tending to prove the liability against it, which it is claimed the verdict of that jury now establishes. To hold that that verdict has that effect is to condemn plaintiff in error without a hearing and to violate the most elementary and sacred rules for the administration of justice between private individuals guaranteed by our laws and our Constitutions, both state and national.

The injustice and the out-and-out viciousness of such a holding will more strikingly appear to all minds, if we but consider that we may at any time have another state of facts in a case that would defeat the rights of the widow and children of the deceased injured employé by a similar holding. Let us suppose that the deceased party was killed outright by revolving machinery while at work at his employment, and was never able to state how the injury occurred; that the superintendent of the employer and one other fellow employé were the only eyewitnesses to the injury; that the superintendent made declarations of the facts that showed deceased was not injured while working at his employment, or by reason of such employ-

ment, and died before he could testify; that a coroner's jury was impaneled, and the declarations of the deceased superintendent were put in evidence before the jury by some attorney representing the employer, and that the widow and children's interests were not there represented, and that the fellow employé did not testify before the coroner's jury, and that the coroner's jury returned a verdict that deceased was killed by some other agency not connected with his employment, and completely exempted the employer from all blame or connection with the death of the employé. We can readily understand that, if the verdict of the coroner's jury furnishes such convincing proof of the facts therein found as is evinced by this record, the widow and children in the case just supposed might be defeated in the contest before the Industrial Commission by the introduction of the coroner's verdict, although the fellow employé might appear and testify, and particularly if the employer was able to offer the testimony of several witnesses whose testimony tended strongly to impeach his evidence. On a review of such a case, this court and the circuit court would be powerless, under the law, to weigh the evidence and to pass on its weight. It is apparent that the result of holding a coroner's verdict competent evidence in such a case will result in substituting coroner's verdicts and holdings that the injury to the deceased employé arose out of and in the course of his employment for those of the Industrial Commission, and in direct contravention of the very spirit and express provisions of the Workmen's Compensation Act.

The foregoing conclusions cast no reflection upon the coroner or his juries. They are not supposed to be men educated in the law. They do their duty as they understand it. The chief blame for such results cannot be placed on the Industrial Commission. Such results have been made possible by the previous holdings of this court, in many cases of various character, that the verdict of a coroner's jury is admissible in such cases between private citizens as prima facie evidence to establish any fact or facts which our statute requires such juries to find when impaneled by the coroner, if such fact or facts are material in the trial of such cases. Our statute requires that every coroner, whenever and as soon as he knows or is informed that the dead body of any person is found or lying within his county, supposed to have come to his or her death by violence, casualty, or any undue means, shall repair to the place where the dead body is, take charge of the same, forthwith summon a jury, and swear them to diligently make the inquiries required by the statute and to deliver to him a true inquest thereof. The jurors are required to inquire how, in what manner, and by whom or what the said body

came to its death, and of all the facts of and concerning the same, together with all material circumstances in any wise related to or connected with said death, and to make up and sign a verdict or true inquest.

For almost 30 years, as already indicated, this court has held that the verdict of the coroner's jury was admissible either for the plaintiff or the defendant in a civil suit for the purpose of showing prima facie some fact or facts found by the jury and appearing on the face of the inquest, when the proof of such fact or facts is material to some issue in the civil suit. We have held that such verdicts were competent to prove prima facie suicide of the assured in suits on insurance policies. *United States Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65; *Grand Lodge, I. O. M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; *Knights Templars' Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066. In *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999, the case was a bill to construe a will, and on the issue of insanity of the testator the coroner's verdict that testator suicided was held admissible. The issue in a suit for damages for assault and battery was whether or not defendant was guilty of unlawful, willful, and wanton conduct, and the holding was that the verdict of the coroner's jury that the defendant fired the shot that killed the deceased, but was justified in the act, was competent on that issue. *Foster v. Shepherd*, 258 Ill. 164, 101 N. E. 411, 45 L. R. A. (N. S.) 167, Ann. Cas. 1914B, 572. In other suits for negligently causing death it has been frequently held that the inquest of the coroner is admissible to show prima facie how and by what means the deceased came to his death, and any other matter properly before the coroner and appearing on the face of the inquest. *Novitsky v. Knickerbocker Ice Co.*, 276 Ill. 102, 114 N. E. 545; *Stollery v. Cicero Street Railway Co.*, 243 Ill. 290, 90 N. E. 709. It is said in the *Novitsky* Case that it is not within the province of the coroner's jury to fix the civil liability of any one growing out of an accident resulting in death, except in so far as the finding required to be made by the statute may have such effect. In *Devine v. Brunswick-Balke-Collender Co.*, 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B, 887, for negligently causing the death of a child in driving an auto truck, the holding is that the verdict of the coroner's jury, finding that the driver of the truck "was blameless for this unfortunate occurrence, and we therefore recommend his discharge from further custody," was admissible, because the question whether or not the driver was blameless was an essential matter before the coroner's jury for their investigation, and a proper matter to be included in their verdict.

Under the Workmen's Compensation Act, our holdings have been that the coroner's

verdict at the inquest on the body of the employé is admissible in evidence in a case for compensation for death of the employé, and is prima facie evidence tending to prove the cause of death and of the facts therein recited, showing that the employé received his injury in the course of his employment. *Armour & Co. v. Industrial Board*, 273 Ill. 590, 113 N. E. 138; *Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 149; *Morris & Co. v. Industrial Board*, 284 Ill. 67, 119 N. E. 944, L. R. A. 1918E, 919. In the last case cited it is held that the statute made it the duty of the coroner to hold an inquest, when informed that it was supposed the deceased had come to his death by casualty, and that casualty means chance, accident, contingency, etc. In *Albaugh-Dover Co. v. Industrial Board*, 278 Ill. 179, 115 N. E. 834, the holding is that where the employé dies of tuberculosis of long standing, and there is no supposition that he came to his death by violence, casualty or any undue means, the coroner was not authorized to hold an inquest, and that the verdict of the coroner's jury was not admissible. In *Peoria Cordage Co. v. Industrial Board*, 284 Ill. 90, 119 N. E. 996, L. R. A. 1918E, 822, it was positively held that a finding by a coroner's jury that the death of an employé resulted from an injury while in the discharge of his duty as an employé of a certain employer is beyond the province of the coroner's jury. It was further held in that case that, in any case where the coroner is authorized to act, his authority is limited to an inquiry into the physical facts, and to obtaining evidence for the apprehension of any person implicated in the commission of a crime, and the verdict of his jury is not admissible to fix civil liability, "except in so far as a legitimate finding of physical facts * * * may have that effect." It is apparent that this decision is not in accord with the principles announced and with the conclusions reached in *Armour & Co. v. Industrial Board*, supra, and *Morris & Co. v. Industrial Board*, supra; but we think that the above holdings in that case state the law as it should be, except so far as it is qualified by the above clause in quotation marks.

The decisions of this court prior to the *Peoria Cordage Co.* Case have been uniform in their holdings. The departure in that case from those holdings resulted by reason of the conclusion of this court that our former decisions were wrong in principle, although uniform and consistent with the views of the court therein announced. The court is of the opinion that it should be no longer the policy of this state and the holding of this court that a coroner's verdict or inquest should be admissible as evidence in civil suits for the purpose of establishing personal liability against any individual in cases where the death of any person is charg-

ed or to establish a defense to such a suit, or for the purpose of establishing other issues between private litigants of the nature indicated in the cases just reviewed. Therefore all of the foregoing cases, and all other cases of this court containing similar holdings, are as to such holdings expressly overruled. We are moved to do this for several reasons. A review of the above cases clearly discloses that many of the cases, if not all of them, have been largely controlled by the admission in evidence of the verdicts of the coroner's jury, and in many of them such verdicts have furnished the sole evidence to establish liability. As a consequence of such practice there has resulted in this state a race and scramble by litigants to secure a favorable coroner's verdict that would influence or control in case a civil suit should be brought to establish a claim by reason of death. It is not intimated here that plaintiffs prosecuting such suits have offended more in this particular practice than defendants who are sued in such suits, and it is believed that the facts would disclose that both are alike guilty. It cannot be questioned that as a result of such practice the coroner's verdict in many cases has been, and will continue to be, a mere trap, or device for the purpose of catching the unwary in such suits, and that public interests intended to be served by coroner's inquests may not be so well guarded as they otherwise would be.

The allowance of coroner's verdicts as evidence in civil suits is wrong in principle, and necessarily results in much injustice to litigants. A coroner, under our law, has no judicial power. Such power is vested by the Constitution in the courts thereby created. *Peoria Cordage Co. v. Industrial Board*, supra. At common law the office of coroner was judicial in its nature. But if he were a judicial officer, invested with judicial powers and duties, we are unwilling to further endorse the holding that any litigant should be bound by the verdict of a coroner's jury in whose inquest he had no right to participate and did not do so. The most solemn finding or judgment of a court is not admissible against a litigant, either as *res judicata* or as an estoppel by verdict, unless he was a party to that judgment. *Chicago Title & Trust Co. v. Storage Co.*, 260 Ill. 485, 103 N. E. 227. The rule has always been recognized that no person shall be affected by any judicial investigation to which he is not a party, unless his relation to some of the parties was such as to make him responsible for the final result of the litigation. 1 *Freeman on Judgments*, § 154.

It is a well-known and well-recognized rule that the evidence of a witness or witnesses, dead or alive, in any suit, although prosecuted to final judgment, is not admissible against any third party in another suit

who was not a party to such judgment. The main ground upon which this rule is based is that such third party had no right of cross-examination of such witness or witnesses. The evidence of witnesses before the coroner's jury, dead or living, is not admissible against either party in a civil suit for damages, and for the same reasons above given. *Pittsburg, Cincinnati & St. Louis Railway Co. v. McGrath*, 115 Ill. 172, 3 N. E. 439; *Knights Templars' Indemnity Co. v. Crayton*, supra. If the evidence of the witnesses before the coroner's jury is not receivable against a party in the civil suit growing out of the death of the party over whose body the inquest is held, and the judgment and findings of a court in another suit concerning the same death are not admissible, there is no sound reason, in our judgment, why the inquest of a coroner ought to be admissible to prove *prima facie* or otherwise, any issue in such case.

So far as we have investigated, only two other states in this country, Iowa and Mississippi, have adopted the same rule as has this court with reference to the admissibility of the inquest of the coroner's jury as evidence in such cases. *Metzradt v. Modern Brotherhood*, 112 Iowa, 522, 84 N. W. 498; *Mittelstadt v. Modern Woodmen*, 143 Iowa, 186, 121 N. W. 803, 136 Am. St. Rep. 765; *Tomlinson v. Sovereign Camp*, 160 Iowa, 472, 141 N. W. 950; *Supreme Lodge Knights of Honor v. Fletcher*, 78 Miss. 377, 28 South. 872, 29 South. 523. In the Iowa cases the admissibility of the verdict or inquest was not questioned by the parties. In the Iowa case last above cited the court indicates that it might have ruled otherwise if objections to the evidence had been raised. The decided weight of the authorities in this country is against the admissibility of such a verdict as evidence. *Aetna Life Ins. Co. v. Milward* (Ky.) 68 L. R. A. 285, note 296; *State v. Cecil County*, 54 Md. 426; *Dougherty v. Pacific Mutual Life Ins. Co.*, 154 Pa. 385, 25 Atl. 739; *Memphis & C. Railroad Co. v. Womack*, 84 Atl. 149, 4 South. 618; *Krogh v. Modern Brotherhood*, 153 Wis. 397, 141 N. W. 276, 45 L. R. A. (N. S.) 404; *Wasey v. Traveler's Ins. Co.*, 126 Mich. 119, 85 N. W. 459; *Cox v. Royal Tribe*, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752; *Germania Life Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215; *Sullivan v. Seattle Electric Co.*, 51 Wash. 71, 97 Pac. 1109, 130 Am. St. Rep. 1082; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795; *Chambers v. Modern Woodmen*, 18 S. D. 173, 99 N. W. 1107; *Walden v. Bankers' Life Ass'n*, 89 Neb. 546, 131 N. W. 962; *Boehme v. Sovereign Camp*, 98 Tex. 376, 84 S. W. 422, 4 Ann. Cas. 1019.

[6] No court, we believe, has gone farther than this court to maintain the maxim or doctrine of *stare decisis*, when the questions

decided affect the validity and control the construction of contracts, or where the rules announced have become rules of property. Rulings on the admissibility of certain documents as evidence of the character here considered, or mere questions of procedure, ought to be followed, unless they are manifestly wrong, but may, and should, be changed when the ends of justice and the public good will be better served. *Rich v. City of Chicago*, 59 Ill. 286; 2 Lewis' Sutherland on Stat. Const. §§ 480-514.

It will not be necessary to further discuss the questions raised relating to the coroner's verdict in question, as the court holds, for the foregoing reason, that the verdict was not admissible in evidence for any purpose. There is no competent evidence in the record tending to prove that the injury to the deceased arose out of and in the course of his employment.

The judgment of the circuit court is reversed, and the award set aside, and the cause is remanded to that court for such further proceedings authorized by law as may be desired.

Reversed and remanded.

(233 Mass. 136)

CROWELL et al. v. DAVIS.

(Supreme Judicial Court of Massachusetts.
Barnstable. June 4, 1919.)

1. WILLS §=365—PROBATE—APPEAL—DISCRETION OF COURT—STATUTE.

The discretionary power vested in the Supreme Judicial Court under Rev. Laws, c. 162, § 13, to allow entry and prosecution of appeal from a decree of the probate court allowing an instrument as the last will of a decedent, *held* not to be said to have been improperly exercised.

2. WILLS §=359—PROBATE—RIGHT TO APPEAL—"PERSONS AGGRIEVED"—STATUTE.

Petitioners under Rev. Laws, c. 162, § 13, for permission to enter and prosecute an appeal from a decree of the probate court allowing a certain instrument as the last will of a decedent, are "aggrieved," within the statute, as a matter of law, if the will as allowed by the probate court wrongfully deprives them of what they would otherwise take under an earlier will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved Party.]

3. WILLS §=229—CONTEST OF PROBATE—"PERSON INTERESTED" OR AGGRIEVED—PECUNIARY INTEREST.

The interest entitling a person interested or a person aggrieved by statute to contest a will must be a direct pecuniary interest affected by the probate of the will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

4. WILLS §=229—RIGHT TO CONTEST—LEGATEES UNDER PRIOR WILL.

Legatees under an earlier will are entitled to contest a later will, to establish their rights.

Appeal from Supreme Judicial Court, Barnstable County.

Petition by Hiram O. Crowell and others against William J. Davis, for leave to enter and prosecute an appeal from a decree of the probate court allowing an instrument as the last will of Rebecca H. Baker. From a final decree permitting the appeal, Davis appeals. Affirmed.

William A. Morse, of Boston, and Frederick C. Swift, of Yarmouth, for appellant.

William D. Turner, of Boston (Henry M. Hutchings, of Boston, of counsel), for appellees.

CROSBY, J. This is an appeal from a final decree, entered by a single justice of this court upon a petition brought under R. L. c. 162, § 13, allowing the petitioners to enter and prosecute an appeal from a decree of the probate court for the county of Barnstable, dated March 6, 1918, allowing a certain instrument dated February 18, 1916, as the last will of Rebecca H. Baker, late of Dennis, in the county of Barnstable. An appeal from the decree allowing the will has been taken by an heir at law of the testatrix and is now pending; a certificate under equity rule XXXVI has been issued by the judge of probate, which recites that the matters relied on by the appellant are deemed a proper subject for judicial inquiry before a jury, and issues for a jury have been framed by a justice of this court.

The record shows that the testatrix left an earlier will, dated and executed in the year 1906, but that the petitioners had no knowledge of its existence until after the time for filing an appeal from the allowance of the will of 1916 had expired. It is alleged by the petitioners that the later instrument ought not to be allowed as the last will of the deceased, because it was not duly executed by her while of sound and disposing mind and memory, and because it was obtained by fraud and undue influence. The earlier will was filed in the probate court soon after it was found, and a petition for its probate is pending.

[1] At the hearing before the single justice in this case, copies of both wills were offered in evidence, from which it appears that under the will of 1906 the petitioner Susan K. Crowell was bequeathed \$15,000 in money, certain specific articles of personal property, and a wood lot in West Dennis; while under the will of 1916 she was given only a legacy of \$10,000. The petitioner Hiram O. Crowell under the 1906 will was given

a legacy of \$1,000; while under the will of 1916 he was to receive nothing. In entering a decree upon the petition the single justice in effect ruled that the petitioners were persons "aggrieved" within the meaning of R. L. c. 162, § 13; and it must be assumed that he found the failure to claim an appeal from the decree of the probate court was without default on their part and that justice required a revision of the case. The discretionary power vested in the court under the statute (section 13) cannot be said to have been improperly exercised in the case at bar. *Hutchings, Petr.*, 122 N. E. 728.

[2] The question remains whether as matter of law the petitioners are persons "aggrieved" as that word is used in the statute; in other words, is a person who is named as a legatee in an earlier will a person "aggrieved" by the allowance of a later will, under which he would take nothing or less than if the earlier will were established?

This precise question presented does not appear to have been decided by this court, although courts in many other jurisdictions have determined that such legatees are entitled to appear and contest the allowance of a later will.

In the case of *Old Colony Trust Co. v. Bailey*, 202 Mass. 283, 88 N. E. 898, it was held by this court that legatees are not entitled as of right to petition for the probate of a will. It was said by Chief Justice Knowlton, at page 290 of 202 Mass., at page 900 of 88 N. E., that—

"It is also true, as a general rule, that the interests of legatees claiming under a will are properly and sufficiently represented by the executor, and * * * individual legatees are not entitled as of right to appear separately and become parties to a petition for the probate of a will. The representation of the estate and the conduct of the trial usually should be left to the executor. But if it appears that one legatee has important interests adverse to those of the legatees generally, or if for any reason, under the issues submitted to the jury, there are contentions that ought to be made in support of some part of the will, it is in the discretion of the presiding justice to allow parties differently interested to appear and be heard in support of their respective contentions."

That rule does not necessarily apply to a case like the present, where there are legatees under an earlier will whose interests are adverse to the allowance of the later will. If the later will is finally allowed, one of the petitioners will take a substantially smaller portion of the estate of the

deceased than she would take if the earlier will were allowed; while the other petitioner will take nothing, although given a substantial legacy in the earlier will. Under these circumstances, it is manifest that the petitioners are "aggrieved" as matter of law if the will as allowed by the probate court wrongfully deprives them of what they would otherwise take under the earlier will. It is plain that the executor of the later will cannot properly and sufficiently represent and protect the interests of these petitioners; nor can the executor named in the earlier will protect and represent their interests, as that will has not been allowed, and his petition to be permitted to enter and prosecute an appeal from the allowance of the later will has been denied. *Hutchings, Petitioner, supra.*

The rights of the petitioners are not protected by the pending appeal of the heir at law of the deceased; he may properly at any time before the issues have been tried (if he sees fit to do so) waive his appeal, and that will may be finally allowed, thereby leaving the petitioners without opportunity to be heard.

[3, 4] Under statutes generally a proceeding to contest a will can be maintained only by a "person interested" or by a person "aggrieved" at the time the will is admitted to probate. The interest must be a direct pecuniary interest affected by the probate of the will. The interests of the petitioners are such that they may have been found to be persons "aggrieved" by the decree as matter of law. It seems to be settled by the great weight of authority that legatees under an earlier will are entitled to contest a later will to establish their rights; and no decisions to the contrary have been called to our attention nor have we been able to find any to that effect. *Crowley v. Farley*, 129 Minn. 460, 152 N. W. 872; *Kosteletzky v. Scherhart*, 99 Iowa, 120, 68 N. W. 591; *In re Wynn's Estate*, 193 Mich. 223, 159 N. W. 492; *Wolf v. Bollinger*, 62 Ill. 368; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Estate of Langley*, 140 Cal. 126, 73 Pac. 824; *Hayle v. Hasted*, 1 Curteis, 236; *Urquhart and Waterman v. Fricker*, 3 Addams, 56. See cases collected in 40 Cyc. p. 1241, note. See, also, *Ensign v. Faxon*, 224 Mass. 145, 112 N. E. 948; *Hayden v. Keown*, 122 N. E. 264; *In re Estate of Stewart*, 107 Iowa, 117, 77 N. W. 574; *Safe Deposit & Trust Co. of Baltimore v. Devilbiss*, 128 Md. 182, 97 Atl. 367.

Decree affirmed.

(232 Mass. 593)

(123 N.E.)

BUSH v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts
Suffolk. April 17, 1919.)

1. CARRIERS ↔303(7)—PASSENGERS—NEGLIGENCE OF CONDUCTOR—TEMPORARY STOP.

Where street car stopped temporarily on account of blockade, conductor on rear platform was not negligent in failing to warn passenger who attempted to alight, the conductor not having given signal to motorman to start, as he did, and having no reason to suppose car would start.

2. CARRIERS ↔303(11)—PASSENGERS—NEGLIGENCE OF MOTORMAN—TEMPORARY STOP.

Where street car stopped temporarily on account of blockade, and motorman had no knowledge passenger would attempt to leave car, the point not being a regular stopping place, he was not negligent, in starting car, in relation to a passenger who attempted to alight, though he was given no starting bell by conductor, which he states he always waited for.

3. CARRIERS ↔303(11)—CARRIAGE OF PASSENGERS — INVITATION TO ALIGHT — EVIDENCE.

The fact that two passengers on a street car preceded plaintiff in alighting from the car when it stopped, the motorman thereafter starting it to plaintiff's injury, is not in itself sufficient to show that plaintiff was invited to leave the car at the place of stoppage, which was not a regular stopping place.

Exceptions from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Action for personal injuries by George M. Bush against the Boston Elevated Railway Company. Verdict for plaintiff, and defendant excepts. Exceptions sustained, and judgment entered for defendant.

Clarence W. Rowley, of Boston, for plaintiff.

Fletcher Ranney and Thomas Allen, Jr., both of Boston, for defendant.

CARROLL, J. The plaintiff was injured while alighting from a car on Washington street, Boston, near the corner of Harvard street. The car was north-bound and had passed Bennett street, where there was a white post marking a regular stopping place. The next white post was at Kneeland street, about four hundred feet away. The plaintiff was employed near the place of the accident. He testified that the "car was blocked and the car stopped opposite the New Marlboro

Hotel; * * * a couple of people went out and the car was stopped, and I says, 'I will get out here now.' He contended that, when he was alighting, the car started and he was injured. The jury found for the plaintiff.

The evidence was conflicting on many material points, but the jury could have found that, while the car was stopped, two passengers alighted from the rear platform and that the plaintiff followed them; that, while stepping from the car, it started, and he was thrown to the ground. There was no evidence that the starting signal by bell was given.

[1] Assuming that the car was not moving when the plaintiff attempted to alight, and that the conductor was on the rear platform, there is nothing in the evidence to show that the conductor was negligent; he did not give a signal to the motorman to start the car; and, while he could have seen the passengers as they attempted to alight, he had no reason to suppose that the car would start; under such circumstances he cannot be considered negligent because he failed to warn the passenger. If he was on the front platform at the time, as claimed by some of the witnesses, there is nothing to show that he knew the plaintiff was going to leave the car, or that in the exercise of reasonable care, he could have prevented injury to the plaintiff.

[2, 3] Neither was there any evidence of the motorman's negligence; he was not informed, and had no knowledge, that the plaintiff would attempt to leave the car at this place, which was not a regular stopping place and where it does not appear that cars ever stopped for the purpose of allowing passengers to leave the car. He was not negligent in starting the car, which had been temporarily stopped because of street traffic, without knowledge that the plaintiff was in the act of alighting and at a place where it would not be expected that he would alight. The fact that no starting bell was given and that the motorman stated he always "waited for his bells before starting his car" is not enough under the facts shown to indicate neglect on his part. *Coneton v. Old Colony St. Ry.*, 212 Mass. 28, 98 N. E. 602. The fact that two passengers preceded the plaintiff in alighting from the car when it stopped is not itself sufficient to show that the plaintiff was invited to leave the car at this place.

Defendant's exceptions sustained.

Judgment for the defendant under St. 1909, c. 236.

(233 Mass. 150)

MANSON & MacPHEE v. FLANAGAN.(Supreme Judicial Court of Massachusetts.
Middlesex. June 18, 1919.)**1. MECHANICS' LIENS §99(1)—SUBCONTRACTOR'S LIEN FOR LABOR—NOTICE OF INTENTION.**

Under R. L. c. 197, § 2, a subcontractor may maintain a lien for labor if its value can be distinctly shown, even if the contract was entire, and there was an entire price for both labor and material, though no notice of intention to claim a lien for material was given.

2. CONTRACTS §71(1)—CONTRACT TO PAY SUBCONTRACTORS—CONSIDERATION.

The promise of the owner of premises to pay subcontractors, who had done work thereon, the amount of their bill, if they would not place a lien on the premises, which they could have done, was based on legal consideration.

3. CONTRACTS §53—CONTRACT TO PAY SUBCONTRACTORS—INADEQUACY OF CONSIDERATION.

Where the promise of the owner of premises to pay subcontractors, who had done work thereon, was based on legal consideration, in that the subcontractors agreed not to file lien, the mere inadequacy of the consideration, in that the value of the labor formed but a small part of the subcontractors' entire claim, in the absence of fraud, is no defense to their right to recover the whole amount of their claim.

Exceptions from Superior Court, Middlesex County; Frederick Lawton, Judge.

Action by Manson & MacPhee against Bridget M. Flanagan. Verdict for plaintiffs, and defendant excepts. Exceptions overruled.

Ira M. Huggan, of Boston, for plaintiffs.
John J. Burns, of Waltham, for defendant.

CARROLL, J. The defendant made a contract with Louis Fisher to build a four-family house for the sum of \$7,000. Fisher was to furnish all material and provide all the

labor. The plaintiffs agreed with Fisher to do the stair work on the premises, furnishing labor and material for the entire price of \$120. This work was completed September 28, 1915; demand for payment was made on Fisher, and refused. Within 30 days from the completion of the work, on October 26, 1915, one of the plaintiffs called on the defendant and informed her that he would place a lien on the premises unless she agreed to pay their claim. Thereupon the defendant agreed in writing to pay the amount due on the contract. The plaintiffs gave no notice of their intention to claim a lien for material. The jury found for the plaintiffs.

[1] It is provided by R. L. c. 197, § 2, that—

"If such agreement is for labor performed or furnished and for materials furnished under an entire contract and for an entire price, a lien for the labor alone may be enforced, if the value of such labor can be distinctly shown; but it shall not be enforced for an amount greater than the entire contract price."

Under this section a subcontractor may maintain a lien for labor if its value can be distinctly shown; even if the contract was entire and there was an entire price for both labor and material, and although no notice of an intention to claim a lien for material was given. *Casey v. Weaver*, 141 Mass. 280, 6 N. E. 372; *Moore v. Erickson*, 158 Mass. 71, 32 N. E. 1081; *Scannell v. Hub Brewing Co.*, 178 Mass. 288, 292, 59 N. E. 628.

[2, 3] There was evidence that the value of the labor could be distinctly shown; and that at the time when the defendant agreed to pay the plaintiffs they could have filed a valid lien for the labor performed or furnished, under their contract, in the erection of the building. The defendant's promise to pay the plaintiffs was based upon a legal consideration, and although the lien could be enforced for the labor only, and the value of the labor formed but a small part of the entire claim, the mere inadequacy of the consideration, in the absence of fraud, is no defense to the plaintiffs' right to recover. *Dean v. Carruth*, 108 Mass. 242.

Exceptions overruled.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(233 Mass. 174)

STILES v. MORSE et al. (two cases).

(Supreme Judicial Court of Massachusetts.
Middlesex. June 23, 1919.)

1. MUNICIPAL CORPORATIONS §=160—OFFICERS—WRONGFUL REMOVAL BY CITY COUNCIL—PERSONAL LIABILITY OF MEMBERS.

Where three of the five members of the municipal council of a city, clothed with authority to remove the city treasurer from office for sufficient cause in accordance with St. 1911, c. 645, § 40, regulating the civil service, went through the form of adopting orders removing the treasurer without notifying him of the proposed action, and without giving him copy of reasons for removal, such removal was improper, and, whether the council members acted in an administrative or quasi judicial capacity, they were individually liable to the treasurer, at least for nominal damages.

2. MUNICIPAL CORPORATIONS §=160 — WRONGFUL REMOVAL FROM OFFICE—ACTION FOR DAMAGES—ELEMENTS.

In action by city treasurer against members of municipal council who wrongfully had gone through the form of removing him from office without complying with the requirements of the civil service law, the treasurer was entitled to have considered, as an element of his damages, amounts reasonably paid for counsel fees in procuring reinstatement in office, damages caused him by being obliged to resign his office, though he was ultimately paid his salary on restoration to office by mandamus, and injury to reputation in the community and with bonding companies.

3. MUNICIPAL CORPORATIONS §=160 — WRONGFUL REMOVAL FROM OFFICE—ACTION FOR DAMAGES—EVIDENCE.

In an action by a city treasurer for damages from an attempted wrongful removal from office by members of the city council, sued as individuals, testimony as to the reasons given by agents of bonding companies for refusal, after the removal, to become surety on the treasurer's bond, *held* competent.

4. MUNICIPAL CORPORATIONS §=160 — WRONGFUL REMOVAL FROM OFFICE—DAMAGES—MENTAL SUFFERING.

In an action by a city treasurer for damages from his attempted wrongful removal from office by members of the city council, sued as individuals, plaintiff was entitled to have the jury consider, on the issue of damages, mental suffering sustained by him as the natural and proximate result of the councilors' unlawful conduct, though they acted in good faith and without malice.

5. DAMAGES §=48—MENTAL SUFFERING.

If the natural consequence of a wrongful act done willfully, or with gross negligence, is mental suffering to plaintiff, such element may be considered in assessing his damages.

6. MUNICIPAL CORPORATIONS §=160 — WRONGFUL REMOVAL FROM OFFICE—ACTION—EVIDENCE.

In an action against members of the municipal council by a city treasurer for wrongful removal from office without compliance with the civil service laws, plaintiff's testimony that he had been informed from various sources that there was no ground for an action against him and the sureties on his bond by the city for failure to collect interest on deposits of city money from a trust company and testimony of plaintiff as to a conversation with a defendant *held* admissible to rebut the inference of malice in the denial by the president of the trust company of request to honor the note of a defendant, and that plaintiff's mental distress came from such cause.

Exceptions from Supreme Court, Middlesex County; John F. Brown, Judge.

Actions of tort by Andrew G. Stiles against Charles J. Morse and others. Verdicts for plaintiff, and defendants except. Exceptions overruled.

Qua, Howard & Rogers, of Lowell, for plaintiff.

M. L. Sullivan and J. J. Ronan, both of Salem, for defendant Warnock.

James J. Kerwin and James C. Reilly, both of Lowell, for defendant Morse.

William D. Regan, of Lowell, for defendant Brown.

RUGG, C. J. [1] These are two actions of tort brought to recover damages for two attempted removals of the plaintiff, the first in January, 1917, and the second in February and March, 1917, from the office of city treasurer and collector of taxes of the city of Lowell. The defendants on those dates were three of the five members constituting the municipal council of Lowell. The municipal council of Lowell was clothed with authority to remove the city treasurer from office for such cause as it deemed sufficient, provided it proceeded in accordance with the law regulating the civil service. St. 1911, c. 645, § 40. It had no power in that regard except by following the terms of that law. The provisions of the civil service law required as essential preliminaries that reasons be specifically given in writing and that the person sought to be removed should be notified of the proposed action and furnished with a copy of the reasons claimed to constitute just cause of removal. The defendants, being a majority of the municipal council, joined in going through the form of adopting orders removing the plaintiff from the office of city treasurer without notifying him of the proposed action and without giving him copy of reasons for removal. Therefore it has been held expressly that the orders "were a nul-

lity and were wholly ineffectual" as attempts to remove the plaintiff from office. *Thomas v. Municipal Council of Lowell*, 227 Mass. 116, 119, 116 N. E. 497; *Stiles v. Municipal Council of Lowell*, 229 Mass. 208, 210, 118 N. E. 347. The duty of the defendants to give the notice and hearing to the plaintiff was certain and specific. The statute covered the ground completely, and left nothing to the exercise of discretion. *Ransom v. Boston*, 193 Mass. 537, 540, 79 N. E. 823.

The defendants, in passing upon the question of the removal of a city officer under civil service rules, were executive or administrative officers. If they had followed the requirements of the civil service laws in making the removal, they then would have been performing functions to some extent judicial. The power to remove an officer in the public service is in its nature executive, when considered by itself alone. *Murphy v. Webster*, 131 Mass. 482. When, as essential prerequisites to the exercise of that power, there must be a formulation of specific charges as grounds for removal, notice of those charges to the person to be removed, opportunity to him for a hearing, followed by a hearing and decision, then the hearing and decision partake also of the "nature of a judicial investigation." *McCarthy v. Emerson*, 202 Mass. 352, 354, 88 N. E. 668, 669 (132 Am. St. Rep. 484, 16 Ann. Cas. 500); *Driscoll v. Mayor of Somerville*, 213 Mass. 493, 494, 100 N. E. 640; *Swan v. Justices of Superior Court*, 222 Mass. 542, 548, 111 N. E. 386; *State v. Common Council of City of Superior*, 90 Wis. 612, 619, 64 N. W. 304. The functions of the members of the municipal council are like those of selectmen in deciding upon the qualifications of voters, which, as was said by Chief Justice Shaw, are "in this respect to some extent judicial." *Blanchard v. Stearns*, 5 Metc. 298, 300. Speaking with accuracy, the removal by a municipal council under these circumstances is still an executive or administrative act which must be performed in this particular in a judicial manner. See *Levangle's Case*, 228 Mass. 213, 117 N. E. 200. Treating the liability of the defendants in its executive or administrative aspect, they are bound to act in accordance with the law. They acquire no authority in the premises except such as the law confers. The plaintiff had an interest in remaining in office, of which he could not be deprived except in accordance with law. Continuance in office was valuable to him both as a means of support and as matter of reputation. *Ham v. Boston Board of Police*, 142 Mass. 90, 95, 7 N. E. 540; *Hill v. Boston*, 193 Mass. 569, 575, 79 N. E. 825. The incumbent of an office carrying emolument has rights protected from assault by third persons, although as against the state itself

his relation may be of a different nature. *Ashley v. Three Justices of the Superior Court*, 228 Mass. 63, 73, 116 N. E. 961. Personal liability attaches to executive or administrative officers who interfere with rights of individuals in ways not authorized by law. The cloak of office is no protection to them even when acting in good faith. The principle by which personal liability is fixed on field drivers for taking stray cattle except as provided by the statute (*Coffin v. Field*, 7 Cush. 355), on members of the board of health for killing a well horse honestly but mistakenly supposed to have glanders (*Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850), on selectmen and other officers when acting as members of an election or registration board in refusing to put on the voting list and to permit to vote a man entitled to vote (*Larned v. Wheeler*, 140 Mass. 390, 5 N. E. 290, 54 Am. Rep. 483), on assessors for making an illegal assessment (*Stetson v. Kempton*, 13 Mass. 272, 283, 7 Am. Dec. 145), and in general on municipal officers for acts of personal misfeasance in performance of public duty (*Moynihan v. Todd*, 188 Mass. 301, 74 N. E. 367, 108 Am. St. Rep. 473), is controlling when the position of the defendants is considered as executive or administrative. If their position is approached from the viewpoint of exercising the judicial faculty, the same result follows. "All inferior tribunals and magistrates * * * if they act without jurisdiction over the subject-matter or * * * if they are guilty of excess of jurisdiction * * * are liable in damages to the party injured by such unauthorized acts." *Piper v. Pearson*, 2 Gray, 120, 122, 61 Am. Dec. 438; *Doggett v. Cook*, 11 Cush. 262; *Clark v. May*, 2 Gray, 410, 61 Am. Dec. 470; *Sullivan v. Jones*, 2 Gray, 570; *Kelly v. Bemis*, 4 Gray, 83, 64 Am. Dec. 50; *Kendall v. Powers*, 4 Metc. 553; *Brewer v. Casey*, 196 Mass. 384, 387, 82 N. E. 45; *Von Arx v. Shafer*, 241 Fed. 650, 154 C. C. A. 407, L. R. A. 1917F, 427. Although there are contrary decisions on this point, to the effect that good faith may be a defense or that there is liability only if there is malice, the weight of authority is in favor of the absolute liability established so firmly in our jurisprudence by the decisions already cited as not to be open further to discussion. The case at bar is indistinguishable in essence from the established liability of election officers for a well intentioned mistake of judgment in refusing registration and in denying the right to vote to one duly qualified. *Lincoln v. Hapgood*, 11 Mass. 350; *Blanchard v. Stearns*, 5 Metc. 298, 300; *Kinneen v. Wells*, 144 Mass. 497, 504, 11 N. E. 916, 59 Am. Rep. 105.

It is plain that the defendants never acquired a jurisdiction to exercise their quasi judicial functions respecting the removal

from office of the plaintiff, because they never notified him and never gave him a copy of the charges against him and he did not voluntarily submit himself to their action, but has resisted and asserted the invalidity of their procedure at every point. The full performance of all conditions established by the statute are essential prerequisites to the jurisdiction of the municipal council over the subject-matter of the removal of an officer. There is no delegation of judicial power to the municipal council. *Holcombe v. Creamer*, 231 Mass. 99, and cases collected at 111, 120 N. E. 354, 359. That hardly could be done under our Constitution, which sharply separates the three departments of government. *Boston v. Chelsea*, 212 Mass. 127, 98 N. E. 620.

The municipal council was clothed with the power of removal of city officers so long as there was conformity to the requirements of the law. When the members ceased to comply with the law they were acting outside their official capacity and were subjected to responsibility as individuals.

It follows that the court rightly ordered verdicts for the plaintiff for at least nominal damages. *Ransom v. Boston*, 196 Mass. 248, 81 N. E. 998.

[2] The plaintiff was entitled to have considered as an element of his damages the amounts reasonably paid for counsel fees in procuring reinstatement in office. He was obliged to resort to the court for redress and to employ counsel to that end. Those proceedings were rendered imperative, in order that he might protect his rights, by the tortious conduct of the defendants. The plaintiff was not obliged to incur these expenses through any misfeasance or contract of his own, but wholly by reason of the wrongdoing of the defendants, of which these expenses were the immediate and direct result. As was said in *Wheeler v. Hanson*, 161 Mass. 376, 37 N. E. 386, 42 Am. St. Rep. 406:

"It has been held more than once in this state, that when the plaintiff has, in consequence of the wrongful conduct of the defendant, been put to expense in the employment of counsel, the amount so paid is an element of damage in an action against the defendant arising out of such wrongful conduct." *Berry v. Ingalls*, 199 Mass. 77, 85 N. E. 191; *Maguire v. Pan-American Amusement Co.*, 205 Mass. 64, and cases collected at 68, 91 N. E. 135, 136, 137 Am. St. Rep. 422, 18 Ann. Cas. 110; *Sears v. Nahant*, 215 Mass. 234, 239, 240, 102 N. E. 491, Ann. Cas. 1914C, 1296.

The case at bar is within this principle. It is quite different from those decisions where the taxable costs are held, so far as concerns a particular proceeding, to be full compensation for expenses in conducting litigation, such as *Newton Rubber Works v. De Las Casas*, 182 Mass. 436, and cases cited

at 438, 65 N. E. 816, 817, and *McIntire v. Mower*, 204 Mass. 233, 237, 90 N. E. 567. See *Fitzgerald v. Heady*, 225 Mass. 75, 113 N. E. 844.

There was no error in permitting the jury to consider the damages caused to the plaintiff by being obliged to resign his office. It might have been found that the plaintiff's inability to secure the required surety on his bond was due directly to the illegal conduct of the defendants and flowed from it as a natural consequence. See *Ransom v. Boston*, 192 Mass. 299, 307, 78 N. E. 481, 7 Ann. Cas. 733. It is not an answer in this connection that the plaintiff was restored to his office by mandamus proceedings and was ultimately paid his salary up to the time of his resignation. With respect to the conduct of the defendants here in issue, the plaintiff had a legal right to remain in office unmolested. If the unlawful efforts of the defendants to remove him from office so injured his standing and reputation in the community and with bonding companies that he could no longer secure surety on his bond and thereby was compelled to resign, that would constitute an element of damage provided he was unable to get more lucrative employment elsewhere.

[3] Testimony as to the reasons given by agents of the bonding companies for refusal to become surety on the plaintiff's bond was competent. *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; *Hubbard v. Allyn*, 200 Mass. 166, 174, 86 N. E. 356.

[4, 5] The plaintiff was entitled to have the jury consider in assessing his damages the mental suffering which he sustained so far as it was the natural and proximate result of the unlawful conduct of the defendants. It might have been found that a feeling of humiliation and a sense of degradation would ensue to the ordinary person as the normal and direct consequence of the illegal expulsion from office. Mental suffering ordinarily has been held not to be an independent cause of action. The reason for this in large part, as was said by Lurton, J., in a dissenting opinion in *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864, "is found in the remoteness of such damages and in the metaphysical character of such an injury. * * * Such injuries are generally more sentimental than substantial." *Sumnerfield v. Western Union Telegraph Co.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17. The rule is well settled, however, that if the natural consequence of the wrongful act, done willfully or with gross negligence, is mental suffering to the plaintiff, then that element may be considered in assessing damages. *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Fillebrown v. Hoar*, 124 Mass. 580, 585. In the application of this rule

it has been held that one, acting on the erroneous but honest belief that the plaintiff was an apprentice in his employ, who made a false statement to that effect, the expected result being the discharge of the plaintiff, was liable in damages including mental suffering. *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 538. It also has been held that the jury, in assessing the damages to a boy "unlawfully excluded" from a public school might consider the indignity or disgrace which followed the expulsion. In that case as reported there is shown no malice or want of good faith, and nothing more than honest mistake of their legal duty as to giving hearing on the part of the school committee. *Morrison v. Lawrence*, 181 Mass. 127, 63 N. E. 400. The case at bar falls within the principle applied in these two decisions and is indistinguishable from them in any essential particular. Good faith and absence of malice in the perpetration of such a palpable wrong to the plaintiff constitute no defense to the defendants against the almost inevitable effect of their acts. In *Bishop v. Rowley*, 165 Mass. 460, 43 N. E. 191, liability was established although apparently the school committee acted in entire good faith in refusing to grant a hearing to the scholar excluded from school. See *Austro-American Steamship Co. v. Thomas*, 248 Fed. 234, 160 C. C. A. 309, L. R. A. 1918D, 873. The case at bar is distinguishable from *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454; *Burton v. Scherpf*, 1 Allen, 133, 79 Am. Dec. 717; *Lopes v. Connolly*, 210 Mass. 487, 97 N. E. 80, 38 L. R. A. (N. S.) 986; *Spade v. Lynn & Boston R. R.*, 168 Mass. 285, 289, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393; and kindred decisions.

[8] Evidence of the plaintiff's narrating a conversation with the defendant Brown, wherein the latter stated in effect that he would get even with the Lowell Trust Company because its president had refused to honor his note, was admissible as tending to show malice toward the plaintiff on the part of Brown, then an issue although subsequently waived, and also as tending to eliminate that charge as a cause of worry to the plaintiff. On cross-examination of the plaintiff it had been developed, that in the spring of 1917 after the illegal removals, action had been brought against him and the sureties on his bond by the city of Lowell, for failure to collect interest on deposits of city money from the Lowell Trust Company. It was pertinent, in reply to the natural effect of this evidence, for the plaintiff to testify that he had been informed from various sources that there was no ground for that action, in order to rebut the inference that his mental distress came from that cause. It is

not necessary to go through the exceptions to evidence in further detail. A careful examination of them satisfies us that there was no reversible error in these particulars.

The defendants' requests for rulings need not be reviewed one by one. It follows from what has been said that there was no error in the denial of these requests, and that the instructions given are not open to just criticism in law.

Exceptions overruled.

(223 Mass. 140)

MILLS v. W. T. GRANT CO.

GODFREY v. SAME.

(Supreme Judicial Court of Massachusetts. Essex. June 16, 1919.)

1. CORPORATIONS \Leftrightarrow 423—SLANDER BY COMPANY'S SERVANT.

Since a corporation is liable for a malicious act on proof which would make an individual liable, a corporation is liable in slander, if the slanderous words are voluntarily uttered by its officer, agent, or servant in the course of his employment, as well as when uttered by the direct authority of the stockholders or directors.

2. MASTER AND SERVANT \Leftrightarrow 306—LIABILITY FOR SERVANT'S TORT.

Even when his act is intended by a servant to violate plaintiff's rights, the master is liable, if it is done to carry out the duty owed to him by the servant.

3. CORPORATIONS \Leftrightarrow 423—LIABILITY FOR LIBEL BY SERVANT.

A corporation is liable for a libel written by its servant or agent in the course of the business in which he is employed.

Exceptions from Superior Court, Essex County; Joseph F. Quinn, Judge.

Actions by Mildred P. Mills and Ruth E. Godfrey against the W. T. Grant Company. Verdict for plaintiffs, and defendant excepts. Exceptions overruled.

James W. Sullivan, of Lynn, for plaintiffs.
C. Neal Barney and Wilbert A. Bishop, both of Lynn, for defendant.

LORING, J. These are two actions of slander by different plaintiffs against the same defendant. The cases were tried together. In each case the plaintiff had a verdict. The facts were in substance these: The plaintiffs went to the defendant's store in Lynn to buy Christmas presents. After they had left the store they were followed by one Flora

Lipkin employed by the defendant "as a store detective" to "assist in pointing out people who were 'a cause for the enormous shortage in the store'; that she was supposed to watch anybody who 'grabbed anything out of the store without paying for it' and to inform the manager thereof; that it was her business to know whether people had taken anything from the store or not." "At Lipkin's request the plaintiffs returned with her to the store of the defendant and were brought by her to * * * Baldwin, manager of the store, whereupon Lipkin, in the presence of others, accused the plaintiffs of having stolen some beads from a counter in the store, in substantially the words set out in the plaintiff's declaration; and the manager, Baldwin, reiterated the charge against the plaintiff and made further talk in which he endeavored to induce the plaintiff to return the beads, which she denied having. The evidence as to the nature of the employment of Mr. Baldwin was that he was manager of the store, that he was in charge there and that there was nobody higher in authority at that time in that particular store." The defendant moved for a verdict in its favor as matter of law and asked for the three rulings set forth in the margin.¹ The presiding judge instructed the jury that:

"The defendant, of course, as a corporation can only do anything through agents or servants, and if these agents or servants of this corporation were doing this in the course of their employment, which is for you to find whether or not they were, then the corporation is responsible."

The case is here on exceptions taken to the refusal of the judge to direct a verdict for the defendant, to his refusal to give the rulings asked for, and to the instructions on the point given in the charge to the jury.

The question raised by these exceptions is a question which was left open by this court

¹ The motion for verdict was placed on two grounds, namely:

1. There is no evidence from which the jury could properly find that the defendant authorized its employees to commit the acts complained of.

2. There is no evidence from which the jury could properly find that the defendant ratified the acts of its agents upon which this action is based.

The rulings asked for were:

3. The defendant is not liable under the count for slander unless the jury find either that the defendant authorized its servants to commit the acts complained of, or that it ratified said acts.

8. If the jury find that the words set forth in the third count of the plaintiff's declaration were published by the servants of the defendant, the defendant is not liable in the absence of evidence tending to show that said words were uttered by the authority of the defendant corporation or that said corporation had ratified such acts of its servants.

9. The mere fact that slanderous words were published by an agent or servant of the defendant in the course of his employment, and in reference to the plaintiff, is not sufficient to hold the defendant liable. *Comerford v. West End Street Railway Co.*, 164 Mass. 13, 41 N. E. 59.

in *Comerford v. West End Street Railway Co.*, 164 Mass. 13, 41 N. E. 59, *Kane v. Boston Mutual Life Insurance Co.*, 200 Mass. 265, 269, 86 N. E. 302, and *Economopoulos v. A. G. Pollard Co.*, 218 Mass. 294, 297, 105 N. E. 896.

In *Comerford v. West End Street Railway Co.*, *ubi supra*, it was said:

"Of course, if slanderous words are shown to have been uttered by the authority of a corporation, or to have been ratified by it, the corporation is liable; but if they are uttered by an agent or servant in the course of the business in which he is employed, it is at least questionable whether the corporation is liable. We are aware of no case in which this has been held."

This question was left open (in *Comerford v. West End Street Railway*) 'because of the statement on the point made by Mr. Odgers in his treatise on Libel and Slander published in 1881. This is apparent from the defendant's brief among the original papers in that case. Mr. Odgers' statement (at page 368, 1st Ed.) is:

"A corporation will not, it is submitted, be liable for any slander uttered by an officer, even though he be acting honestly for the benefit of the company and within the scope of his duties, unless it can be proved that the corporation expressly ordered and directed that officer to say those very words: for a slander is the voluntary and tortious act of the speaker."

In the second edition of his book (published in 1890, five years before the decision in *Comerford v. West End Street Railway*) Mr. Odgers repeated the statement made in the first edition, with the omission of the concluding words, "for a slander is the voluntary and tortious act of the speaker," and that statement was repeated in the third edition of his work. There are statements in 18 Am. & Eng. Encyc. (2d Ed., published in 1901) 1059, and in 10 Cyc. (published in 1904) 1216, substantially to the same effect.

Townshend on Libel and Slander also is relied on by the defendant in the case at bar. In the first edition (published in 1868) at page 300, Mr. Townshend makes this statement:

"As a corporation can act only by or through its officers or agents [section 261] and as there can be no agency to slander [section 87] it follows that a corporation cannot be guilty of slander; it has not the capacity for committing that wrong. If an officer or an agent of a corporation is guilty of slander, he is personally liable and no liability results to the corporation."

The same statement is repeated in the second edition (published in 1872) at page 459, and again in the fourth edition (published in 1890) at page 474. It is to be observed that the proposition laid down by Mr. Town-

shend is quite different from that originally laid down by Mr. Odgers, in substance repeated in 18 Am. & Eng. Encyc. 1059, and in 10 Cyc. 1216. The proposition laid down by Mr. Townshend is that laid down by Lord Bramwell in *Abrath v. North Eastern Railway*, 11 App. Cas. 247, 253, 254. When that proposition was stated by Lord Bramwell in that case, it was not concurred in by the Lord Chancellor, Lord Watson, or Lord Fitzgerald who sat with him at that time. It never became the law of England. See Lord Lindley in *Citizens' Life Assurance Co., Ltd., v. Brown*, [1904] App. Cas. 423, 426. It is not the law of this commonwealth. *Reed v. Home Savings Bank*, 130 Mass. 443, 39 Am. Rep. 468. Moreover the statement made by this court in *Comerford v. West End Street Railway*, ubi supra, 164 Mass. 14, 41 N. E. 59, is a statement that that proposition is not law here. In that statement this court said:

"Of course, if slanderous words are shown to have been uttered by the authority of a corporation, or to have been ratified by it, the corporation is liable."

The distinction put forward originally by Mr. Odgers (namely, that although a corporation is liable in slander if the stockholders or directors of the corporation expressly authorize the slanderous words or subsequently ratify them, yet it is not liable if they are uttered by an agent or servant in the course of his employ), was abandoned by him in the end. In the fourth edition of *Odgers' Libel and Slander* (published in 1906) that statement was omitted. The omission without doubt was due to the decision of the Privy Council in *Citizens' Life Assurance Company, Ltd., v. Brown*, ubi supra. Having reference to that case Mr. Odgers (in the fourth edition, at page 553) said:

"It has now been decided that a corporation may be rendered liable for words published on a privileged occasion, by proving malice in its servant who published them, provided the servant was acting within the scope of his employment. *Citizens' Life Assurance Co., Ltd., v. Brown* [1904] A. C. 423, 74 L. J. P. C. 102, 90 L. T. 739, 20 Times L. R. 497."

And the statement here in question made by Mr. Odgers in the earlier editions of his work was omitted.

[1] A corporation, being an artificial being, can act only by stockholders, officers, agents or servants. It is now settled (contrary to the opinion of Lord Bramwell in *Abrath v. North Eastern Railway*, 11 App. Cas. 253, 254) that a corporation can be made liable for a malicious act on proof which would make an individual liable therefor. It necessarily follows that a corporation is liable in slander if slanderous words are

uttered by an officer, agent or servant of a corporation in the course of his employment as well as when slanderous words are uttered by the direct authority of the stockholders or directors. Whether in an individual case action is taken in behalf of a corporation by stockholders or directors or by an officer, agent or servant in the course of his employment is immaterial. In each case the corporation is liable because the act is done by a natural person acting for the corporation.

[2] The reason for the distinction originally put forward by Mr. Odgers and left open in *Comerford v. West End Street Railway*, originally was stated to be:

"For a slander is the voluntary and tortious act of the speaker."

But in the ordinary case where a corporation is liable for an act done by an agent or employé in the course of his employment, the act of the agent or servant (for which the corporation is liable because it was done in the course of his employment) is a voluntary act. There may be cases in which the act of a servant for which the master is liable is an involuntary act on the part of the servant. But ordinarily the act of the servant for which the master is liable (because it is an act in the course of the servant's employment) is the voluntary act of the servant. Even when the act is intended by the servant to violate the rights of the plaintiff the master is liable if it is done to carry out the duty owed by the servant to his master. *Howe v. Newmarch*, 12 Allen, 49. The fact that the act of uttering the slanderous words uttered by an agent or servant of a corporation in the course of his employment is a voluntary one is no reason for holding that the corporation is not liable therefor.

It seems to have been in the mind of those who have put forward the distinction originally put forward by Mr. Odgers, that such a wrong as a slander cannot in fact be committed by an agent in the course of his employment whether the master is a natural person or a corporation. But that is not so. The case at bar is perhaps as good an instance to the contrary as could be found. It was in evidence in the case at bar that Mrs. Lipkin "was employed * * * as a store detective * * * to assist in pointing out people who were 'a cause for the enormous shortage in the store'; that she was supposed to watch anybody who 'grabbed anything out of the store without paying for it' and to inform the manager thereof. * * * That it was her business to know whether people had taken anything from the store or not." If Mrs. Lipkin in the performance of that duty thought that the plaintiffs had stolen the beads which she thought they had stolen, the jury were warranted in finding that it was

her duty to accuse them of the theft "to induce the plaintiff to return the beads."

The weight of authority is in favor of the ruling made by the presiding judge in the case at bar. There is but one decision of a final court of appeal in favor of the proposition originally put forward by Mr. Odgers, namely, *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320. In addition to that there is a statement to that effect in *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 577-578, 43 South. 210, 9 L. R. A. (N. S.) 929, 124 Am. St. Rep. 90. But the statement made in that case was not necessary to the decision there made. In that case the agent and the corporation were sued jointly and the statement as to the law of slander (originally put forward by Mr. Odgers) was put forward after the case had been decided on the ground that "the offense of slander is essentially single, differing in this respect from libel." On the other hand, it was laid down by the House of Lords in *Glasgow v. Lorrimer*, [1911] A. C. 209, s. c. sub nomine *Riddell v. Corporation of Glasgow*, [1911] S. C. (H. L.) 85, that a corporation is liable for words spoken by a servant in the course of his employment. In that case it was held that the words were not uttered in the course of the agent's employment and for that reason the corporation was held not to be liable. It is the settled law of New Jersey (*Empire Cream Separator Co. v. De Laval Dairy Supply Co.*, 75 N. J. Law, 207, 87 Atl. 711), Ohio (*Citizens' Gas & Electric Co. v. Black*, 95 Ohio St. 42, 115 N. E. 495, L. R. A. 1917D, 559), Minnesota (*Roemer v. Jacob Schmidt Brewery Co.*, 132 Minn. 399, 157 N. W. 640, L. R. A. 1916E, 771), and North Carolina (*Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 392, by a divided court of 3 to 1; see also *Sawyer v. Railroad Co.*, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, 9 Ann. Cas. 440) that a corporation is liable for slanderous words uttered by one of its servants in the course of his employment. There is a decision by the Circuit Court of Appeals for the Fourth Circuit (*Grand Union Tea Co. v. Lord*, 231 Fed. 390, 145 C. C. A. 384, Ann. Cas. 1918C, 1118) to the same effect. And it was so laid down in *Hopkins Chemical Co. v. Read Drug & Chemical Co.*, 124 Md. 210, 212-215, 92 Atl. 478. In that case the words uttered were not slanderous per se and there being no allegation of special damage the demurrer was sustained.

[3] Moreover, we are of opinion that no distinction can be made in this respect between libel and slander. It was decided in *Fogg v. Boston & Lowell Railroad*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583, that a corporation is liable for libel where it is proved that the libel was written by a servant or agent of the corporation in the course

of the business in which he was employed. See also *Howland v. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. 656; *Hill v. Murphy*, 212 Mass. 1, 4, 98 N. E. 781, 40 L. R. A. (N. S.) 1102, Ann. Cas. 1913C, 374.

It follows that the ruling made by the presiding judge in his charge to the jury was right, the rulings asked for were wrong, and that the exceptions must be overruled.

It is so ordered.

(233 Mass. 143)

WEST v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 18, 1919.)

1. UNITED STATES ⇐125—ACTION AGAINST—CONSENT.

The United States, unless it consents, cannot be impleaded in any court, federal or state, and whether it is a party to the litigation is not determined by the nominal party shown by the record, but by the effects of the judgment which can be entered.

2. RAILROADS ⇐5½—New, vol. 6A Key-No. Series—FEDERAL CONTROL—ACTION—VENUE.

Railroad guard's right to damages for breach of his contract of employment is a vested right of property, enforceable, under General Order No. 18a of the federal Director General of Railroads, in the superior court for the county where, in contemplation of law, the guard had his residence.

3. VENUE ⇐33—TRANSFER TO PROPER COUNTY—STATUTES.

The trial court, under Rev. Laws, c. 167, § 14, even if defendant's plea in abatement that the action was brought in the wrong county was good, and the Supreme Judicial Court, under St. 1913, c. 716, § 3, on plaintiff's motion could order the case transferred to the proper county, where it could be prosecuted as if duly begun therein, and all prior proceedings regularly taken would be valid.

4. EVIDENCE ⇐46—JUDICIAL NOTICE—PRESIDENT'S PROCLAMATION.

All courts are bound to take judicial notice, as a public act, of the President's proclamation taking over the railroads on account of the emergency of the war.

5. RAILROADS ⇐5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL.

The President could direct and empower the Director General of Railroads, as his representative, to carry out the powers conferred upon him by Congress as to federal operation of railroads on account of the emergency of the war.

6. EVIDENCE ⇐46—JUDICIAL NOTICE—ORDERS OF DIRECTOR GENERAL OF RAILROADS.

The Supreme Judicial Court takes notice of general orders promulgated by the Director General of Railroads, appointed by the President to

execute the authority conferred upon him by Congress to take over the railroads on account of the emergency of the war, in so far as they are applicable to an action against a railroad under federal control, though not called to the attention of the court by counsel.

7. RAILROADS ¶5½, New, vol. 6A Key-No. Series—FEDERAL OPERATION—CONGRESSIONAL CONTROL.

Notwithstanding its prior delegation of powers over the railroads during the emergency of war, enumerated in certain resolves and statutes, Congress, in the exercise of general legislative authority, could further provide by any appropriate enactments for the operation of the systems of railroad transportation undertaken pursuant to the President's proclamation, asserting the authority vested in him by Congress.

8. RAILROADS ¶5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—SUIT AGAINST—VENUE.

Order of federal Director General of Railroads that suit against carrier, while under federal control, must be brought in the county where plaintiff resides, or where the cause of action arose, having been issued after action had been begun for breach of contract of employment by a railroad's discharged guard, held inapplicable, so that the guard could resort to any court of competent jurisdiction, though no attachment on mesne process could be made, and, if a judgment was obtained, no execution could be levied on the railroad's property.

9. VENUE ¶4—TRANSITORY ACTION—PLACE OF BUSINESS OF DEFENDANT.

Under Rev. Laws, c. 167, § 1, plaintiff can sue on a transitory cause of action, as one for breach of contract of employment, in any county where defendant has a usual place of business.

Report from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Frank N. West against the New York, New Haven & Hartford Railroad Company, resulting in overruling of defendant's plea in abatement. On report to the Supreme Judicial Court. Defendant ordered to answer over under the terms of the report.

Whipple, Sears & Ogden, of Boston (William R. Sears, of Boston, of counsel), for plaintiff.

Choate, Hall & Stewart, of Boston, for defendant.

BRALEY, J. [1, 2] The defendant's contentions, that the United States unless it consents cannot be impleaded in any court either federal or state, and whether the sovereignty is a party to the litigation is not determined by the nominal party shown by the record, but by the effects of the judgment which can be entered, may be conceded as being beyond the pale of successful contradiction. Public Service Commission v. N. E. Tel. & Tel. Co., 122

N. E. 567. But the plea in abatement on which it relies to defeat the action recites that the plaintiff at the time the suit was brought resided in "the county of Dukes * * * and that the cause of action, if any, accrued in the state of Connecticut; that by General Order No. 18a, signed by W. G. McAdoo, Director General of Railroads, it is ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides at the time of the accrual of the cause of action, or in the county or district where the cause of action arose, and therefore the defendant ought not to be held to answer to the plaintiff's writ." The cause of action according to the declaration accrued July 14, 1917, when the plaintiff who is alleged to have been employed as a guard for the duration of the war was discharged while on duty at the "Connecticut River Bridge," because his services were no longer required by the defendant. The right to damages for breach of this contract is a vested right of property enforceable under the order in the superior court for the "county of Dukes" where in contemplation of law he had his residence. Bogani v. Perotti, 224 Mass. 152, 112 N. E. 853, L. R. A. 1916F, 831; Angle v. St. Paul, Minn. & Omaha Ry., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; Reeder v. Holcomb, 105 Mass. 93; Hazard v. Wason, 152 Mass. 268, 25 N. E. 465.

[3] The trial court under R. L. c. 167, § 14, even if the plea were adjudged good, and this court under St. 1913, c. 716, § 3, could on the plaintiff's motion order the case transferred to the proper county where it could be prosecuted as if duly begun therein and all prior proceedings regularly taken would thereafter be valid.

The presiding judge, however, overruled the plea "on the ground that the federal government is without authority to regulate procedure in the courts of the various states" and reported the case under the stipulation "that if the ruling is right the defendant be ordered to answer over; and if the plea in abatement be found to be a good defense that the action be dismissed." See in this connection as to procedure, R. L. c. 173, § 96, as amended by St. 1906, c. 342, § 2, and St. 1910, c. 555, § 4; R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5; Cotter v. Nathan & Hurst Co., 211 Mass. 31, 97 N. E. 144.

It therefore becomes necessary to decide whether the order of the Director General deprived the court when sitting for Suffolk county of jurisdiction. The president's proclamation appointing a Director General of Railroads under the joint resolutions of Congress passed April 6, 1917, December 7, 1917, and section 1 of the act approved August 29, 1916 (39 Stat. 645, c. 418 [U. S. Comp. St. § 1974a]), was issued December 26, 1917.

The joint resolution of April 6, 1917, reads:

"That the state of war between the United States and the Imperial German government which has been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the government to carry on the war against the Imperial German government; and to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States."

The joint resolution of December 7, 1917, resolved:

"That a state of war is hereby declared to exist between the United States of America and the Imperial and Royal Austro-Hungarian government; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial and Royal Austro-Hungarian government; and to bring the conflict to a successful termination, all the resources of the country are hereby pledged by the Congress of the United States."

And by section 1 of the act approved August 29, 1916 (U. S. Comp. St. § 1974a):

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The proclamation among other provisions contains a clause that:

"Except with the prior written assent of said Director no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto only and except so far as said Director may by general or special order otherwise determine."

[4, 5] The proclamation does not purport to limit or restrict the right to bring suit on causes of action then existing until the Director General may by general or special order otherwise determine. It is plain in the absence of such order by the Director General that only the rights of attachment on mesne process and of levy on execution are suspended. While on the record at the date of the plaintiff's writ, April 6, 1918, the Director General apparently had taken full possession and control of the defendant's railroad, the date of the order relied on does not appear.

But the President's proclamation is a public act of which all courts are bound to take judicial notice and to which all courts are required to give effect. *Armstrong v. United States*, 18 Wall. 154, 20 L. Ed. 614. And the President may direct and empower as in the case at bar a representative to carry out the powers conferred upon him by Congress. The act of the representative is the act of the President. *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Williams v. United States*, 1 How. 290, 11 L. Ed. 135.

[8, 7] We accordingly take notice of the general orders promulgated by the Director General in so far as they are applicable to the present case even if they have not been called to our attention by counsel. *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Jones v. United States*, 187 U. S. 202; 11 Sup. Ct. 80, 34 L. Ed. 691; *Jenkins v. Collard*, 145 U. S. 546, 12 Sup. Ct. 888, 36 L. Ed. 812; 15 R. C. L. "Judicial Notice," § 40, and cases cited in notes 11, 12 and 13; *Wigmore on Evidence*, § 2565. It is settled that notwithstanding its prior delegation of the powers enumerated in the resolves and the statute referred to in the proclamation, Congress in the exercise of its general legislative authority could further provide by any appropriate enactments for the operation of the systems of railroad transportation undertaken pursuant to the proclamation. *McCulloch v. Maryland*, 4 Wheat. 316, 321, 4 L. Ed. 579; *Miller v. New York*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971; *Juilliard v. Greenman*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204; *Logan v. United States*, 144 U. S. 265, 12 Sup. Ct. 617, 36 L. Ed. 429.

By Act of March 21, 1918, c. 25, 40 Stat. 456 (U. S. Comp. St. 1918, §§ 3115½a-3115½p), entitled "An act to provide for the operation of transportation systems while under federal control, for the just compensation of their owners and for other purposes," it is declared by section 10 (section 3115½j):

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has theretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be

retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control. * * *

The Director General April 9, 1918, issued the following order:

"Whereas, the act of Congress approved March 21, 1918 [c. 25], entitled 'An act to provide for the operation of transportation systems while under federal control,' provides (section 10) 'that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act * * * or with any order of the President, * * * but no process, mesne or final, shall be levied against any property under such federal control;' and

"Whereas, it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside, or where the cause of action arose, the effect thereof being that men operating trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government, and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights of the just interests of plaintiffs.

"It is therefore ordered that all suits against carriers while under federal control must be brought in the county and district where the plaintiff resides or in the county or district where the cause of action arose."

The last paragraph of this order was amended by a general order dated April 18, 1918, designated as 18a, which previously has been quoted. It is to be noticed that the order as amended is based on the act of Congress of March 21, 1918, but the authority of the Director General to act rests on his appointment by the President.

[8] It is manifest, although no attachment or levy can be made, that neither the resolutions, the proclamation thereunder, nor the subsequent statute prohibits actions for damages in accordance with the civil procedure prescribed by the states. The order of the Director General having been issued after the plaintiff's action had been begun is therefore inapplicable and the plaintiff could resort to any court of competent jurisdiction for redress although no attachment on mesne process could be made, and if he obtained judgment no execution could be levied on the defendant's property.

[9] It follows that his cause of action being transitory and not local the plaintiff can bring suit in this county where the defendant has a usual place of business and under the terms of the report the defendant is to answer over. R. L. c. 167, § 1.

So ordered.

(283 Ill. 516)

BAUM v. INDUSTRIAL COMMISSION et al.
(No. 12543.)

(Supreme Court of Illinois. June 18, 1919.)

1. MASTER AND SERVANT ⇨374—WORKMEN'S COMPENSATION ACT—INJURIES ARISING OUT OF EMPLOYMENT.

While there must be some causal relation between the employment and the injury for which compensation is sought, it is not necessary that the injury be one which ought to have been foreseen or expected.

2. MASTER AND SERVANT ⇨375(1)—WORKMEN'S COMPENSATION ACT—SCOPE OF EMPLOYMENT.

Where a workman voluntarily performs an act during an emergency, which he has reason to believe is in the interest of his employer, and is injured thereby, he is not acting beyond the scope of his employment.

3. MASTER AND SERVANT ⇨375(1)—WORKMEN'S COMPENSATION ACT—INJURY "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where an assistant cutter in a shirt waist factory was fatally wounded by strikers, while trying to save his employer and other employes from injury, the injury arose "out of and in the course of his employment," within Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

4. MASTER AND SERVANT ⇨404—WORKMEN'S COMPENSATION ACT—EVIDENCE—ADMISSIBILITY.

In a proceeding before the Industrial Commission to recover compensation for the death of an employé killed by strikers it was error to prove by parol the contents of a letter received by deceased from the union, demanding that he sign up to prevent the strike.

5. MASTER AND SERVANT ⇨417(8)—WORKMEN'S COMPENSATION—REVIEW—HARMLESS ERROR.

In a proceeding before the Industrial Commission to recover compensation for the death of an employé killed by strikers, error in proving by parol a letter from the union demanding that deceased sign up was harmless, in view of other competent evidence showing the existence of the strike.

6. MASTER AND SERVANT ⇨417(8)—WORKMEN'S COMPENSATION—HARMLESS ERROR—EVIDENCE.

In a proceeding before the Industrial Commission to recover compensation for death of an employé killed by strikers, it was not prejudicial error to admit opinions that deceased was protecting the employer's life and property; where there was sufficient competent evidence.

7. MASTER AND SERVANT ⇨417(9)—WORKMEN'S COMPENSATION—REVIEW—POWERS OF CIRCUIT COURT—MONEY JUDGMENT.

Under Workmen's Compensation Act, § 19, it is error for the circuit court, on affirming

award by Industrial Commission, to direct payment of the award and order execution thereon.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under the Workmen's Compensation Act by Constance Tomczyk to recover compensation for the death of Edward Tomczyk, opposed by Simon M. Baum, employer. The award of the Industrial Commission was affirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

John Clark Baker, of Chicago, for plaintiff in error.

Joseph L. Lisack, of Chicago (John H. McAuliffe, of Chicago, of counsel), for defendant in error.

THOMPSON, J. This writ of error is brought to review a judgment of the circuit court of Cook county confirming an award by the Industrial Commission against Simon M. Baum, plaintiff in error, of compensation for the death of Edward Tomczyk, who died February 25, 1917, from injuries received February 16, 1917, in a difficulty caused by some strikers raiding the factory where deceased was working. The questions raised are whether the death of Edward Tomczyk arose out of his employment, whether there was error in the admission of certain evidence, and whether the circuit court, in confirming the award of the Industrial Commission, erred in entering a money judgment and ordering execution.

Deceased was employed by plaintiff in error, doing business as the Nora Shirt-Waist Company, as an assistant cutter in his factory located at Milwaukee avenue and Oakley boulevard, in the city of Chicago. The workroom of this factory is triangular in shape, there being about 5,000 square feet of floor space in the room. The entrance to this workroom is from Milwaukee avenue through an outer door, down a passageway, and through a second door. At the right of the passageway between the avenue and the workroom was Baum's office. At the time of the difficulty there were employed in the workroom 2 men and about 25 women. Plaintiff in error manufactured wash dresses, shirt waists and other like wash garments. As assistant cutter it was the duty of deceased to lay out goods and cut same with a knife or a power-driven machine. It appears that on January 13, 1917, plaintiff in error received a letter from the International Garment Workers' Union, demanding that he sign up with the union to avoid a strike and other difficulty. On February 14 a strike was called by this union, which strike was more or less general throughout the city of Chicago. None of the employes

of plaintiff in error were members of this union, and there was no strike at this factory, and no trouble existed between employer and employes. Two days later, at about 11:45 a. m., 20 or 30 striking members of this union, men and women, rushed through the passageway, past the office, and into this workroom, calling upon the employes of plaintiff in error to strike. Plaintiff in error was in his office at the time, and when he saw the crowd rushing into his factory he ran to the rear of his office and tried to prevent the crowd from entering his workroom. He seized a hammer, which was taken away from him by the strikers. He then tried to reach his telephone to call the police, but was prevented by the strikers. As the crowd forced its way past plaintiff in error, Tomczyk walked around from his cutting table, where he was working, and tried to hold them back. The plaintiff in error was standing about 4 feet away from Tomczyk, and there were about 6 male strikers standing between them. The remaining strikers, men and women, were crowded around plaintiff in error, Tomczyk, and the forelady, all the women employes of the factory having fled in a panic. In the course of the riot Tomczyk was stabbed, and cried out, "Baum! I am cut!" It was from this wound that he died. The strikers left immediately, throwing bricks through the plate glass windows as they went.

The first question is whether Tomczyk's injury, which was received in the course of his employment, arose out of his employment. The words "arising out of" have reference to the cause or origin of the accident, and seem to indicate that the accident must happen out of the transaction of the business in which the workman is engaged. That would include any accident which might naturally result from the manner in which the business is carried on and which would be considered incidental to the employment itself. This injury was clearly a mishap, occurring outside of the usual course of events, and was an emergency which arose while Tomczyk was engaged in his work. It is well argued that such a situation could hardly have been contemplated by either the employer or the employe when Tomczyk entered the employment of plaintiff in error. On the other hand, when plaintiff in error failed to sign the agreement with the union, it was certain to cause the members of the union to use some measure to compel compliance with their demands. It was generally known that there was a strike in the city of Chicago, and this fact was known to the plaintiff in error. Unfortunately, during the course of a strike, and in the excitement of events which occur during a strike, trouble quite frequently arises. In view of the general conditions and events that were happening

in the immediate vicinity of the factory of plaintiff in error, it can hardly be said he should not, as a reasonable person, expect some difficulty with the strikers.

[1, 2] While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected. It must, however, be one which, after the event, may be seen to have had its origin in the nature of the employment. Such was our holding in *Pekin Cooperage Co. v. Industrial Com.*, 285 Ill. 31, 120 N. E. 530. Where a workman voluntarily performs an act during an emergency, which he has reason to believe is in the interest of his employer, and is injured thereby, he is not acting beyond the scope of his employment.

It is conceded that Tomczyk was a peaceable and law-abiding citizen. It is also conceded that the strikers rushed into the workroom without any warning and that plaintiff in error tried to eject them. The evidence shows that there was great excitement in the workroom, and that the women employes fled, screaming, to the back of the room. Nothing was said between the plaintiff in error and Tomczyk. Tomczyk, seeing his employer and his fellow employes in apparent danger, came to the rescue. He was assisting his employer in the defense of his person and his property, and was acting in defense of his fellow employes, all of whom were women. We have held that it is the duty of an employe to do what he can to save the lives of his fellow employes when all are at the time working in the line of their employment. *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999. That the fellow employes of deceased were not actually in danger of losing their lives cannot change the rule. The danger was clearly apparent to Tomczyk. He acted as any man would have acted under the circumstances. The rioters had rushed in without warning and threw the women employes into a panic. It was up to deceased to act, or to abandon the workroom and its occupants to trespassing strangers, apparently bent upon doing damage to whatever came in their path. The situation was an unusual and unforeseen one, and called for quick action. From every point of view it was the duty of deceased to defend himself and his employer, and to assist his employer in defending the persons of his women coworkers. Where the trouble arises out of the employer's work, and as a result of it one of the trespassers injures an employe who is defending his employer's business, it may be inferred the injury arose out of the employment.

[3] An assault arises out of one's employment in a case where the duties of the employe, under the particular situation, are such as are likely to cause him to have to deal with persons who, under the circum-

stances, are liable to attack him. *Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 221. Such was the situation in this case. Deceased was assaulted, not for anything he had done, but because he was in the employ of the plaintiff in error, who was in bad favor with the union on account of not having complied with its demands. We are therefore of the opinion that the injury, which occurred in the course of the employment, arose out of the employment.

[4-6] It appears that plaintiff in error received a letter from the union demanding that he sign up with them to prevent a strike. It was attempted to prove the contents of this letter by oral testimony. This was error. When an arbitrator hears evidence, it must be evidence that is competent and legal, as tested by the usual rules for producing evidence in any legal proceeding. *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627. There was, however, competent evidence showing the existence of the strike, and no damage was done plaintiff in error by this ruling. Neither was there any damage done when the plaintiff in error expressed the opinion that deceased was protecting the employer's life and property. He had testified as to what was being done by deceased, and there was sufficient competent evidence to sustain the finding of the commission.

[7] It is contended by plaintiff in error that the circuit court erred in entering a judgment, which not only confirmed the award of the commission, but also directed the payment of the amount of the award and ordered execution. The proceedings in cases of this character are purely statutory, and it is a settled rule that the requirements of the statute must govern and control them. These proceedings were under paragraph (f) of section 19 of the Compensation Act (Laws 1913, p. 349), and the only authority of the court under this paragraph is to confirm or set aside the decision of the Industrial Board. From a consideration of the whole act, it would appear that the Legislature intended that the employer might protect himself against a judgment for payment of the award by performing certain optional conditions. Paragraph (g) of the same section provides that when the proceedings are under that section "no judgment shall be entered in the event the employer shall file with the said board its bond with good and sufficient surety in double the amount of the award, conditioned upon the payment of said award in the event the said employer shall fail to prosecute with effect proceedings for review of the decision or the said decision upon review shall be affirmed." Paragraph (f) of the same section (the one under which these proceedings are brought) provides that the writ of certio-

rari shall not issue until the employer has filed with the circuit clerk "a bond conditioned that if he shall not successfully prosecute said writ or said suit he will pay the said award, and the costs of the proceedings in said court. The amount of the bond shall be fixed by any member of the Industrial Board and the surety or sureties on said bond shall be approved by the clerk of said court." Such a bond was filed in this case. These provisions to prevent judgments are made to avoid incumbering the employer's property with accumulative liens that in many cases would not be discharged for many years and might run for the life of the employe. These judgments might accumulate until the defect in the title of the employer's real estate would make it unmarketable. The employe is fully protected by the bond required by the statute. The court in this case had only such power on certiorari as the statute gave, and that was to confirm or set aside the decision of the commission. There is nothing in the statute to authorize a judgment directing the payment of the amount of the award and ordering execution to issue.

The judgment is reversed, and the cause remanded, with directions to enter an order confirming the decision of the Industrial Commission.

Reversed and remanded, with directions.

(238 Ill. 434)
BAKER v. WILMERT et al. (No. 12696.)

(Supreme Court of Illinois. June 18, 1919.)

1. JUDGMENT ¶743(2) — RES ADJUDICATA — FORMER DECISION OF SUPREME COURT.

Former decision of the Supreme Court that remainders created by will were contingent, and that therefore deeds of life tenants and reversioners extinguished remainders and vested fee in grantees, is res adjudicata as to that question in the instant case, in which all parties are those who were parties to the former suit; the same will being involved in both cases.

2. WILLS ¶692—POWER IN GROSS—EXTINGUISHMENT.

Under will devising realty to a daughter for life and providing that if she leaves no lineal descendants, realty shall go to such of testator's lineal descendants as devisee shall direct, and in default of will and lineal descendants to all of testator's lineal descendants, the power given was a "power in gross," not coupled with a trust, and was extinguishable by the donee.

3. POWERS ¶23—"POWER COLLATERAL."

A power collateral is one in which a power of appointment is vested in one not interested in the property made the subject thereof.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Collateral Power.]

4. POWERS ¶23—"POWER IN GROSS."

A power in gross is one in which the donee having an interest in the land is to create by appointment an estate only which will not attach to the interest limited to him or take effect out of his own interest, but which arises after the donee's own estate has terminated.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Power in Gross.]

5. POWERS ¶23—"POWER APPENDANT" OR "POWER APPURTENANT."

A "power appendant or appurtenant" is that power existing where the donee of the power has an estate in the land and the power is to take effect wholly or in part out of that estate, and the estate created by its exercise affects the estate and interest of the donee of the power.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Power Appendant.]

6. POWERS ¶15 — POWERS COLLATERAL — SUSPENSION OR EXTINGUISHMENT.

A power simply collateral cannot be extinguished by any act on the part of the donee with respect to the land, nor can it be released by him except when it is for his own benefit, as a power to charge a sum of money on the land for himself.

7. POWERS ¶15—IN GROSS—RELEASE.

Powers in gross, if not coupled with a trust, may be released by the donee to any person having an estate or freehold in the land.

8. POWERS ¶15 — APPENDANT OR APPURTENANT RELEASE.

A power appendant or appurtenant may be released or extinguished.

9. POWERS ¶15 — POWER APPENDANT OR APPURTENANT—DESTRUCTION.

Where the donee of the power has an estate in land, the exercise of which power would necessarily affect his estate, as where a tenant in fee has power to appoint others in fee, such donee has a power appendant or appurtenant, and the alienation of his estate will destroy the power.

10. POWERS ¶15—IN GROSS—EXTINGUISHMENT.

Where the donee of a power of appointment in gross not coupled with a trust conveyed her life estate and reversionary interest, vesting fee in grantee and extinguishing contingent remainder, and after grantee had reconveyed fee to her she conveyed the same to him by warranty deed, with recital that she relinquished, released, and extinguished any power of appointment, the power was extinguished.

Appeal from Circuit Court, Logan County;
T. M. Harris, Judge.

Suit between Hermina M. Baker and Margaret Wilmert and others. From decree rendered, the latter appeal. Affirmed.

A. D. Cadvallader, of Lincoln, guardian ad litem, for appellants.

Covey & Woods, of Lincoln, for appellee.

STONE, J. This is an appeal from a decree in partition of the circuit court of Logan county.

Charles Paulus died about April 21, 1916, leaving a last will and testament duly proven and admitted to probate. He left him surviving as his only heirs at law his four children, Henry J. Paulus, Louis W. Paulus, Hermina M. Baker, and Nettie E. Wilmert. At the time of his death he was seized in fee simple of 1,000 acres of land, among which was the land in question, disposed of by the sixth clause of the will and the second paragraph of the first codicil thereto. The sixth clause reads as follows:

"Sixth. I give and devise to my beloved daughter Nettie E. Paulus the following described real estate to wit: The northwest quarter of section 16 and the northwest quarter of the southwest quarter of said section 16, all in township 18, north, and range 1, west of the Third principal meridian, in said Logan county, to have and to hold for the period of her natural life, and after her death I give and devise the remainder in the same to all the lineal descendants she may leave living at her death, per stirpes in fee."

The second paragraph of the first codicil reads:

"In said will I have given certain real estate to my daughter Nettie Paulus for life and remainder to her lineal descendants and in default of lineal descendants I have devised the remainder to my lineal descendants living at her death; now by this codicil I desire to so change said will that if said Nettie Paulus die leaving no lineal descendants living at her death, the real estate which is given to said Nettie Paulus for life is hereby devised to such of my lineal descendants as she, said Nettie Paulus, shall by will appoint, and in default of will and lineal descendants of herself, then said real estate given to her for life shall descend to all of my lineal descendants living at her death, per stirpes in fee."

The four children by mesne conveyances conveyed their life estates, together with their reversionary interests, to Edward Spatz. These conveyances were held by this court to have destroyed the remainders, which were held to be contingent and therefore destructible. *Spatz v. Paulus*, 285 Ill. 82, 120 N. E. 503. Spatz thereafter by warranty deed conveyed to Nettie E. Wilmert in fee the tract of land in question here, and she immediately thereafter by warranty deed conveyed the same lands to Spatz, in which deed the following language was used:

"The grantor, Nettie E. Wilmert, hereby releases, relinquishes and extinguishes any power of appointment or disposition she may have over said premises under and by virtue of the will of Charles Paulus, deceased, or the codicils thereto, and she further covenants and agrees with said Spatz that she will never, under any circumstances or at any time, exercise any such power of disposition or appointment or other-

wise do any act or thing that will in any way cut down, detract from or affect the absolute, indefeasible, fee-simple title to said premises which is hereby conveyed to said Spatz."

By subsequent mesne conveyances Hermina M. Baker, Henry J. Paulus, Nettie E. Wilmert, and Louis Paulus became seized of said premises and other lands as tenants in common. The bill for partition herein was thereupon filed and decree entered thereon, finding that said four persons were owners in fee of the lands in question, together with the other lands, and decreeing partition thereof. The chancellor also found and decreed that by the warranty deed of Nettie E. Wilmert, Spatz took the fee-simple title to the lands in question, and that all contingent remainders and contingent future interests of every kind were by merger destroyed, and that any power of appointment existing in Nettie E. Wilmert by virtue of said codicil was released and extinguished.

It is contended by appellants that the chancellor erred in holding that the power of appointment given to Nettie E. Paulus by the will was extinguished by her deed to Edward Spatz; that she did not and could not exercise the power of appointment contained in the codicil by the giving of the deed, but that such power could only be exercised by her by means of a will.

[1] This case came before this court in *Spatz v. Paulus*, supra, where it was held that the remainders created by the will of Charles Paulus were contingent remainders, and that therefore the deeds of the life tenants and reversioners extinguished the contingent remainders and vested the fee in the grantee therein. That question, although here raised on assignments of error, was in that case passed upon, and as there the same will was involved and all parties to this suit were parties in that suit and before the court, that case is *res judicata* as to that question.

[2] But it is urged the power of appointment in this case prevented the merger of the life estate with the reversion so as to extinguish the contingent remainders, and that that matter was not passed upon by this court in the case of *Spatz v. Paulus*, supra. The record discloses that such point was not raised in that case, and while the fact that the court did not comment on that feature of the case does not affect the rule with reference to its being *res judicata*, it is clear that if this power be one which may be extinguished by the act of the donee thereof, it would not prevent a merger in case such donee would so act as to extinguish such power. The principal question, therefore, is whether or not the deed of Nettie E. Wilmert extinguished the power of appointment given her by the second paragraph of the first codicil to the will of Charles Paulus. It is evident from the language of her deed that she, in so far as she was able to do, released, relin-

quished, and extinguished this power of appointment or disposition, and if it be such a power as may be by the donee thereof released and extinguished, such has clearly been done in this case. Again, Nettie E. Wilmert gave her warranty deed to the premises in question, and if the power of appointment given her by the will is such as may be extinguished, she would be estopped under her warranty from exercising the same. We therefore come to the question whether or not the power granted in the codicil is extinguishable.

It is contended by appellants that since the will provides that the power of appointment shall be exercised by will it cannot be exercised in any other way. The question here, however, is not one of the exercise of the power of appointment, but whether or not the same may be extinguished and the exercise thereof avoided by the act of the donee over such power. It follows that authorities cited by appellants in support of their contention have no application.

[3] Powers of appointment have been by some authorities divided into three classes: First, collateral powers; second, powers in gross; and third, powers appurtenant or appendant. A power collateral is one in which a power of appointment is vested in one not interested in the property made the subject thereof. 1 *Tiffany on Real Prop.* § 291.

[4] A power in gross is one in which the donee having an interest in the land is to create by appointment an estate only which will not attach to the interest limited to him or take effect out of his own interest, but which arises after the donee's own estate has terminated, as where a life estate is given to A. with power to appoint by will, such power not being designed or intended to create an estate by appointment out of the estate held by the donee, but subsequent to the termination of the donee's estate is held to be power in gross. 1 *Sugden on Powers* (3d Am. Ed.) 107.

[5] A power appendant or appurtenant is that power existing where the donee of the power has an estate in the land and the power is to take effect wholly or in part out of that estate, and the estate created by its exercise affects the estate and interest of the donee of the power. *Farwell on Powers*, 8. Appendant and appurtenant powers are annexed to the estate of the donee, and when created are to be executed out of and must be concurrent with and have their being and continuance, at least for some part, out of the estate of the donee. *Powell on Powers*, 10.

[6] A power simply collateral cannot be suspended or extinguished by any act on the part of the donee with respect to the land, nor can it be released by him except when it is for his own benefit, as a power to charge a sum of money on the land for himself. 1

Tiffany on Real Prop. § 291; Sugden on Powers, 40.

[7] Powers in gross, if not coupled with a trust, may be released by the donee to any person having an estate or freehold in the land. Sugden on Powers, § 82; 5 Gray's Cases, 328; Tiffany on Real Prop. § 291; Farwell on Powers, § 12.

[8] A power appendant or appurtenant may be released or extinguished. Washburn on Real Prop. § 1668. Where lands are limited to such uses as A. shall appoint and in default of such appointment such lands shall go to A. and his heirs, he may dispose of the lands either by the exercise of the power or by a conveyance of his estate. If he exercises the power the estate limited to him in default of the appointment is destroyed, but if he conveys his estate the power is extinguished. Williams on Real Prop. (17th Ed.) 446.

[9] Where the donee of the power has an estate in land, the exercise of which power would necessarily affect his estate (as where a tenant in fee has power to appoint others in fee), such donee has a power appendant or appurtenant, and the alienation of his estate will destroy the power, since it would be a fraud on the alienee if the grantor could thereafter, by exercising the power which is optional with him, derogate from his own grant. 1 Tiedeman on Real Prop. 642. In 2 Coke on Littleton (Butler & Hargrave's notes, 243b) the rule is thus stated:

"As to powers relating to the estate of the donee of the power in the land: Such of those powers as are in the nature of powers appendant to estate may, it is agreed, be extinguished by the release, feoffment, fine, or common recovery of the donee of the power. These powers also are liable to be extinguished or suspended by any of the conveyances which are said not to operate by transmutation of the possession, as bargains and sales, leases and releases, and covenants to stand seized, for whoever has any estate in the land may convey that estate to another, and it would be unjust that he should afterwards be admitted to avoid or to do anything in derogation from his own grant. Any assurance of this nature, therefore, which carries with it the whole of the grantor's estate, is a total destruction of the powers appendant to that estate."

Applying these rules to the case at bar, it is evident that the power taken by Nettie E. Wilmert under the will was a power in gross not coupled with a trust, for by the terms of said codicil it is provided that "in default of will and lineal descendants of herself" the real estate was to go to the lineal descendants of the testator. The appointment was of an estate not out of her estate, but to commence after the termination of her estate. The power thereby given was a power in gross, not coupled with a trust, which, as we have seen under the authorities, may be extinguished by the donee. 22 Am. & Eng. Ency. of Law (2d Ed.) 131; 1 Sugden on Powers (3d Ed.) §§ 82, 158; Tiffany on Real

Prop. § 291; McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139.

[10] As we have seen, Nettie E. Wilmert conveyed her life estate, together with her reversionary interest, to Edward Spatz, which, as was held in the case of Spatz v. Paulus, supra, vested the fee in Spatz and extinguished the contingent remainder. Spatz thereafter by warranty deed conveyed the fee in the land in question to Nettie E. Wilmert. The deed by which she conveyed her life estate and reversionary interest to Spatz, while containing a recital that it was the intention to extinguish all contingent remainders and future interests, contained no recital as to the relinquishment or extinguishment of her power of appointment. Assuming, therefore, that such power had not been extinguished when she became vested with the fee to the lands in question by the deed of Spatz to her, we have a situation where she is the owner of the fee subject to this power of appointment. The rule is, that while a power of appointment is not merged in an estate in fee where such power of appointment of the fee is given to the donee by the same instrument, yet where the donee of the power acquired the fee simple subsequently, such power of appointment is merged. Tiffany on Real Prop. § 291; Farwell on Powers, 31. Whether or not this be the true rule, it is evident that the character of the power thereby became changed from a power in gross to a power appurtenant, in that the exercise of that power would be to appoint an estate out of the fee of the donee of the power. McFall v. Kirkpatrick, supra. In either event said power may become extinguished by the act of the donee, and when Nettie E. Wilmert, after receiving the fee to said property, conveyed the same by warranty deed, with the recital therein that she relinquished, released, and extinguished any power of appointment that she may have had, and covenanted that she would never, under any circumstances, exercise such power of appointment, said power must be held to be extinguished. 1 Sugden on Powers (8th Ed.) 74; 2 Chance on Powers, 3149; McFall v. Kirkpatrick, supra.

As we have seen, it appears that subsequent to the warranty deed of Nettie E. Wilmert to the premises in question, the appellee, Hermina M. Baker, and Henry J. Paulus, Nettie E. Wilmert, and Louis Paulus, took title to the property in question together with other lands, by mesne conveyances as tenants in common, and it follows from the views herein expressed that they took as such tenants in common the fee-simple title thereto, free from all incumbrances and not affected by the power of appointment in question herein, and the chancellor did not err in so finding and decreeing.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(238 Ill. 530)

**SCHILLER PIANO CO. v. ILLINOIS
NORTHERN UTILITIES CO.**

(No. 12712.)

(Supreme Court of Illinois. June 18, 1919.)

1. CONSTITUTIONAL LAW §81—POLICE POWER—NATURE AND SCOPE.

All property in a state being held on the implied condition that the owner will so use it as not to interfere with the rights of others is subject to such police power regulations as the Legislature may impose upon it for protection of the safety, health, morals, good order, and general welfare of the public.

2. CONSTITUTIONAL LAW §81—POLICE POWER—SCOPE—UNREASONABLE EXERCISE.

The police power of a state cannot be permitted to unreasonably invade private rights or impair rights of property guaranteed by the Constitution.

3. CONSTITUTIONAL LAW §117—IMPAIRING OBLIGATION OF CONTRACTS—EXERCISE OF POLICE POWER.

The constitutional prohibition upon a state to pass any law impairing the obligation of contracts does not limit the right of or prohibit the state from passing laws to protect the public health, safety, or morals; rights and privileges arising from contracts being subject to police regulations.

4. CONSTITUTIONAL LAW §81—POLICE POWER—REASONABLENESS.

A state's police power regulation may prevent the enjoyment of individual rights in property, but must be reasonable in its operation on persons affected by it and not unduly oppressive; the measure of reasonableness not being necessarily what is best, but what is fairly appropriate under the circumstances.

5. CONSTITUTIONAL LAW §81—POLICE POWER—NATURE AND SCOPE.

State police power legislation must relate to the protection of public health, safety, morals, or welfare, and an act which does not affect the public in these particulars is not within the police power.

6. CORPORATIONS §391 — POLICE POWER—PUBLIC UTILITIES—CHARGES.

Police power legislation may be enacted by a state to regulate the charges and business of a public utility corporation, so as to protect the public against unreasonable charges and discrimination, and to promote general welfare, but is void if it operates to confiscate private property or arbitrarily infringe on personal or property rights.

7. CONTRACTS §108(2) — VALIDITY—PUBLIC POLICY.

A contract by which a manufacturing corporation transferred to a power company power created by its dam, in consideration of the power company's agreement that it and its successors should furnish the manufacturer perpetually thereafter certain power agreed upon, is not invalid at common law, as being against public policy, nor is it contrary to any statute.

8. CONSTITUTIONAL LAW §278(7)—DUE PROCESS—INVALIDATING CONTRACT.

Performance of a contract under which a manufacturing corporation transferred a dam to a power company, which agreed for itself and successors to perpetually furnish power to such manufacturer, is not made unlawful by the subsequently enacted Public Utilities Act, as such holding would deprive the manufacturer of property without due process of law; there being nothing in such contract injurious to public welfare, for the protection of which the act was adopted.

Appeal from Circuit Court, Ogle County; Oscar E. Heard, Judge.

Suit by the Schiller Piano Company against the Illinois Northern Utilities Company. From a decree dissolving a temporary injunction and dismissing the original bill, complainant appeals. Reversed and remanded.

J. O. Seyster, of Oregon, Ill., for appellant.
Francis Bacon, of Oregon, Ill., and Ralph D. Stevenson, of Chicago, for appellee.

FARMER, J. This appeal is prosecuted by the Schiller Piano Company from a decree of the circuit court of Ogle county denying the relief prayed in a bill filed by the Schiller Piano Company against the Illinois Northern Utilities Company and dismissing the bill for want of equity.

The bill alleged, in substance, that appellant is, and has been for more than 20 years, engaged in the manufacture of pianos at Oregon, Ill., at the west end of a dam there located across Rock river for the purpose of furnishing power for carrying on various manufacturing enterprises. The dam was alleged to be 924 feet long and of sufficient height to create power estimated equal to 1,000 horse power. December 28, 1910, appellant owned 117 horse power created by said dam, and on that day it entered into a contract with the Oregon Power Company whereby appellant sold and transferred its 117 horse power created by the dam to the Oregon Power Company in consideration of the agreement of that company to furnish the appellant perpetually thereafter, at its factory, with 90 kilowatts of electrical power free of charge, and all power furnished appellant in excess of 90 kilowatts should be paid for. The Oregon Power Company agreed to pay appellant \$25 per day for each day it failed to furnish the power as agreed. The contract was performed until May 2, 1912, when a new contract between the parties was made, by which the Oregon Power Company was released from its obligations created by the former contract, and by the new contract the Oregon Power Company, for itself, its successors and assigns, agreed to continuously supply appellant with 72.4 kilowatts of electrical power or energy free

of charge, unless prevented by act of God or inevitable accident. The contract of May 2, 1912, it is said, was made in lieu of the contract of December 28, 1910, because, while it is undisputed that 117 horse power owned by appellant would create 90 kilowatts of electrical energy, there would be such loss in transmitting it to appellant as would reduce it to 72.4 kilowatts. At the time the contract of May 2 was made, the Oregon Power Company owned a steam plant at the west end of the dam, to be used to supply power when the dam for any reason failed to do so. Shortly after the date of the second contract the Oregon Power Company sold and transferred its rights and properties in the dam to the Illinois Northern Utilities Company, appellee, which assumed the obligations of the Oregon Power Company and furnished appellant power according to the contract until October 25, 1913, when it notified appellant in writing that, the dam having been taken out by high water, it would discontinue furnishing appellant power after November 1 following. The bill alleges a break had occurred in the dam, which could have been easily repaired, but appellee neglected and refused to repair it. The bill was filed October 31, alleging all the facts and the injury appellant would suffer if appellee did not furnish it power, and praying appellee be enjoined from turning off or discontinuing the power to appellant's plant under the contract and that said contract be enforced. A temporary writ of injunction was issued.

Appellee answered the bill and denied appellant was entitled to the relief prayed. The case was referred to the master in chancery to take and report the proofs, together with his findings thereon. The appellant having closed its proofs, at the January term, 1917, a rule was entered against appellee to close its proofs by the first day of the next term of the court. The record does not show the rule was complied with, but on October 9, 1918, appellee filed its cross-bill, alleging it was a corporation organized under the laws of Illinois; that it owned and operated for public use, property for the production, transmission, sale, and delivery of electric light, heat, and power in the vicinity of Oregon and other parts of Illinois; that from the time the cross-complainant acquired the property of the Oregon Power Company to October 31 it had voluntarily supplied appellant with power, and that since that time it had furnished power under compulsion of the injunction granted by the circuit court. The cross-bill alleged that January 1, 1914, the Public Utilities Act went into effect; that appellee is a public utility, and the act provides that charges for service made by a public utility shall be reasonable and just, and all unjust and unreasonable charges shall be un-

lawful; that the act requires a public utility company to file with the state public utilities commission a schedule of its rates and charges, and prohibits charging or receiving any different rate than that provided in the schedule of rates. The substance of some of the provisions of the Public Utilities Act are set out, and the cross-bill avers that by virtue of said act the contract to furnish appellant power became unlawful and it became and is unlawful for appellee to supply appellant with power free of charge. The cross-bill prays that the temporary injunction be dissolved and appellant's bill dismissed.

Appellant answered the cross-bill, denying appellee had furnished it power, free of charge, and averring that it had paid for its power by the consideration expressed in the contract. The answer further denied the performance of the contract was rendered unlawful by the Public Utilities Act (Hurd's Rev. St. 1917, c. 111a), and denied appellee was entitled to the relief prayed in the cross-bill. The motion to dissolve the injunction was heard on the pleadings and affidavits in support of and in opposition to the motion, and a decree entered dissolving the injunction and dismissing the original bill.

Three questions involved are: (1) Whether the Public Utilities Act made the contract unlawful, and to compel its performance by continuing the injunction in force would be requiring appellee to violate the law; (2) whether the original contract was invalid at common law, in that it unfairly discriminated in favor of appellant; (3) whether appellant's bill alleged facts entitling it to the writ of injunction.

[1, 2] All property in a state is held on the implied condition or obligation that the owner will so use it as not to interfere with the rights of others and subject to such reasonable regulations as the Legislature may impose upon its use in order to protect the public and others in the use of their property. It is held subject to the police power of the state to so regulate its use in a proper case as to secure the safety, health, morals, good order, and general welfare of the community. There are limitations, however, to the police power, and an unreasonable invasion of private rights or impairment of the rights of property guaranteed by the Constitution, under the guise of the police power, will not be sustained.

[3, 4] The constitutional prohibition upon a state to pass any law impairing the obligation of contracts does not limit the right of or prohibit the state from passing laws for the protection of the public health, safety, or morals, and rights and privileges arising from contracts are subject to such regulations. Instances of these principles frequently cited are that when entered into a contract to sell liquor, operate a brewery

or distillery, or conduct a lottery may be lawful, but such contracts are subject to impairment by a change of policy on the part of the state. That such change of policy by the state may prevent the enjoyment of individual rights in property without providing compensation therefor does not necessarily render such legislation unconstitutional, but such legislation must, to be within the police power, be reasonable in its operation on persons affected by it and not unduly oppressive. Such statutes are sustained on the theory that they are necessary for the safety, health, morals, or welfare of the public, and a restriction or regulation without reason or necessity cannot be enforced.

[5, 6] The measure of reasonableness of a police regulation is not necessarily what is best, but what is fairly appropriate under all the circumstances. Legislation in the exercise of the police power must have relation to and be appropriate for the protection, preservation, and promotion of the public health, safety, morals, or welfare. An act which has no tendency to affect or endanger the public in any of those particulars and which is entirely innocent in character is not within the police power. These general principles are universally recognized and will be found discussed and numerous authorities referred to in 6 R. C. L. 193 et seq. Under the police power the state has authority to enact legislation to regulate the charges and business of a public utility corporation; but if such legislation operates as a confiscation of private property, or constitutes an arbitrary or unreasonable infringement on personal or property rights, it will be held void, as in violation of the constitutional guaranty that no person shall be deprived of his property without due process of law. The Public Utilities Act of this state has no relation to the public health, safety, or morals, but was enacted to protect the public against unreasonable charges and discrimination and to promote the general welfare.

[7] When the contract between the Oregon Power Company and appellant was made, it was a valid and lawful agreement, not contrary to the common law or any statute. Contracts void at common law are contracts against public policy because injurious to the public welfare. This was not such a contract. Appellant by the contract sold and transferred to the Oregon Power Company the 117 horse power of which it was then the owner, in consideration of the agreement of the Oregon Power Company that it, its successors and assigns, would furnish appellant the power agreed upon. The contract was performed by that company until it sold the dam and all its rights therein to appellee, the Illinois Northern Utilities Company, and that company con-

tinued to furnish the power under the contract until October 25, 1913, when it notified appellant that because the dam, or part of it, had been washed out, it would discontinue supplying power November 1 following. In October, 1918, appellee's cross-bill was filed, alleging the passage and approval of the Public Utilities Act; that it became effective January 1, 1914, and that said act made it unlawful for appellee to perform the contract. It must be assumed that what appellee's predecessor acquired from appellant under the contract was worth the consideration agreed to be paid. Appellee purchased the property with knowledge of the contract and the consideration for it. It acquired the property and rights of appellant and became obligated to pay the consideration therefor. It now seeks to avoid that obligation on the ground that the Public Utilities Act was enacted by the Legislature in the exercise of the police power and that said act render the performance of the contract unlawful.

[8] That the Public Utilities Act was a valid exercise of the police power for the purposes for which it was enacted must be conceded, but it does not necessarily follow that it operated to render the performance of this contract unlawful. The object of the statute was to regulate public service corporations in the interest of the public welfare. Any contract to furnish service in violation of that act would be unlawful, but the situation here presented is not a contract to furnish appellant power at a less rate than the approved schedule of charges. It may be conceded that if appellant, owning no interest in the dam, had before the passage of the Public Utilities Act entered into a contract with appellee to purchase power at a certain rate or charge per annum and the rate fixed was lower than the authorized schedule, the performance of the contract would have been unlawful after the act went into effect. Here, however, appellant conveyed and transferred its property as the consideration for the power, and the effect of holding the performance of the agreement was made unlawful by the legislation referred to takes from appellant its property without compensation and without due process of law. The right of appellant under the contract was property. The right of property is a fundamental right, and its protection is one of the most important objects of government. There is nothing in the contract and its performance which is detrimental to the public interest and welfare, for the protection and promotion of which the Public Utilities Act was adopted. It jars unpleasantly on one's sense of justice to say the effect of the statute was to destroy or confiscate appellant's property for the benefit and advantage of appellee.

We are aware courts have gone to consid-

erable length in holding that legislation enacted in the proper and reasonable exercise of the police power will not be held invalid because it may impair the obligation of contracts or deprive the owner of property without due process of law, but the qualification that such legislation must be proper and reasonable for the purpose sought to be accomplished is an important one. True, private rights must yield to consideration of the public safety, health, morals, and welfare, and no investment in property, however large, will preclude the exercise of the governmental power of regulation when reasonably necessary for these purposes; but our attention has not been called to any case where the exercise of such power has been sustained when not necessary for these objects. None of the subjects which are the valid basis for the exercise of the police power were involved in the contract. It could in no way affect the public health or safety, and was not contrary to good morals or the public interest and welfare. If the protection of one or more of these things is necessary to a valid exercise of the police power, how can it be said the performance of the contract was made unlawful by the statute? It seems to us it would be pushing the valid exercise of the police power to unreasonable limits to so hold.

It must be admitted the situation here is unusual and could not have been contemplated by the Legislature. That body, in enacting the Public Utilities Act, sought only to regulate public service companies. It did not intend to destroy property where such destruction was wholly unnecessary to accomplish the objects and benefits of the legislation. Full effect may be given the statute for the purposes for which it was enacted and the contract performed at the same time without injury of any character to the public. On the contrary, it would offend against good morals and common honesty, now that appellant has conveyed its property to appellee, to give the statute the effect of having relieved appellee of the obligation to pay for it. We would only be justified in so construing the statute if such construction were reasonably necessary for the protection of the public. This we have endeavored to show is neither involved nor necessary in sustaining this contract. The contract did not provide for furnishing free service. The equivalent in value for the service agreed to be furnished was paid by appellant by the conveyance of its property. We have not overlooked *Hite v. Cincinnati, Indianapolis & Western Railroad Co.*, 284 Ill. 297, 119 N. E. 904, *Louisville & Nashville Railroad Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, and other cases relied on by appellee, some of which we think distinguishable and others not controlling.

The decree of the circuit court is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

(288 Ill. 281)

PEOPLE v. MOSES. (No. 12297.)

(Supreme Court of Illinois. June 18, 1919.)

1. CONSPIRACY \Leftrightarrow 47 — EVIDENCE — SUFFICIENCY.

Evidence *held* sufficient to show that defendants conspired to and did obtain and cash a check secured by false pretenses that maker's daughter had consumption, and that defendants represented the state board of health, and would have the daughter confined in a sanitarium unless allowed to treat her.

2. CRIMINAL LAW \Leftrightarrow 789(1), 1172(2)—HARMLESS ERROR—INSTRUCTIONS—REASONABLE DOUBT.

An instruction, informing the jury that a reasonable doubt must be reasonable and not unreasonable nor a variety of other things not within the meaning of the word "reasonable," while subject to criticism, both as unnecessary and because being no better definition than the words "reasonable doubt" themselves, *held* not so prejudicial as to alone warrant a reversal of the judgment.

3. CRIMINAL LAW \Leftrightarrow 1179—REVIEW—INTERMEDIATE COURT—ABANDONMENT.

The Supreme Court reviews the judgment of the Appellate Court, and alleged errors not presented to that court are waived and abandoned, and cannot be raised in the Supreme Court for the first time.

4. CONSPIRACY \Leftrightarrow 51 — CRIMINAL LAW \Leftrightarrow 884, 1208(9)—PAROLE LAW—RIGHT OF JURY TO FIX PUNISHMENT.

The general provisions of Parole Law 1917, §§ 1, 2, providing that jury shall fix the punishment for the offenses of misprision of treason, murder, rape, or kidnapping, and providing, except for such crimes, every sentence to the penitentiary shall be a general sentence of imprisonment, and the court imposing the sentence shall not fix the limit of imprisonment, cannot be construed to apply to the crime of conspiracy.

5. CRIMINAL LAW \Leftrightarrow 1216(1)—TIME \Leftrightarrow 11—PUNISHMENT—UNIT OF TIME—DAY—"NOT EXCEEDING FIVE YEARS."

Under Cr. Code, § 46, fixing imprisonment at "not exceeding five years," the unit of time is one day, unless there are hostile claims requiring the division of the unit for the purpose of settling relative rights, and the punishment prescribed by the Criminal Code is therefore imprisonment for the minimum time of one day and maximum time of five years.

6. STATUTES \Leftrightarrow 118(4)—VALIDITY—PAROLE LAW—TITLE.

To construe Parole Law of 1917, as changing the punishment for conspiracy to a term

not less than one nor more than five years would be to render it void under Const. art. 4, § 13, as embracing matter not included within its title.

7. CONSTITUTIONAL LAW §203—EX POST FACTO LAWS—PUNISHMENT.

The construction of Parole Law of 1917, as affecting the limitation of imprisonment for the crime of obtaining money under false pretenses, committed prior to the statute taking effect, would make it an ex post facto law and void.

8. CONSPIRACY §51—PARDON §6—PAROLE—NECESSITY OF SERVING MINIMUM TERM.

One sentenced to the penitentiary under the general or intermediate sentence cannot be released on parole under Parole Law 1917, § 7, until he has been confined in the penitentiary for at least one year, or until he shall have served the minimum term provided by law for that crime, and Parole Law of 1917, has not changed the term of imprisonment fixed by Cr. Code, § 46, for conspiracy.

9. CONSPIRACY §51—CRIMINAL LAW §884—JURY'S FIXING PUNISHMENT—SENTENCE TO DEFINITE TERM.

In a prosecution for conspiracy to obtain money under false pretenses, it was not error to direct the jury to fix the punishment of the defendant, nor to sentence him to confinement in the penitentiary for a definite term of 18 months. Parole Law of 1917.

Error to Appellate Court, Third District, on writ of error to Circuit Court, Hancock County; Harry M. Waggoner, Judge.

Joseph M. Moses and another were convicted of conspiracy to obtain property or money under false pretenses, and from a judgment of the Appellate Court (212 Ill. App. 641), affirming a judgment of conviction and sentence, Joseph M. Moses brings error. Judgment affirmed.

Newman, Poppenhusen, Stern & Johnston, of Chicago (Edward R. Johnston, of Chicago, of counsel), for plaintiff in error.

Edward J. Brundage, Atty. Gen., Earl W. Wood, State's Atty., of Carthage, and Edward C. Fitch, of Chicago (Clifton J. O'Hara, of Hamilton, of counsel), for the People.

CARTWRIGHT, J. Joseph M. Moses and Arthur Wilson were charged in an indictment in the circuit court of Hancock county with conspiracy to obtain from Mary G. Carr property or money of the value of \$75 by means of false pretenses. They were found guilty, and by the verdict punishment was fixed at confinement in the penitentiary for a term of 18 months. They were sentenced in accordance with the verdict, and Joseph M. Moses, plaintiff in error, sued out a writ of error from the Appellate Court for the Third District, where the judgment was affirmed,

and he prosecuted a writ of error from this court to review the judgment of the Appellate Court.

[1] In April, 1917, Joseph M. Moses, plaintiff in error, and Arthur Wilson formed a partnership to travel from place to place under the firm name of J. M. Moses & Co., specialists to treat and cure diseases, and divide the money obtained from the business equally. Moses was a graduate of the College of Physicians and Surgeons of Chicago, and had traveled through the country districts of Illinois and Missouri since 1897, practicing as a specialist for diseases of the eye, ear, nose, and throat. Wilson was an optician, who had traveled, doing work in that line, for 14 years. Wilson solicited the business and did some optical work, and Moses made free examinations and treated such persons as could be induced to accept and pay for services. About the last of May, 1917, Moses and Wilson established Quincy as their headquarters, and made daily trips through the country in the prosecution of their business. On June 21, 1917, they left Loraine in the morning in a hired automobile and stopped at various places, soliciting persons to be treated. About 10:30 o'clock in the forenoon they came to the home of Mary G. Carr, two miles west of the village of Stillwell, and were told by the driver that she was a widow and owned the farm. Wilson went into the house and handed to Mrs. Carr a card having on it the firm name, above which were the words, "Illinois State License—Missouri State License," and below were the words, "Chicago, Ill., St. Louis, Mo.," and asked her if her people were well. Mrs. Carr said that her daughter Iva, had hay fever and asthma, but was not at home and would be back in the afternoon about 2:30 o'clock. Wilson asked if there was any consumption in the family, and Mrs. Carr said there was on her husband's side. Moses and Wilson returned about 2:30 in the afternoon, when the daughter, Iva, was at home, but she refused to be examined. After much persuasion she consented, and Moses examined her while seated in a chair and also in bed. The only disputed question of fact was as to what occurred in the house at that time after the examination. Mrs. Carr and her daughter testified that Moses told them Iva was in the first stages of consumption; that she had a spot on her left lung as large as a half dollar and if she did not take their treatment she would be dead in a year and a half; that they had authority from the state board of health that if she did not take their treatment to place her in the Dwight Sanitarium just like an insane person, and unless she accepted their treatment they would be obliged to place her in a sanitarium within 24 hours; that they would take her to the Dwight Sanitarium and keep

her there for a year, and she would see no one and no one would see her, and the state would pay for it if Mrs. Carr was not able, but if she was able she would have to pay for it; that Iva refused to take the treatment, and Moses said, "All right, my little lady, we don't have to fool with you; we will send your name to the state board of health;" that she again refused, and he said, "You be ready in the next 24 hours, and we will be after you;" that she said, "You can't take me," and he said, "We will have some one along with us, and I guess you will go." Moses testified that he found catarrhal conditions of the nose and throat, known as incipient consumption; that it was a condition where the field was there, and when the germ hits it consumption will develop, and that incipient consumption means a germ disease lying there ready to be set afire by conditions which are predisposing. He said that he explained to Mrs. Carr and Iva that the upper part of one lung was slightly affected. Wilson testified that Moses pointed out the conditions of the lungs which might lead to consumption, a dormant condition which might at any time develop into tuberculosis if a heavy cold settled on the lungs. Both defendants denied any statement about authority from the state board of health, or that anything was said about a sanitarium at Dwight, or that threats of any kind were made to take the daughter forcibly or against her will to any sanitarium. Again, there was no dispute as to the following facts: Mrs. Carr and the daughter refused to take the treatment, and Moses and Wilson went out to the automobile. The daughter then consented to take the treatment, and Mrs. Carr went to the door and called Wilson. Moses told Wilson that the old lady was up and stirring around and coming out of the house, and Wilson told the driver to make a stall and get a bucket of water, which was done. It was then agreed that the cost of the treatment should be \$150, \$75 cash and \$75 at the end of one year, and if the daughter was not cured at the end of one year the defendants would continue to treat her for nothing. Mrs. Carr then gave her check for \$75 on a bank at Stillwell, and Moses gave her a bottle of liquid, two boxes of pills, and an atomizer. Moses and Wilson then drove direct to the bank at Stillwell, where the check was cashed. There was no tuberculosis sanitarium at Dwight, and neither Moses nor Wilson had any authority to represent the state board of health. Neither that board nor the department of public health has ever exercised any authority over tuberculosis, and Iva Carr was not suffering from tuberculosis when she was examined. The jury were fully justified in finding that the check was obtained by false pretenses of the plaintiff in error which Mary G. Carr believed to be true.

The argument that the check was obtained by threats and intimidation, and therefore a conspiracy to obtain money by false pretenses was not established, is not founded in fact, and affords no ground for reversing the judgment. It is true there were threats, but they would have been wholly ineffective but for the false representations of authority from the state board of health to represent that board as specialists in the treatment of disease and the knowingly false representation that the daughter had tuberculosis. If Mary G. Carr had known that her daughter did not have tuberculosis, and that the state board of health had never assumed any jurisdiction of tuberculosis or authorized the plaintiff in error and Wilson to represent the state board, she would not have cared for their threats or given up her check.

[2, 3] It was assigned for error in the Appellate Court, and is again assigned in this court, that the circuit court erred in giving instructions to the jury. The objections made are of little importance, and the series of instructions fully and fairly presented the law. The principal complaint is that the court gave several instructions on the subject of reasonable doubt, informing the jury that a reasonable doubt must be reasonable and not unreasonable nor a variety of other things not within the meaning of the word "reasonable." The giving of such instructions has been criticized, both as unnecessary and because there is no better definition of the meaning of the words "reasonable doubt" than the words themselves (*People v. Harrison*, 261 Ill. 517, 104 N. E. 259; *People v. Parker*, 284 Ill. 272, 120 N. E. 14), but they have not been regarded as so prejudicial as to alone warrant the reversal of a judgment. In *Bean v. People*, 124 Ill. 576, 16 N. E. 656, an instruction, characterized as a treatise on reasonable doubt, containing seven specifications of what is and what is not a reasonable doubt, was given to the jury, and the court said that in order to a full understanding by the jury of the import of the term somewhat of amplification might be excusable. The judgment would not be reversed on account merely of these instructions, and it appears from a certified copy of the brief and argument of the plaintiff in error in the Appellate Court that no objection was made or argued concerning the giving of any instruction here complained of. This court reviews the judgment of the Appellate Court, and alleged errors not presented to that court are waived and abandoned, and cannot be raised in this court for the first time. *Dunn v. Crichfield*, 214 Ill. 292, 73 N. E. 386; *People v. Seymour*, 272 Ill. 295, 111 N. E. 1008; *People v. Donahoe*, 279 Ill. 411, 117 N. E. 105.

[4-6] It is argued that the court erred in directing the jury, if they found the plaintiff in error guilty, to fix the punishment, and that the verdict and sentence were contrary

to law because the Parole Law of 1917 required an indeterminate sentence. That Parole Law is entitled "An act to revise the law in relation to the sentence and commitment of persons convicted of crime or offenses and providing for a system of parole and to repeal certain acts and parts of acts therein named." Laws of 1917, p. 353. Section 1 of the act provides that the jury shall fix the punishment for the offenses of misprision of treason, murder, rape, or kidnapping, and section 2 provides that except for crimes enumerated in section 1 every sentence to the penitentiary shall be a general sentence of imprisonment, and the court imposing the sentence shall not fix the limit or duration of the imprisonment. The punishment fixed by Criminal Code, § 46 (Hurd's Rev. St. 1917, c. 38, § 46) for the crime of conspiracy is imprisonment in the penitentiary for not more than five years or a fine not exceeding \$2,000, or both. The unit of time in the law is one day, unless there are hostile claims requiring a division of the unit for the purpose of settling relative rights. *Grosvenor v. Magill & Latham*, 37 Ill. 239; *Levy v. Chicago Nat. Bank*, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 330. The punishment prescribed by the Criminal Code is therefore imprisonment for a minimum time of one day and a maximum of five years. While the general language of sections 1 and 2 might be regarded as applying to all crimes, section 7 provides that no person sentenced under a general or indeterminate sentence shall be eligible to parole earlier than one year after commitment, nor until he or she shall have served the minimum term of imprisonment provided by law for the crime or offense for which he or she was sentenced. The general provisions of sections 1 and 2 therefore cannot apply to the crime of conspiracy unless the Parole Law amended the Criminal Code by increasing the minimum term of imprisonment to one year or one convicted of that crime is eligible to parole the next day after his commitment. The first proposition is not within the purpose or any provision of the Parole Law, and if adopted would render it unconstitutional, and the second is contrary to the plainly expressed legislative intent.

In *Featherstone v. People*, 194 Ill. 325, 62 N. E. 684, the court said that the Parole Law then in force was not intended to fix the punishment for crime, but from its provisions clearly implied that the General Assembly had already defined crimes and fixed

their punishment, and that parole laws do not fix punishment but direct the manner of imposing sentence by the court. In *People v. Hartsig*, 249 Ill. 348, 94 N. E. 525, Emory Hartsig was convicted of the crime of conspiracy, and was sentenced under the Parole Law. The judgment was reversed, and it was decided that the Parole Law did not apply to the crime because it fixed a term of imprisonment of not less than one year. It was also decided that the subject of fixing punishments for crime was not within the scope of the title of the act then in force, which was the same as the title of the present act, and a provision therein changing the punishment for conspiracy to a term of not less than one year nor more than five years would be void under section 13 of article 4 of the Constitution. As applied to this case it would also be *ex post facto*, since the crime was committed on June 21, 1917, before the act took effect.

[7, 8] One sentenced to the penitentiary under a general or indeterminate sentence cannot be released on parole until he has been confined in the penitentiary at least one year nor until he shall have served the minimum term of imprisonment provided by law for that crime. The two conditions must concur. One year of imprisonment must have been served in any case, and if the minimum term of imprisonment provided by law for the crime exceeds one year the imprisonment must be for such minimum term. If the General Assembly had intended that a prisoner committed under a general or indeterminate sentence should be eligible to parole when he had served the minimum term of imprisonment prescribed by law for the crime of which he was convicted, a provision to that effect would have covered the entire subject, and there would have been no necessity for fixing the period of one year. The plain meaning of the Parole Law is that the imprisonment shall be for at least a year, and if the minimum term fixed by law is more than a year the prisoner must serve that length of time before being eligible to parole. The Parole Law of 1917 has not changed the term of imprisonment fixed by the Criminal Code for the crime of conspiracy.

[9] The court did not err in directing the jury to fix the punishment of the plaintiff in error, nor in sentencing him to confinement in the penitentiary for a definite term of 18 months, and the judgment is affirmed.

Judgment affirmed.

(223 Ill. 476)

McFARLANE v. CHICAGO CITY RY. CO.
(No. 12578.)

(Supreme Court of Illinois. June 18, 1919.)

1. TRIAL ¶178—MOTION FOR DIRECTED VERDICT—QUESTIONS DETERMINABLE.

On motion by defendant for directed verdict, the only question determinable by the court is whether there is any evidence fairly tending to support plaintiff's cause of action; the court having nothing to do with the preponderance of the evidence or the credibility of the witnesses.

2. APPEAL AND ERROR ¶1094(2)—REVIEW—QUESTION OF FACT.

Jury's finding that death of a passenger was caused by injuries received while alighting from defendant's street car, and was due to defendant's negligence, will not be disturbed on appeal to the Supreme Court, where the evidence reasonably tends to support such finding, and the verdict has been approved by the Appellate Court.

3. DEATH ¶104(4)—ACTIONS—INSTRUCTIONS—DAMAGES—"PECUNIARY LOSS" TO NEXT OF KIN.

In suit for wrongful death of widow, instruction that the damages would be such "pecuniary loss" and personal service as she would have rendered her children was not erroneous, as the jury under Hurd's Rev. St. 1917, c. 70, § 2, may give such damages as they deem fair compensation with reference to pecuniary loss, which includes personal service of deceased.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pecuniary Loss.]

4. TRIAL ¶296(11)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

Instruction that damages for death would be such pecuniary loss and such personal service as deceased would have rendered her children, if erroneous in adding the element of personal service, was cured by other instructions, given at request of defendant, which clearly limited recovery to the pecuniary loss suffered by the children.

5. CARRIERS ¶321(14)—DEATH OF PASSENGER—INSTRUCTION—NEGLIGENCE OF CARRIER.

In action for death of passenger caused by injuries received in alighting from a street car, instruction that if the death was caused by defendant's negligence as alleged in the declaration, and that deceased exercised ordinary care, the jury should find defendant guilty, *held* not error, as tending to convey meaning that recovery can be had without proof that defendant's acts were negligent.

6. TRIAL ¶233(3)—INSTRUCTIONS—REFERENCE TO PLEADINGS.

An instruction to the effect that if plaintiff has made out a case as alleged in the declaration then the jury should find the defendant guilty is not erroneous, though not in accordance with the best practice.

7. TRIAL ¶295(1)—INSTRUCTIONS—CONSIDERED AS A SERIES.

There is no error in the giving of instructions which, if considered as a series, fairly present the law applicable to the case.

Error to Second Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Joseph B. David, Judge.

Action by Margaret McFarlane, administratrix of Alice McFarlane, deceased, against the Chicago City Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

For opinion of Court of Appeals, see 212 Ill. App. 664.

Harry P. Weber, George W. Miller, and Arthur J. Donovan, all of Chicago (John R. Guillems and Franklin B. Hussey, both of Chicago, of counsel), for plaintiff in error.

Edward J. Green, of Chicago, for defendant in error.

THOMPSON, J. This cause comes to this court by writ of certiorari to the Appellate Court to review a judgment of that court affirming a judgment of the superior court of Cook county for \$2,500 in an action on the case instituted by Margaret McFarlane, administratrix of the estate of Alice McFarlane, deceased, against the Chicago City Railway Company, to recover damages for the death of Alice McFarlane.

There are many assignments of error, but plaintiff in error relies for reversal upon the following grounds: First, the evidence does not fairly and reasonably tend to show that the death of Alice McFarlane was proximately caused by the injuries sustained, and the court erred in refusing to direct a verdict for plaintiff in error; second, the court erred in the giving and refusing of instructions.

The declaration consisted of three counts. The first count alleges, in substance, that the deceased was a passenger on an east-bound electric car of the plaintiff in error operating on Forty-Seventh street, in the city of Chicago; that Forty-Seventh street intersects a street known as Vincennes avenue; that when said car arrived near Vincennes avenue it stopped for the purpose of allowing deceased and other passengers to alight therefrom; that while deceased was in the act of alighting and while in the exercise of ordinary care for her own safety, the plaintiff in error, by its servants, so carelessly, negligently, and improperly managed and operated said car that the car was jerked, jolted, jarred, and moved, and the deceased was by reason thereof thrown to and upon the street and suffered serious injuries from which she died. The count further alleges heirship and issuance of letters of administration. The allegations

of the second count are substantially the same as those of the first count, except the second count alleges that while said car was near to and approaching Vincennes avenue, a place then usually used by plaintiff in error for the purpose of receiving and discharging passengers, and while said car was then moving slowly at said place and was about to stop, and while the deceased was in the act of alighting from said car in the exercise of due care, all of which plaintiff in error knew or should have known, the servants of plaintiff in error then and there so negligently managed and operated said car that it was suddenly and hurriedly started and jerked, jolted, moved, and swayed, and by reason thereof deceased was thrown to the street and received therefrom said injuries. The third count alleges that the car was stopped for the purpose of allowing deceased and other passengers to alight, and that she was in the act of doing so and exercising ordinary care, all of which plaintiff in error knew, or should have known, when plaintiff in error, by its servants, negligently moved and started the car while deceased was in the act of alighting and before she had a reasonable time in which to alight, by reason whereof she was thrown and received injuries from which she died January 13, 1914.

[1] The first point to be considered is whether or not the court erred in refusing to give the peremptory instruction. This raises the question whether there was any evidence which fairly and reasonably tended to show that the injuries received caused the death of Alice McFarlane. Primarily, it is a question for the trial court whether the evidence, with all the legitimate and natural inferences to be drawn therefrom, is sufficient, if credited, to sustain a verdict. On consideration of such a motion the trial court has nothing to do with any question as to the preponderance of the evidence or the credibility of the witnesses or the force to be given to evidence having a tendency merely to impeach the veracity of the witnesses. The only question which the court has to determine is whether there is in the record any evidence which, if true, fairly tends to prove the allegations of the declaration. *Libby, McNeill & Libby v. Cook*, 222 Ill. 206, 78 N. E. 599; *Woodman v. Illinois Trust & Savings Bank*, 211 Ill. 578, 71 N. E. 1099. The question of the weight to be given the testimony is a question for the jury. All controverted questions of fact are settled by the judgment of the trial and Appellate Courts, and the only question in this court is whether or not there is any evidence in the record fairly tending to support the cause of action of defendant in error.

[2] The accident occurred about 6 o'clock in the evening of December 3, 1913. The deceased, a widow aged 57 years, was a passen-

ger on an east-bound car belonging to plaintiff in error. The car on which deceased was a passenger was traveling east on Forty-Seventh street, in the city of Chicago, and was following closely another car operated over the same tracks. When the car in question left Grand boulevard, deceased requested the conductor to signal the car to stop at Vincennes avenue, the next regular stopping place. Both cars were traveling very slowly. William White testified that he was an employé of the city of Chicago; that he was standing on the rear platform of the car in question, and noticed a lady come to the door and call for Vincennes avenue; that the conductor pulled the bell for the stop; that he was counting his transfers, and paid no further attention to the lady; that she pulled the door open and stepped out upon the platform; that she stepped down on the step, took hold of her dress with one hand, and held to the car with the other hand; that the car stopped and the lady started to step to the ground; that just as she was about to put her foot on the ground the conductor gave the motorman the signal, and the car started with a jerk and threw the lady to the pavement; that he and the conductor picked her up and put her in a doctor's car.

Dr. Richard W. Carter testified that on the evening of the accident he was on Forty-Seventh street between Vincennes avenue and Grand boulevard, and that at the time the accident occurred he was on the sidewalk, facing the street cars; that there were two cars running east along Forty-Seventh street, quite near together; that he saw the second car stop between the alley and Vincennes avenue and saw it stand for an instant and then move forward; that immediately after it started he saw a person lying in the street; that he rushed to assist, and found the person lying in the street to be a woman who he learned was Mrs. Alice McFarlane, the deceased; that he found her in considerable distress and quite helpless, but conscious; that he placed her in his automobile and drove her to her home, which was near by; that there he made an examination, and found a fracture of the patella of the right knee and a fracture of the second phalanx of the second finger of the left hand and considerable injury to the left shoulder and left thorax region; that he placed her leg in a cast, applied splints to the finger, and applied a compress and binder to the thorax; that he visited her at frequent intervals until approximately the time of her death, which occurred on January 13, 1914, about 40 days after the accident, the number of his visits amounting in all to about 25; that the leg was in a cast for probably five weeks; that she continued to complain of her side; that she suffered from frequent attacks of syncope; that she had difficulty in breath-

ing; that at times she passed into an unconscious state; that there was a decided congestion of the left lung; that he attended the post mortem, which revealed myocarditis (an inflammation of the muscles of the heart); and that the kidneys were congested but not inflamed.

Margaret McFarlane, daughter of the deceased and defendant in error here, testified that prior to receiving the injuries deceased did her own work, and that she had never complained of illness; that she kept a seven-room house, in which five people lived, the mother, an adult son and daughter and two roomers; that the day after the accident deceased had frequent fainting spells, and that she gasped for breath, and that these attacks recurred at frequent intervals until her death; that before the accident deceased had never had fainting spells, nor had she ever shown any evidence of diseased heart or lungs.

Evidence in behalf of plaintiff in error in part supported the case of defendant in error. It was substantially as follows: Richard B. Thornton, the conductor on the car, did not testify, but his testimony, given before the coroner's jury, was admitted in evidence. It was practically the same as that of White, except he says that while he was counting transfers deceased came to the door immediately after he left Grand boulevard, and asked him to let her off at Vincennes avenue; that he signaled the motorman to stop at Vincennes avenue and then continued to count his transfers; that the deceased stepped onto the rear platform and started to step down to the car step; that he put his hand on her shoulder and told her to wait until the car came to a full stop; that she said she would, and that he stepped back to his position and continued to count his transfers; that the car was following another car and was moving very slowly, sometimes as slowly as three miles an hour; that while the car was thus moving slowly deceased voluntarily stepped to the street and was thrown to the pavement; that he immediately gave three emergency bells as a signal to the motorman to stop; that the car did not stop until after he gave the three emergency bells; that deceased fell about 150 feet west of Vincennes avenue, which was a short distance east of the alley. Timothy Griffin, the motorman, testified that he made no stop from the time he left Grand boulevard until he received the three emergency bells. Leonard C. Monroe and Frank H. Monaghan, two boys riding on the front platform, corroborate him in this. Dr. Joseph Springer, the coroner's physician, testified that he held a post mortem on the body of deceased. The injuries as described by Dr. Springer are substantially the same as described by Dr. Carter. When asked his opinion as to the cause of death he stated that the deceased came to

her death from organic heart disease, complicated by the injuries which the post mortem revealed.

It is clear that the evidence favorable to the theory of defendant in error, if credited, fairly and reasonably tends to show that the injuries caused the death of Alice McFarlane, and that such injuries were the result of the negligence of the servants of plaintiff in error. On this evidence the jury have found that the injuries received in this accident caused her death, and, the Appellate Court having approved this finding, this court is precluded from considering the question. The trial court did not err in refusing to direct a verdict in favor of the plaintiff in error.

[3] It is next urged that the trial court erred in giving instruction No. 8, which reads:

"If the jury find a verdict in favor of the plaintiff under the evidence and the instructions of the court, then the jury will be required to assess the plaintiff's damages. In assessing the plaintiff's damages, if any, the jury should allow such damages as will compensate the daughter and two sons of Alice E. McFarlane, deceased, for such pecuniary loss and personal service she would have rendered them, if any, as shown by the evidence, as the children of the deceased have sustained by reason of her death, not exceeding, however, the sum of \$10,000."

The italics are ours, and the plaintiff in error insists that the giving of this instruction with these words following "pecuniary loss" was reversible error. It contends that the instruction does not limit recovery to pecuniary loss, but authorizes the jury, in addition thereto, to allow damages as compensation for personal service she would have rendered the next of kin, if any. In every action of this character "the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death." Hurd's Stat. c. 70, § 2. There is no rule by which the pecuniary loss can be exactly determined, and the jury must therefore calculate the damages with reference to a reasonable expectation of benefit from the continuance of the life. These children might reasonably expect in many ways to derive pecuniary benefit from the continued life of the intestate. It is not required that the evidence shall afford data from which the extent of the pecuniary loss can be ascertained with certainty. Clearly, one of the elements of pecuniary loss is the personal service of deceased. *Goddard v. Enzler*, 222 Ill. 462, 78 N. E. 805; *Baltimore & Ohio Southwestern Railway Co. v. Then*, 159 Ill. 535, 42 N. E. 971; *Illinois Central Railroad Co. v. Reardon*, 157 Ill. 372, 41 N. E. 871; *City of Chicago v. Keefe*, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860. Whatever effect these additional words could have had upon the minds of the jurors would not have been with respect

to the right of recovery. They tended rather to limit the injuries than to broaden them. We do not believe that the jury were misled by the phrase in the instruction.

[4] If it be conceded that there was a slight inaccuracy in the wording of instruction No. 8, this was cured by the following instructions, given at the request of plaintiff in error:

(12) "This is an action to recover damages to the next of kin of the deceased. Under the statute the next of kin can only recover, even where the defendant is guilty, such damages as are a fair and just compensation with reference to the pecuniary injuries resulting to the next of kin of said deceased person from such death, and even if you believe from the evidence, under the law as stated in the instructions of the court, that defendant is guilty as charged in the declaration, you can allow to the plaintiff only such damages as will compensate the next of kin for the pecuniary injury, if any are shown by the evidence, resulting from the death of plaintiff's intestate."

(25) "With reference to the question of damages, if you reach a conclusion where you will have to consider them at all the feelings of the children or other relatives, or their wealth or poverty, cannot be considered in assessing damages in a case like this. You cannot allow \$1 for solace or comfort or sorrow of the family. It is only the pecuniary or money loss which the evidence may show the next of kin have suffered by the death of the deceased. If the evidence shows that they have suffered any pecuniary or money loss by reason of said death, that can be considered in this case."

(26) "In this case, even if you find for the plaintiff, you can allow only such damages as will make good the pecuniary loss, if any is shown by the evidence, sustained by the next of kin of the person deceased. Mental suffering or loss of domestic or social happiness or the degree of the culpability of the defendant, if any, are not proper elements in the calculation of damages. You cannot award exemplary or vindictive damages."

These instructions, considered with instruction No. 8, are not contradictory nor inconsistent. They explain the expression used in No. 8, and as a series correctly state the rule of liability. The error, if any, was obviated and rendered harmless. *Richardson v. Nelson*, 221 Ill. 254, 77 N. E. 583.

[5, 6] Complaint is also made in regard to the giving of instruction No. 6, which is:

"If you believe from the evidence that the death of Alice E. McFarlane was caused by the negligence of the defendant as alleged in the declaration or some count thereof, and that Alice E. McFarlane herself was in the exercise of ordinary care for her own safety at and before the time of the injury, then you should find the defendant guilty."

It is urged that this instruction was so artificially drawn that it could very well

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have been understood by the jury to mean that a recovery was warranted on proof that the death was caused by the acts of defendant alleged in the declaration to have been negligent, together with ordinary care on the part of deceased, and without proof that such acts were, in fact, negligent. We think the instruction is not susceptible of the construction placed upon it by plaintiff in error. Instructions to the effect that if the plaintiff has made out a case as alleged in the declaration then the jury should find the defendant guilty have been approved by this court in a number of cases, and it is unnecessary to repeat what is said in those cases. *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 71 N. E. 1081. A similar instruction was under discussion in *Krieger v. Aurora, Elgin & Chicago Railroad Co.*, 242 Ill. 544, 90 N. E. 266, and we there reviewed the authorities at length. In that case the averment in the declaration, which by reference was incorporated into the instruction, limited the due care of plaintiff to the time when plaintiff was in danger, regardless of his conduct in putting himself in that position. The instruction herein complained of is not so limited, but clearly included the time at and before the injury. It is better and safer practice not to give an instruction of this character, for the reason that the court should define the issues to the jury without referring them to the pleadings to ascertain what they are. Reference is made to the *Krieger Case*, supra, for our reasons for this holding.

Complaint is also made of the court's action in refusing instructions 1 and 2 offered by plaintiff in error. These instructions did not correctly state the law, and were properly refused.

[7] Five instructions were given on behalf of defendant in error and 18 instructions on behalf of plaintiff in error. "The law applicable to different questions may be stated in separate instructions, and the entire law applicable to all the questions involved in a case need not be stated in each. In such case the instructions supplement each other, and if they present the law fairly when viewed as a series, it will be sufficient." *Partridge v. Cutler*, 168 Ill. 504, 48 N. E. 125. We think the instructions, considered as a series, very fairly presented the law applicable to the case, and that there was no error in the giving or refusing of instructions.

Finding no reversible error in the record, the judgments of the Appellate Court and the superior court of Cook county are affirmed.

Judgment affirmed.

(188 Ind. 245)

MOORE v. RYAN et al. (No. 23462.)

(Supreme Court of Indiana. June 20, 1919.)

1. DRAINS §32 — REMONSTRANCE—COMMISSIONERS' REPORT—EVIDENCE—PRESUMPTION.

On trial of remonstrance to drainage commissioners' report, alleging that remonstrant's land will not be benefited to the extent of the assessment, the report though prima facie evidence of contents under Burns' Ann. St. 1914, § 6151, cannot be considered for purpose of weighing evidence sustaining remonstrance; such presumption merely requiring remonstrant to first introduce such evidence, upon introduction of which case is tried as if no such presumption ever existed.

2. TRIAL §375 — DRAINS — VALUE OF IMPROVEMENTS—EVIDENCE—COURT'S VIEW OF PREMISES.

Where court trying remonstrance to drainage commissioners' report, alleging that remonstrant's land would not be benefited to extent of assessment, by consent of parties made personal inspection of land "with a view to apply the evidence," the judge's view of premises was not in the nature of the evidence and cannot be considered as such.

3. DRAINS §82(5)—VALUE OF IMPROVEMENTS—ASSESSMENTS—EVIDENCE.

Evidence held not to sustain finding that land of remonstrant would be benefited by drainage improvements to the extent of the assessments.

4. DRAINS §32 — COMMISSIONERS' REPORT—ILLEGALITY OF.

Under Burns' Ann. St. 1914, § 6141, providing for accurate report by drainage commissioners as definite basis for bidding by contractors, a report delegating to commissioner of construction the power to withhold the payment of such part of the contract price as he might elect is unlawful, and, under section 6143, petition will be referred back to commissioners for amended or new report.

Appeal from Circuit Court, Jasper County; Elmer Barce, Special Judge.

Petition by John P. Ryan and others to establish a drain. Remonstrance filed to report of commissioners by Austin O. Moore and others. Judgment establishing drain, and remonstrant named appeals. Reversed, with directions.

John A. Dunlap, of Rensselaer, Quincy A. Myers, of Indianapolis, and W. H. ParKinson, of Rensselaer, for appellant.

George A. Williams and Frank Foltz, both of Rensselaer, for appellees.

WILLOUGHBY, J. This cause was before this court in the case of Thompson v. Ryan, 183 Ind. 232, 108 N. E. 98. The record discloses that on September 16, 1909, appellee Ryan and others filed in the circuit court of Jasper county their petition for a drain, and

such proceedings were had that the court ordered the construction of the drain. From this judgment an appeal was taken, and the judgment reversed, with instructions to grant a new trial and proceed upon the report of the commissioners as originally filed. After the cause had been remanded to the circuit court, a remonstrance was filed to this report, and it was held that the same was not according to law and referred to commissioners for a new report. This second report, upon remonstrance being filed to it, was set aside, being held not according to law. The court then appointed new commissioners, who qualified and filed what is designated in the record as a "new report" on September 22, 1917. To this report appellant Moore and others filed remonstrances, and the cause was tried on such remonstrances, and the court found against the remonstrants, and judgment was rendered establishing the drain.

The appellant and others filed separate motions for a new trial. These several motions were overruled, and the remonstrants each took separate and several exceptions to the ruling. In each case 30 days' time was given to file appeal bonds, and 60 days' time to file all bills of exceptions. The remonstrants other than Moore do not appeal. The appellant Moore appeals from the judgment establishing the drain. The only error properly assigned and not waived is the court erred in overruling appellant's motion for a new trial. Among the reasons for a new trial, appellant alleges that the decision of the court is not sustained by sufficient evidence.

The remonstrance of A. O. Moore filed October 4, 1917, after setting out a description of his lands assessed for said improvement, alleges:

"That each and every separate tract of said remonstrant's land assessed as benefited, as above set forth, will not be benefited to the extent of the assessment by the proposed work if accomplished."

[1] In the trial of appellant's remonstrance the only evidence on behalf of the petitioners was the commissioners' report setting out the separate tracts of appellant's lands, and the amounts assessed as benefits against each of said tracts. The only witness testifying in regard to said assessments was the appellant, himself, and his testimony places the benefits to said land, and each tract thereof, at less than the assessments thereon, making a total amount of \$941.30 assessed against all of said land more than it would be benefited by the proposed work if accomplished. The appellant contends:

"That the drainage commissioners' report was only prima facie evidence of the things therein contained, and that its only office and effect was to compel the remonstrants to go forward with evidence sustaining the remonstrance."

When such evidence has been introduced sustaining the remonstrance, the presumption growing out of the prima facie case has served its function and cannot be considered for the purpose of weighing the evidence or for any other purpose. The presumption growing out of a prima facie case remains only so long as there is no substantial evidence to the contrary. When that is offered, the presumption disappears, and, unless met by further proof, there is nothing to base a finding solely upon it. *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78.

In the case of *Rockfort v. Mower*, 259 Ill. 604, 102 N. E. 1032, which was a suit to recover compensation for land taken for public improvements, the court says:

"In this case, however, the amount awarded as compensation for the land taken was \$500, while the lowest value fixed by any of the witnesses was \$2,000. The report of the commissioners cannot be regarded as evidence either upon the question of value or upon the question of damages. While it is true that section 23 of the Local Improvement Act provides that such report 'shall be prima facie evidence, both of the amount of the compensation to be awarded, and of the benefits to be assessed,' we held in *Chicago Terminal Transfer R. Co. v. City of Chicago*, 217 Ill. 343, 75 N. E. 499, in considering the constitutionality of that provision, that the effect of the provision was merely to change the burden of proof. In discussing this question we there said: 'Statutes giving prima facie weight to facts or to official certificates are properly regarded as rules of procedure changing the burden of proof. In the absence of this statute, the city, in the case at bar, would have been required, in the first instance, to assume the burden of producing proof relative to the amount which the appellant company would be entitled to receive by way of compensation for so much of its right of way as would be also occupied by the proposed public way. The statute does no more than to declare that this amount shall be inferred or assumed from the report of the commissioners until evidence to the contrary is introduced.' When plaintiff in error introduced evidence upon the question of the value of the land sought to be taken and upon the question of the damages to the land not taken, the report of the commissioners ceased to have any weight as evidence, and it was then incumbent upon the city to meet the evidence offered by plaintiff in error upon these questions, unless the city was satisfied with the values and damages fixed by the witnesses for plaintiff in error. It is apparent that the jury either considered the report of the commissioners as evidence or ignored the testimony of the witnesses, and based their verdict entirely upon their view of the premises. That the jury have no right to disregard the testimony of the witnesses and base their verdict upon their view of the premises is well established in this state. *Atchison, Topeka & Santa Fé R. Co. v. Schneider*, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422; *Sanitary District v. Loughran*, 160 Ill. 362, 43 N. E. 359; *East St. Louis, Columbia & Waterloo Ry. v. Illinois Trust Co.*, 248 Ill. 559, 94 N. E. 149."

We approve the reasoning of the court in the above cases, except the statement in regard to changing the burden of proof. That is not the law in this state.

The drainage commissioners' report in the case now being considered was only prima facie evidence of the things contained therein, and it was only admissible by virtue of the statute. Section 6151, Burns 1914 (Acts 1907, p. 508). *Wilson v. Tevis*, 184 Ind. 712, 111 N. E. 181; *Lake Agricultural Co. v. Brown*, 186 Ind. 30, 114 N. E. 755. Its only office and effect is to compel the remonstrants to go forward with evidence sustaining the remonstrance. When such evidence has been introduced sustaining the remonstrance, the presumption growing out of the prima facie case has served its function, and cannot be considered for the purpose of weighing the evidence, or for any other purpose. When such evidence has been introduced sustaining the remonstrance, the presumption falls, and the case is then tried as if no such presumption ever existed. *Cleveland, etc., Ry. Co. v. Wise*, 186 Ind. 316, 116 N. E. 299.

[2, 3] The appellee contends that the trial judge's view of the premises was in the nature of evidence, and should be considered with all the other evidence, in the case. We cannot accede to that view. The record recites that—

"By consent of all parties interested the court makes personal inspection and observation of the line, route and termini of said drain, together with its laterals and outlets with the view to apply the evidence heard."

This shows that it was not intended as evidence by either party. Our conclusion is that the finding of the court was not sustained by sufficient evidence as to the assessments upon the lands of this appellant.

[4] Among the reasons for a new trial, appellant alleges that said report of the drainage commissioners is not according to law, in that the following provision in said report will have a tendency to prejudice bidders against said improvement, which provision of said drainage commissioners' report reads as follows:

"The contractor shall maintain the ditch and every part thereof to the full width and depth required by this report until the entire ditch and all that part embraced in this contract shall have been completed as required by this report, and the ditch is finally accepted as completed by the court, and a sufficient percentage of the contract price shall be withheld until the contractor complies with this requirement, and if he shall fail to do so, the drainage commissioners shall expend sufficient of the contract price to complete or clean out said ditch and deduct the amount from the contract price." That the amount held back is indefinite and no contractor will know how much is to be held out at the time he makes the bid. That no contractor who takes the lower portion will know

how long he will have to maintain it against the contractor who takes the upper portion. That the contractor who takes the upper portion or some lateral will not know how long he will have to maintain it until the entire ditch is constructed.

This was one of appellant's causes of remonstrance. Appellant contends that the foregoing provision in the report of the commissioners was in violation of the law, and by reason of said provision it came within the first statutory cause for remonstrance, and that said report was not according to law; that said report conferred upon the superintendent of construction dangerous discretionary power and opened the door to fraud.

The statute, section 6141 et seq., Burns 1914, requires of the commissioners a definite, accurate report, to the end that parties may know in advance the precise character of the proposed drain and that the contractor may have a definite basis for bidding. It is clear that the contractor cannot intelligently bid upon the work when he does not know how much of the contract price will be held back, or how long it will be held back.

In the case of *Broerman v. Spilker* (1915) 183 Ind. 88, 108 N. E. 226, it was held that the court erred in overruling a remonstrance assailing a provision in the report of the drainage commissioners which provided that the interpretation of the plans and specifications by the engineer, who planned and designed the work, should be the accepted interpretation, and in that case the court say:

"The law provides that one of the parties shall be a competent engineer. It also provides for a definite, accurate report, fixing metes and bounds, courses and distances, grades and bench marks, with a computation of the cubic yards of excavation, and cost thereof. Provision is made for the services of an engineer to secure accuracy and definiteness to the end that the parties may know in advance the precise character of the proposed drain, and that contractors may have a definite basis for bidding. The engineer's duties are fully performed on the filing of the report, and the contractor is invested with no more power over the plans and specifications than is a stranger."

Whether the commissioners could provide in their report that a definite part of the contract price should be retained until the work was completed, we do not decide; but it seems clear that the commissioners did not have the right to delegate to the commissioner of construction the power to withhold the payment of such part of the contract price as he might elect. The provision delegating the power of the commissioner of construction to withhold a sufficient percentage of the contract price to complete or clean out said ditch and deduct the amount from the contract price made said report un-

lawful, and the court erred in refusing to sustain appellant's remonstrance thereto. The report was not according to law, and the petition should have been referred back to the commissioners for an amended or new report. Section 6143, Burns 1914 (Acts 1907, p. 508, § 4).

Judgment reversed, and the Jasper circuit court is directed to sustain appellant's motion for a new trial, and to sustain appellant's remonstrance and refer the petition back to the commissioners for an amended or new report.

(72 Ind. App. 29)

SMITH v. WELLS et al. (No. 9653.)*

(Appellate Court of Indiana, Division No. 1
June 19, 1919.)

Appeal from Circuit Court, De Kalb County; Dan M. Link, Judge.

On motion for rehearing. Rehearing denied.

For former opinion, see 122 N. E. 334.

P. V. Hoffman, of Auburn, for appellant.
Chas. J. Brennan and Mountz & Brinkerhoff, all of Garrett, for appellee.

BATMAN, C. J. Appellant, in an able brief on her petition for a rehearing, contends that the decision of the court in this case contravenes a ruling precedent of the Supreme Court, as found in certain cases cited, to the effect that beneficiaries in insurance contracts of the kind involved in this action have no vested interest therein until the death of the insured. There is nothing in the original opinion in this case, when properly construed, that either expressly or impliedly sustains this contention. We do not hold that the children of the insured had any interest whatever in the contract of insurance, as beneficiaries or otherwise, that could not have been fully and completely divested by the insured, if he had elected to do so, and had taken the proper steps to accomplish that purpose. The true purport of our holding is, not that he could not have done so, but that he did not do so. The special finding of facts shows that on October 14, 1907, the insured, by an instrument in writing, specifically designated his children as beneficiaries in his insurance contract. The interest thus conferred was never divested unless the tripartite agreement of June 10, 1911, worked that result. Appellant insists that whether or not it worked such a result must be determined from the provisions of certain by-laws, which formed a part of the contract of insurance, which provided that members procuring loans must furnish life insurance, which, in case of death, will be available to discharge such loans, and also which limit the persons who

*Transfer denied.

may become beneficiaries, but excepting from such limitation the superintendent of the relief department, when an assignment of such contract is made to him to secure a loan from the savings feature made to the insured. We cannot agree with this contention, but, on the contrary, hold that the effect of such agreement must be determined from its own provisions, as stated in our original opinion, which led to the conclusion there announced. It is quite apparent that such agreement, to which both the relief department and improvement company were parties, might have been so drawn as to have fully complied with all the requirements of the by-laws and to have accomplished the result for which appellant contends, but we hold that a fair interpretation of the same shows that was not done. The improvement company and relief department could waive a strict compliance with the requirement that life insurance should be obtained and made available in case of death for the discharge of the loan made the insured, and could as far as their interests were concerned, waive any formality that may have been prescribed in that regard. The only right which the superintendent of the relief department had to the proceeds of the insurance certificate in question came through the tripartite agreement. His power to dispose of the same was limited thereby. To read anything into said agreement not expressly stated or reasonably implied would be to make a new contract for the parties, which the law forbids. If it be said that the tripartite agreement does not control the disposition of the proceeds of said certificate because not in conformity with the provisions of the by-laws which form a part of the insurance contract, then the designation of beneficiaries made by the insured on October 14, 1907, would stand unmodified, as the evidence fails to disclose any other effort on the part of the insured to divest, limit, or incur the contingent interest created thereby. This, however, would weaken rather than strengthen appellant's contention. A reconsideration of the questions presented leads us to conclude that the decision announced in our original opinion is correct.

The petition for a rehearing is therefore overruled.

(70 Ind. App. 604)

CARTER v. SCHOOL TP. OF LIBERTY
et al. (No. 9929.)

(Appellate Court of Indiana, Division No. 2
June 20, 1919.)

SCHOOLS AND SCHOOL DISTRICTS — 65 —
GRANT FOR SCHOOL PURPOSES.

Where grant of land for a school building provided that it should revert to the grantor whenever the property ceased to be used for

school purposes, the grantor is entitled to re-take the property, where it ceased to be used for school purposes, even though the school authorities acting, under Burns' Ann. St. 1914, § 6422, enacted after the grant abandoned the school, because the average daily attendance was 12 pupils or less, for the conditions of the grant could not be affected by subsequent legislation.

Appeal from Circuit Court, Grant County; J. F. Charles, Judge.

Action to quiet title by John A. Carter against the School Township of Liberty and others. From a judgment for defendants, and an order denying new trial, plaintiff appeals. Reversed and remanded, with directions.

Bell & Dickey and R. L. Ewbank, of Indianapolis, for appellant.

Orlo L. Cline, of Marion, for appellees.

McMAHAN, J. This is an action commenced in May, 1916, by appellant, to quiet his title to a tract of one acre upon which stands a building which was erected for a schoolhouse. It appears from the evidence that in 1897 appellant and his brother owned adjoining 80-acre tracts of land, and in that year each deeded adjoining half-acre tracts to the school trustee and his successors in office, each of said deeds containing the following provision: "Whenever this property ceases to be used for school purposes, it is to revert to the grantors herein, their heirs or assigns." Appellant's brother has since died, and appellant purchased his brother's 80 acres and moved thereon, and has purchased by quitclaim deed all rights of his brother's heirs in the half-acre tract deeded by the brother.

The township trustee in the spring of 1913 discontinued and abandoned this school, for the reason that during the previous school year the average daily attendance had been fewer than 12. Harlin Haisley, who was the township trustee from 1909 to January 1, 1915, testified that when he discontinued the school it was temporarily abandoned; that in 1914 the parents residing in that school district filed a petition with him, asking that the school be opened again; that the enumeration was taken, and that there were only 7 or 8 pupils in the district, and he could not under the law open the school at that time; that the only reason the school was discontinued was on account of there not being a sufficient number of pupils; if there had been enough pupils in this district the school would not have been closed. This school is in district 14. The building cost about \$3,000 and is in a fair state of preservation. The seats were taken out in 1914. The pupils were enumerated each year as belonging to district 14,

but were attached to another district for school purposes. The appellant took possession of the building and real estate about a year before this action was commenced.

Judgment having been rendered against the appellant, he filed a motion for a new trial, wherein he challenged the decision of the court on the grounds: (1) That it is not sustained by sufficient evidence; and (2) that it is contrary to law.

Appellee contends that it was forced to discontinue the school by reason of the provision of section 6422, Burns', which requires that all schools shall be discontinued and temporarily abandoned when the average daily attendance during the preceding year has been 12 pupils or fewer, and that the decision of the court was therefore correct. The statute referred to was enacted in 1907 and amended in 1909. It is our judgment that this statute has no bearing upon the question before us. The rights of the parties were fixed by the conditions mentioned in the deeds conveying the property to appellee, and these rights cannot be impaired by subsequent legislation. It is the duty of the court to decide this case without giving consideration to the said statute. That the appellee ceased to use the property for school purposes cannot be denied. The fact that the cessation was brought about by virtue of the statute can make no difference. The property had not been used for school purposes since the spring of 1913, a period of more than three years. Our judgment is that the evidence shows without conflict that the appellees intentionally ceased to use the property in controversy for school purposes, and that the court erred in overruling the motion for a new trial. See Fall Creek Township v. Shuman, 55 Ind. App. 232, 103 N. E. 677.

Judgment reversed, with direction to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

(70 Ind. App. 590)

LEWIS et al. v. POPEJOY et al. (No. 9954.)

(Appellate Court of Indiana, Division No. 2.
June 20, 1919.)

FRAUDS, STATUTE OF §43(1) — AGREEMENT TO PAY COMMISSION—EXCHANGE OF LANDS—STATUTE OF FRAUDS.

Under Burns' Ann. St. 1914, § 7463, a broker cannot maintain an action for commission for effecting an exchange of farms unless his contract with his employer is in writing.

Appeal from Circuit Court, Wells County; Wm. H. Elchhorn, Judge.

Action by Harry E. Popejoy and others against Sam Lewis and another. From judgment for plaintiffs, defendants appeal. Cause reversed, with directions to restate conclusions of law in favor of defendants and to render judgment accordingly.

Frank W. Gordon, of Bluffton, for appellants.

McMAHAN, J. Appellants owned a farm of 80 acres which they desired to exchange for a smaller one. They engaged appellees, who were real estate brokers, to find an owner of a small farm who would exchange farms with appellants. The only question for our determination is: Must contracts of this character be in writing in order to bind the owner of the real estate for the payment of a commission? If so, this cause must be reversed; otherwise affirmed.

It was held in *Elmore v. Brinneman* (No. 9855) 123 N. E. 248, decided by this court at the November term, 1918, that section 7463, Burns 1914, applied to a contract of this character, and that the broker could not maintain an action for his commission unless the contract was in writing.

The court erred in its conclusions of law. Cause reversed, with direction to the court to restate its conclusions of law in favor of appellants and to render judgment accordingly.

(70 Ind. App. 714)

KOSTA et al. v. J. R. WATKINS MEDICAL CO. et al. (No. 9894.)

(Appellate Court of Indiana, Division No. 1.
June 19, 1919.)

Appeal from Circuit Court, Jasper County; Wm. H. Parkinson, Special Judge.

Action by the J. R. Watkins Medical Company and another against Joseph Kosta and others. Judgment for plaintiffs, and certain defendants appeal. Affirmed.

John A. Dunlap, of Rensselaer, for appellants.

James H. Chapman, of Rensselaer, and Tawney, Smith & Tawney, of Winona, Minn., for appellees.

REMY, J. The questions presented by the record herein are substantially the same as those involved in the case of *Hammerton v. J. R. Watkins Medical Co.*, 120 N. E. 710, decided by this court November 21, 1918, and upon authority of that case the judgment is affirmed.

GLOBE MERCANTILE CO. v. PERKEY-
PILE et al. (No. 9664).*(Appellate Court of Indiana, Division No. 2.
June 18, 1919.)Appeal from Circuit Court, Jay County;
Jacob F. Denney, Judge.

On motion for rehearing. Denied.

For former opinion, see 121 N. E. 844.

Fleming & Skinner, of Portland, for appel-
lant.S. A. D. Whipple & Son, of Portland, for
appellees.

PER CURIAM. Rehearing denied.

NICHOLS, P. J. (dissenting). After care-
ful consideration of the matters in issue in
this case, upon the petition for rehearing, I
conclude that there was error in the original
opinion for the following reasons:

Under the statutes of this state, and law, as
declared by the court, the surviving hus-
band is the owner by descent of the undivid-
ed one-third of all real estate of which his
wife dies the owner, subject to its proportion
of her debts contracted before marriage.
Section 3016, Burns' R. S. 1914. There
being no antenuptial debts, the husband in
this case became the owner of such one-third
of the wife's land, subject to be divested un-
der the conditions hereinafter. This one-
third was not subject to sale for the pay-
ment of his wife's general debts. *Hampton*
v. *Murphy*, 45 Ind. App. 513, 86 N. E. 436, 88
N. E. 876. Not even for costs of adminis-
tration, or expenses of last sickness. *Kemph*
v. *Belknap*, 15 Ind. App. 77, 43 N. E. 891.

As against a purchase-money mortgage, in
which he has joined with his wife, he has no
interest in the land, until after the mortgage
is paid. *Vandevender v. Moore*, 146 Ind. 44,
44 N. E. 8; *Brenner v. Quick*, 88 Ind. 546,
556; *Butler v. Thornburg*, 131 Ind. 237, 240,
30 N. E. 1073; *Butler v. Thornburgh*, 141
Ind. 152, 155, 40 N. E. 514; *Hampton v. Mur-*
phy, 45 Ind. App. 513, 86 N. E. 436, 88 N. E.
876; *Whetstone v. Baker*, 140 Ind. 213, 39 N.
E. 868; *Sarver v. Clarkson*, 156 Ind. 316, 59
N. E. 933; *Carver v. Grove*, 68 Ind. 371; *Bow-*
man v. Mitchell, 97 Ind. 155; *Overturf v.*
Martin, 170 Ind. 308, 84 N. E. 531; *Denton v.*
Arnold, 151 Ind. 188, 195, 51 N. E. 240.

The case of *Sarver v. Clarkson*, *supra*,
holds that the same rule as to the interest of
the surviving husband or wife prevails,
whether the lien be that of a purchase-money
mortgage or a vendor's lien.

The case of *Overturf v. Martin*, *supra*,
holds that, if a man dies the owner of real
estate with a purchase-money mortgage upon
it, his widow's interest therein will be sub-
ject to the lien of the mortgage, and that she
can require the two-thirds of the land to be
first applied to the satisfaction of the mort-
gage, and if not sufficient to pay and satisfy

it she will then be entitled only to what re-
mains, if anything, after the full payment
of such incumbrance.

The case of *Denton v. Arnold*, 151 Ind.
188, 194, 51 N. E. 240, 242, involved the rights
of a widow as against a purchase mortgage
lien, and in that case the court says that:

"The law made it the duty of the adminis-
trator, in the course of the administration of
the estate, to pay off and satisfy this mortgage;
and, it becoming necessary, as we must pre-
sume, under the facts, to subject this land to
a sale to satisfy the lien in question, it was
still liable to be sold by the administrator upon
the order of the court for that purpose. In
contemplation of law, so far as it was rendered
necessary to subject this real estate to the pay-
ment of this purchase-money lien, it still be-
longed to the estate of the decedent, although
it had been set off to appellant as her inter-
est in his lands."

To the same effect, see *Bowen v. Lingle*,
119 Ind. 560, 20 N. E. 534; *Fowler v. Maus*,
141 Ind. 47, 40 N. E. 56. The land involved
was sold only for the payment of the pur-
chase-money mortgage. This was the only
debt mentioned in the petition for sale, and
the court finds that the sale was to pay and
satisfy said mortgage. Under the law, it
could be sold for no other purpose, and the
one-third of the proceeds of the sale of the
whole tract, or so much as may remain after
the payment of such mortgage, belonged to
the husband. There was no authority of law
for using it for the payment of the general
debts of the wife, not even the costs of ad-
ministration and expense of last sickness and
burial. We must keep in mind that the hus-
band had no interest in this land as against
said purchase-money mortgage, and it fol-
lows that his judgment creditor could have a
lien on no greater interest than he had, or
right to collect his debt out of any interest
except the interest of the husband. This in-
terest was only the right to the balance of the
fund after the payment of the purchase-money
mortgage. *Shirk v. Thomas*, 121 Ind. 148, 22
N. E. 976, 16 Am. St. Rep. 381. If the admin-
istrator of the estate of *Scarbor Williams*
made a misapplication of the proceeds of the
sale of the real estate, this malfeasance can-
not be charged against the purchaser. 11 R.
C. L. § 418. The judgment creditors had notice
of the sale, which was a public sale with no-
tice, and they had their remedy against the
administrator. They had a right by proper
proceeding, to fasten the proceeds of the sale
belonging to the husband in the hands of
the administrator, and, failing to pursue
their proper remedy, they had no right to re-
quire the appellant, as grantee of the pur-
chaser at such administrator's sale, to pay
their judgments and any such payment by
appellant was a voluntary payment. The
original opinion suggests the remedy that the
judgment creditors might have pursued, that
of intervening and following the funds in the
hands of the administrator, and this sugges-

*Superseded by opinion in Supreme Court 125 N. E. 29. Rehearing denied.

tion of a remedy is sustained by a long list of authorities. Ball, Adm'r, v. Green, 90 Ind. 75; Ballenger v. Drock, 101 Ind. 172; Clapp v. Hadley, 141 Ind. 28, 39 N. E. 504, 50 Am. St. Rep. 308; Kolars v. Brown, 108 Minn. 60, 121 N. W. 229, 133 Am. St. Rep. 133; Koons, Adm'r, v. Mellett, 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231.

The judgment should have been affirmed, and this petition for rehearing should be sustained.

(70 Ind. App. 484)

H. W. JOHNS-MANVILLE CO. v. SOUTH SHORE MFG. CO. et al. (No. 9907.)

(Appellate Court of Indiana, Division No. 1. June 17, 1919.)

1. NEW TRIAL ⇨152—SUPPLEMENTAL MOTION—TIME FOR FILING.

In view of Burns' Ann. St. 1914, § 587, as to motion for new trial being filed within 30 days, and section 589, providing remedy, where a party discovers a cause for new trial after expiration of the 30 days the filing of a supplemental motion more than 30 days after decision of the court on the merits was unauthorized, and court did not err in striking it out.

2. APPEAL AND ERROR ⇨705—EVIDENCE.

Question whether interest should have been included in amount of recovery cannot be determined by the Appellate Court without a consideration of the evidence which is not in the record.

3. EVIDENCE ⇨41—JUDICIAL KNOWLEDGE—EXPIRATION OF TERM OF COURT.

• The Appellate Court knows judicially that the October, 1916, term of the Lake Superior Court expired in November of that year.

4. EXCEPTIONS, BILL OF ⇨41(1)—APPROVAL AND FILING—COMPLIANCE.

Where bill of exceptions containing the evidence was not filed during the term at which motion for new trial was overruled nor within the time given beyond such term for that purpose nor presented to the judge of the trial court for his approval within such time, it cannot be considered.

5. APPEAL AND ERROR ⇨705—BILL OF EXCEPTIONS—SUFFICIENCY.

Where bill of exceptions purporting to contain all the evidence shows on its face that a contract which does not appear in the bill of exceptions was admitted in evidence, the Appellate Court cannot determine question whether interest should have been included in amount of recovery.

6. INTEREST ⇨67—RECOVERY—BURDEN OF PROOF.

The duty rested upon plaintiff to establish that it was entitled to interest and to furnish proper data from which the amount thereof could be computed.

7. APPEAL AND ERROR ⇨705—BILL OF EXCEPTIONS—SUFFICIENCY.

Where bill of exceptions fails to disclose the contract out of which it is alleged that

plaintiff's claims arose or any other fact from which trial court could determine whether anything was due plaintiff as interest, the Appellate Court is unable to ascertain whether said contract provided for interest and cannot pass upon contention that trial court erred in not including interest in amount of recovery.

Appeal from Superior Court, Lake County; Charles E. Greenwald, Judge.

Action by the H. W. Johns-Manville Company against the South Shore Manufacturing Company and others. There was judgment for plaintiff, but foreclosure of its alleged mechanic's lien was denied. Plaintiff filed motion for new trial, and subsequently filed a supplemental motion therefor. Defendants filed a motion to strike out the supplemental motion for new trial, which was sustained, and the court thereupon overruled the original motion for new trial, and plaintiff appeals. Affirmed.

Bomberger, Peters & Morthland, of Hammond, and Vose & Page, of Chicago, Ill., for appellant.

Greenlee & Call, of Gary, and F. B. Pattee, of Crown Point, for appellees.

BATMAN, C. J. This is an action by appellant against appellees to foreclose a mechanic's lien against land of the South Shore Manufacturing Company, and to require the remaining appellees to answer as to their respective interests in said land, which interests, if any, it is alleged are junior to said lien. Issues were joined by answers in general denial. A trial was had by the court, which resulted in a judgment in favor of appellant for \$4,432.56, and an order on the receiver of the South Shore Manufacturing Company, who was a party defendant, to pay the same out of the proceeds in his hands for distribution as a general claim, under the order of the court. The foreclosure of the alleged mechanic's lien was denied. Appellant filed a motion for a new trial, and subsequently filed a supplemental motion therefor. Appellees filed a motion to strike out the supplemental motion for a new trial which was sustained, and the court thereupon overruled the original motion for a new trial, to each of which rulings appellant excepted, and has assigned said rulings of the court as the errors on which it relies for reversal.

[1] The record discloses that the decision of the trial court was rendered in this cause on December 29, 1915. On January 27, 1916, appellant filed its motion for a new trial, and subsequently on June 1, 1916, it filed a supplemental motion for a new trial on the ground of newly discovered evidence, which it alleges could not have been discovered by the exercise of reasonable diligence in time to have introduced the same at the trial of

the cause. As pertinent to the action of the court in striking out appellant's supplemental motion for a new trial, it should be noted that section 587, Burns 1914, provides that an application for a new trial may be made at any time within 30 days from the time the verdict or decision is rendered and not afterwards. It has been held that this section of the statute is mandatory, as to the time of filing a motion for a new trial. *Talbot v. Meyer* (1915) 183 Ind. 585, 109 N. E. 841; *Acme, etc., Works v. Indiana, etc., Co.* (1916) 61 Ind. App. 644, 112 N. E. 392. It has also been held that a supplemental motion for a new trial may be filed within the time provided by statute for filing an original motion for such purpose. *Fisher v. Southern R. Co.* (1913) 55 Ind. App. 599, 104 N. E. 521. But we have not been able to find any authority in this state for filing such a motion after the expiration of the time for filing an original motion for a new trial. However, a party who discovered a cause for a new trial, after the expiration of the time fixed for filing a motion therefor, is not without a remedy, as the Legislature by section 589, Burns 1914, has provided for such a contingency. In view of the language used in said section 587, the decisions cited, and the provision of said section 589, we are led to conclude that the filing of said supplemental motion for a new trial, more than 30 days after the decision of the court on the merits of the cause, was unauthorized, and the court did not err in striking it out.

[2-4] The only question presented by the appellant, involving the action of the court in overruling its motion for a new trial, is based on a failure to include in the amount of recovery any sum as interest on the claim sued on. A determination of this question would require a consideration of the evidence, which an examination discloses is not in the record. The transcript shows that appellant's motion for a new trial was overruled on November 8, 1916, the same being the twenty-seventh judicial day of the October, 1916, term of the Lake superior court, at which time it was given 60 days in which to file its bill of exceptions; that thereafter on January 8, 1917, it presented to the trial judge the typewritten manuscript which now appears with the transcript as a bill of exceptions containing the evidence; that said judge did not then approve the same, but took it under advisement, and later, on March 17, 1917, approved the same, and attached his certificate thereto evidencing such fact; and that thereafter on May 16, 1917, such completed bill was filed in the office of the clerk of the Lake superior court. We know judicially that the October, 1916, term of the Lake superior court expired in November of that year. It thus appears that the bill of exceptions containing the evidence was not filed during the term at which the motion for a new trial was overruled, nor within the

time given beyond such term for that purpose, nor was it presented to the judge of the trial court for his approval within such time. Under these circumstances, such bill of exceptions cannot be considered a part of the record. *Cornell v. Hallett* (1894) 140 Ind. 634, 40 N. E. 132; *Indiana, etc., Oil Co. v. O'Brien* (1902) 160 Ind. 266, 65 N. E. 918, 66 N. E. 742; *City of Huntington v. Boyd* (1900) 25 Ind. App. 250, 57 N. E. 939; *Brown v. American, etc., Co.* (1908) 43 Ind. App. 560, 88 N. E. 80; *Haehnel v. Seidentopf* (1916) 63 Ind. App. 218, 114 N. E. 422; *Huntingburg Bank v. Morgenroth* (1917) 115 N. E. 798; *Beard v. Fenton* (1918) 119 N. E. 495.

[5, 6] There is still another reason why such bill of exceptions cannot be considered in determining the question, which appellant asserts renders the action of the court in overruling its motion for a new trial, error. The bill of exceptions, while purporting to contain all the evidence given on the trial of the cause, shows on its face that a certain paper, designated as a "contract," and marked "Exhibit No. 3" for identification, was admitted and read in evidence; but said exhibit does not appear in such bill of exceptions. This fact would prevent a consideration of the question which appellant seeks to present. *Ward v. Bateman* (1870) 34 Ind. 110; *Weaver v. Kennedy* (1895) 142 Ind. 440, 41 N. E. 810; *Jordan v. Muth* (1892) 6 Ind. App. 655, 34 N. E. 29; *Collins v. Collins* (1884) 100 Ind. 266; *Rhea v. Crunk* (1894) 12 Ind. App. 23, 39 N. E. 879; *Elchel v. Bowser* (1891) 2 Ind. App. 84, 28 N. E. 192. But if the alleged bill of exceptions accompanying the transcript had been duly presented, approved, and filed, so that it could be considered as a part of the record, and nothing appeared on its face to disclose that it did not contain all the evidence, still we could not sustain appellant's contention relating to its right to have the court include a sum for interest in the amount of its recovery. If appellant believed it was entitled to recover interest, the duty rested upon it to establish such fact by the evidence, and to furnish proper data from which the amount thereof could be computed, as the court was not permitted to speculate in that regard. *Green v. Macy* (1905) 36 Ind. App. 560, 76 N. E. 264; *Connersville Wagon Co. v. McFarlan Carriage Co.* (1906) 166 Ind. 123, 76 N. E. 294, 3 L. R. A. (N. S.) 709; *Williams v. Pittsburgh, etc., R. Co.* (1918) 120 N. E. 46; *Bilske v. Bilske* (1919) 122 N. E. 436.

[7] An examination of the alleged bill of exceptions fails to disclose the contract out of which it is alleged appellant's claim arose; hence we are unable to ascertain whether such contract provided for interest, and, if so, when, by its terms, it should begin to run, and the rate thereof. It does not contain any evidence of demand for, or vexatious delay in, payment, or of any other fact from which the trial court could determine

whether anything was due appellant as interest, and, if so, the amount thereof. For the reasons stated, appellant has failed to show any error in overruling its motion for a new trial. We find no error in the record. Judgment affirmed.

(70 Ind. App. 591)

STATE ex rel. THORLTON v. PUCKETT
et al. (No. 9879.)

(Appellate Court of Indiana, Division No. 2.
June 20, 1919.)

1. TOWNS \Leftrightarrow 42—PUBLIC IMPROVEMENT CONTRACTS—PROTECTION OF LIEN CLAIMANTS.

Burns' Ann. St. 1914, § 5901a, requiring public officers and boards contracting for public improvements to withhold full payment until subcontractors or laborers have been paid, and requiring such claims to be filed within 30 days after the completion of the work, confers no right of action on any one unless the public officer wrongfully fails to withhold money due the contractor which should have been applied to claims previously filed.

2. TOWNS \Leftrightarrow 33—TRUSTEES—OFFICIAL BONDS—PLEADING—SUFFICIENCY.

A complaint in an action by the sureties of a public contractor against a township trustee and his bondsmen to recover for an alleged wrongful payment by the trustee to a public contractor before the claims of subcontractor and laborers were paid was insufficient to show a violation of Burns' Ann. St. 1914, §§ 5901a, 5901b, where it failed to allege the filing of claims of subcontractors of materialmen prior to the time of full payment; it being presumed that the trustee performed his statutory duties, and therefore that no claims had been filed.

Appeal from Circuit Court, Clay County;
John M. Rawley, Judge.

Action by the State, on the relation of Wallace Thorlton, against Elihu Puckett and others. Judgment for defendants, on demurrer, and plaintiff appeals. Affirmed.

Cary L. Harrell, of Jasonville, and Walker & Blankenbaker, of Terre Haute, for appellant.

E. S. Holliday, A. W. Knight, F. A. Horner, and A. C. Miller, all of Brazil, and S. M. McGregor, and Edward H. Knight, both of Indianapolis, for appellees.

McMAHAN, J. This action was brought by relator on the bond of the appellee Elihu Puckett, as trustee of Lewis township, Clay county, Ind. The appellees other than Elihu Puckett are sureties on said bond. The only error assigned relates to the action of the court in sustaining a demurrer to appellant's complaint. The complaint, after alleging the election and qualification of said Puckett, alleges the execution of the bond in

suit, the conditions of which bond were that said Puckett "shall well and faithfully discharge the duties of said office according to law, shall faithfully collect and receive all moneys belonging to said township, expend the same as required by law," etc., a copy of which bond is filed with and made a part of the complaint; that said Puckett, as such trustee, entered into a written contract with Farabee & Berry for the alteration and repair of a certain schoolhouse belonging to said township under the terms of which contract said contractors were to do all the work and furnish all the material therefor for \$7,356; that at the time of the execution of said contract and as a part of the consideration therefor said contractors executed a bond in the sum of \$7,356 with relator and others as sureties thereon, which said bond obligated and bound said sureties for the payment of all claims for work, labor, and material furnished or done under or pursuant to the said contract of Farabee & Berry for said alteration, repair, and improvement and for the payment of all subcontractors who contracted with said Farabee & Berry to furnish material or do any part of said work undertaken by said Farabee & Berry as aforesaid; that at the request of said contractors certain named parties furnished material and performed labor for said contractors in the alteration and repair of said schoolhouse to the extent of \$3,978.07, which said contractors failed to pay, and which said sum the sureties on said contractors' bond were compelled to and did pay; that the relator, as one of said sureties, was obliged to and did pay one-seventh of said sum or \$568.07; that each of said materialmen and laborers filed their claims for the amount due each of them with said trustee within 30 days from the time of furnishing the material and the completion of the work done by said parties; that no dispute arose between said contractors and the said parties who furnished labor and material; that said trustee unlawfully and in violation of the duty enjoined upon him by law failed to withhold full payment to said contractors, Farabee & Berry, until said contractors had paid to said materialmen and laborers, and each of them, all bills due and owing them; that the contractors' bondsmen were required to pay said sum of \$3,978.07 by reason of the failure of said trustee to so withhold payment to said contractors; that said trustee, in violation of the statutory law of this state, paid said contractors, who had not paid for any of the material or labor hereinbefore mentioned, \$6,000, and that by reason of the unlawful acts of said Puckett in failing to withhold full payment relator was compelled to and did pay said sum of \$568.07; that when relator signed said contractors' bond he believed said Puckett would

faithfully perform his duties as trustee and would withhold full payment to said contractors until all bills due and owing by them for material and labor were paid; that relator relied upon said Puckett as such trustee to perform faithfully all the duties and obligations imposed upon him by reason of his official bond and the laws of the state of Indiana, and that, if said Puckett had faithfully performed his duties required by law, the relator would not have been compelled to pay any sum whatever upon the said contractors' bond so executed by relator and others—and demanding judgment for the amount so paid by relator.

The relator's contention is that under sections 5901a and 5901b, Burns 1914, it was the official duty of the appellee Puckett, as trustee, to have withheld full payment to the said contractors until all bills due for labor and material had been paid.

Said section 5901a provides that certain public officers and boards when authorized to contract for any public building or improvement—

"shall withhold full payment to the contractor until such contractor has paid to the subcontractor or subcontractors or laborers employed in such construction, all bills due and owing the same: Provided, there is a sufficient sum owing to the contractor to pay all such bills, and if there is not a sufficient sum owing to such contractor on such contract to pay all of such bills, then the sum owing on said contract shall be prorated in payment of all such bills: Provided, such subcontractor or subcontractors or laborers shall file with the trustees or board or commission their claim * * * within thirty days from the completion of the work. Where no dispute shall arise between the contractor and the subcontractor or the laborer, the trustees, board or commission shall pay such claim or claims out of the funds due such contractor, and take receipt therefor, which sum or sums shall be deducted from the contract price. Where there is a dispute between the contractor and the subcontractor or laborers, sufficient funds shall be retained by the board, trustees or commission until such disputes are settled, and the correct amount is determined when payment shall be made as aforesaid."

It is quite clear that the purpose of this statute is the protection of the laborers, materialmen, and subcontractors, and not the protection of the contractors or their bondsmen. It will be observed that the language of the statute is that the "trustees shall withhold full payment to the contractor until such contractor has paid to the subcontractor or subcontractors or laborers employed in such construction, all bills due and owing the same," provided, that if there is

not a sufficient amount owing to pay all of such bills, then the sum owing shall be prorated in payment of all such bills, and provided further that "such subcontractor or subcontractors or laborers shall file with the trustees or board or commission their claim * * * within thirty days from the completion of the work."

[1] There is no provision in the act which requires the trustee to withhold any payment from the contractor prior to the filing of such claims, and the trustee is not obliged to assume in advance of such filing that any claim will be filed with him. Clearly this statute confers no right of action on any one unless the trustee wrongfully fails to withhold and pays to the contractor money due the latter which he should apply to the payment, either in full or pro rata, of claims previously filed in accordance with the statute.

The proviso for prorating claims "if there is not a sufficient amount owing to such contractor on such contract to pay all of such bills" clearly indicates that the trustee is obliged to withhold full payment only after claims are filed.

[2] The averments of the complaint show that the contract price of the improvement was \$7,356, and that of this amount the trustee paid \$6,000 to the general contractors; it thereby affirmatively appearing that said trustee retained in his hands a considerable sum due the contractors. There is no allegation anywhere in the complaint that any of the subcontractors or materialmen filed any claim with the trustee prior to his paying out the entire \$6,000 above referred to. The want of such allegation would be absolutely fatal to a complaint by any of said claimants in an action against the trustee under this statute; and it is necessarily fatal to the relator's complaint, who claims his right through said claimants by means of subrogation. The presumption of law is, as against this pleading, that the trustee has performed his statutory duties; and thus it will be presumed that none of the claims mentioned in the complaint were filed with the trustee prior to his paying out the \$6,000, and that upon said claims being filed he withheld the balance of the contract price for the purpose of permitting it to be prorated among the claimants pursuant to the statute. The complaint therefore fails to show any violation of said statute by said trustee, regardless of whether relator can base any right of action on that statute. This being true, there was no error in sustaining the demurrer.

Judgment affirmed.

(70 Ind. App. 597)

INDIANAPOLIS CONSERVATORY OF MUSIC v. McCONNELL. (No. 9853.)(Appellate Court of Indiana, Division No. 2.
June 20, 1919.)**1. EXECUTORS AND ADMINISTRATORS — 171
— CONTRACTS — CONSIDERATION — TRANSFER OF RIGHTS.**

Where plaintiff's sister failed to complete her paid-up course of study in defendant's conservatory under a contract between her father and defendant, and defendant and plaintiff verbally agreed that plaintiff might use remaining portion, plaintiff, upon appointment as administratrix of father's estate, and assignment to herself individually by herself as administratrix of the contract, could not recover for breach of the verbal contract in the absence of evidence of a showing of consideration in that plaintiff succeeded to her father's rights under the original contract.

2. CONTRACTS — 277(2) — ACTION FOR BREACH—PLEADING AND PROOF.

In an action on an unperformed contract to pay the purchase price of an automobile in living and tuition, a money demand was not authorized in the absence of pleading and proof of breach of contract.

Appeal from Superior Court, Marion County; Theop. J. Moll, Judge.

Action by Sarah I. McConnell against the Indianapolis Conservatory of Music. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

Pickens, Moores, Davidson & Pickens, of Indianapolis, for appellant.

Charles T. Kaelin and Elias D. Salisbury, both of Indianapolis, for appellee.

NICHOLS, P. J. The plaintiff commenced this action by filing her complaint in the Marion superior court, which complaint was succeeded by an amended complaint, and later by a reamended complaint, which said reamended complaint is identified in the record as an amended complaint and was the one upon which the case was tried. It is in substance as follows:

The appellant (defendant) is indebted to the appellee (plaintiff) in the sum of \$147.95, with interest for money had and received from appellant, all of which is more fully set out in the bill of particulars filed herewith, and which is a balance due plaintiff by virtue of a verbal contract and agreement between appellee and appellant.

Heretofore, to wit, January 1, 1910, William T. McConnell, father of appellee, sold an automobile to appellant for \$450, in consideration of which appellant promised and agreed in writing, a copy of which agreement is filed herewith, to give appellee's sister certain living and tuition expenses in its Conservatory of Music. Appellee's sister, with

the consent of the appellant, left said institution before all of said money was used therefor, and it was agreed verbally by appellee and appellant that appellee could use said unused money for tuition and living expenses in appellant's said conservatory; that heretofore, to wit, on the ——— day of ———, 19—, William T. McConnell died, and this appellee was appointed administratrix of his estate in Daviess county, Ind. Appellee, as such administratrix, by permission of the court, assigned to herself individually any and all interest that she had as such administratrix in such contract, filed her final report as such administratrix, which was approved by the court, and she was discharged from said trust, which was closed.

On October 4, 1914, it was verbally agreed between the appellee and appellant that the appellant under the said contract was indebted to appellee in the sum of \$327.45. Appellee thereupon entered said school and received living and tuition in sums amounting to \$179.50. Appellee has performed all of the contract on her part to be performed, and there is now due and unpaid to appellee the sum of \$147.95, which appellant has wholly failed, neglected, and refused to pay on demand. There is a demand for judgment of \$175 and costs.

The bill of particulars filed with and as a part of said complaint was as follows:

Exhibit A to Complaint.

Jan. 1, 1910. O. M. Leader automobile	\$450 00
June 30, 1911. Balance due on acct.	\$24 00
Jan. 1-Apr. 4, 1911. 22 voice lessons at \$2.50 per lesson	57 50
Jan. 1-Apr. 4, 1911. 14 piano lessons at \$1.40 per lesson	19 60
Jan. 1-Apr. 4, 1911. 6 weeks' board at \$7.50 per week	45 00
Jan. 1-Apr. 4, 1911. 6 weeks' board at \$6.87½ per week	48 13

\$255 77

Three lessons in voice and six lessons in piano missed on account of sickness, during which time student was home for three weeks.

8 per cent. interest on balance for 3½ years from April 4, 1911, to October 4, 1914..... 71 68

Total due Sarah I. McConnell, October 4, 1914.....\$327 45

Sept. 1911-June, 1913. Counterpoint lessons taken by Sarah I. McConnell, through correspondence, 7 counterpoint lessons at \$2.50.....\$ 17 50

October 3, 1914. Lessons to Sarah I. McConnell, under Daniel Jones, 24 at \$3 per lesson..... 72 00

October 3, 1914. Board and room for 12 weeks at \$7.50 per week..... 90 00 179 50

Balance due Sarah I. McConnell.....\$147 95

The original contract filed with and as a part of the complaint is as follows:

"This agreement made this 2d day of January, 1911, by and between the Indianapolis Conservatory of Music, of Indianapolis, Ind.,

by and through Edgar M. Cawley, its director, first party, and Mr. William T. McConnell, of Washington, Ind., second party, witnesseth:

"That first party does hereby agree to furnish Miss Abigail McConnell, daughter of said second party, with board and room in the Conservatory Building of said first party, in a comfortable room on second floor south, including light, heat, plain washing, and use of piano, voice tuition two lessons per week, Artist Department, pianoforte tuition, two lessons per week, Normal Department, for a period of twenty-five weeks, beginning January 2, 1911, and ending June 30, 1911, for a sum total of \$382.50. This amount in addition to a balance of \$24.00 upon season 1909 and 1910, which balance second party now owes said first party, total \$406.50, shall be credited as cash payment on the purchase price of a machine (Leader automobile five passenger touring car), model D, and No. 209, which first party agrees to accept from second party at the price of \$450.00. The difference between the total charge for board and tuition, \$382.50, and balance, \$24.00, viz. \$406.50, and the price of the machine, \$450.00, which is \$43.50, shall be credited upon account of living and tuition for daughter of second party, beginning September, 1911.

"Second party agrees to turn the machine over to first party January 2, 1911, guaranteed to be in first-class condition, reasonable wear and tear excepted, the machine to include full set of tools, jack and pump, top complete with side curtains and wind shield (the wind shield for the car is a part of the top), all in good condition, and agrees to receive as full consideration therefor the board, lodging, and tuition herein provided for.

"It is further agreed that a clear title shall be given for said machine to first party by second party.

"Second party further agrees to deliver said machine to the B. & O. S. W. Ry. Co., at Washington, Indiana, and forward bill of lading to the first party.

"Witness our hands in duplicate on the 2d day of January, 1911.

"The Indianapolis Conservatory of Music,

"Edgar M. Cawley, Director.

"William T. McConnell."

Appellant answered this complaint by general denial. The cause was submitted to the jury for trial, which returned a verdict in favor of the appellee in the sum of \$63, upon which judgment was rendered against the appellant, and from which judgment, after appellant filed its motion for new trial, which was overruled, this appeal is prosecuted.

The errors assigned by appellant are:

(1) Trial court erred in overruling appellant's amended demurrer to amended complaint.

(2) The trial court erred in overruling appellant's motion for new trial.

The first assignment is without force, and

is evidently presented by counsel for appellant by inadvertence. While there was an amended demurrer to the amended complaint (which by the way was sustained), there was no demurrer filed in the reamended complaint. The next proceeding after such reamendment was filing the answer in general denial aforesaid.

The only error to consider is the action of the court in overruling the motion for new trial, which presents the questions of the sufficiency of the evidence to sustain the verdict, as to whether the damages are excessive, and as to whether the verdict is contrary to law.

[1] There is evidence of the death of William T. McConnell and of the appointment of the appellee as administratrix of his estate, but there is no evidence of any disposition of his contract with appellant, by assignment to appellee, or otherwise, nor is there any evidence as to the final settlement of the estate. It does not appear from the evidence that the widow and heirs of William T. McConnell ever released their interest, if any, in the contract with appellant, or that appellee ever succeeded to the rights of her father therein. Without this evidence there is no consideration whatever shown for the verbal contract which is the basis of appellee's action. Without a consideration there can be no recovery on the contract. *Taylor v. Leeson*, 35 Ind. App. 620, 74 N. E. 907; *Bright v. Coffman*, 15 Ind. 371, 77 Am. Dec. 96; *Elliot on Contracts*, § 195; *Mount v. De Haven*, 29 Ind. App. 127, 63 N. E. 330; *Kelso v. Fleming*, 104 Ind. 180, 3 N. E. 830; *Pope v. Vajen*, 121 Ind. 320, 22 N. E. 308, 6 L. R. A. 688.

[2] In the original contract with William T. McConnell the consideration for the automobile was living and tuition for said McConnell's daughter, and in the verbal contract between appellee and appellant, had there been a valid consideration for such verbal contract, appellant was bound only to pay in living and tuition, and this does not authorize a money demand in the absence of a breach of the contract by appellant. *Wilson v. Dale*, 16 Ind. 390; *Leiter v. Emons*, 20 Ind. App. 22, 50 N. E. 40. There can be no recovery for a broken contract unless a breach thereof is pleaded and proven. *Brickey v. Irwin*, 122 Ind. 51, 23 N. E. 694; *Riley v. Walker*, 6 Ind. App. 622, 627, 34 N. E. 100. No breach of the contract is either pleaded or proven. The verdict is not sustained by sufficient evidence.

The judgment is reversed, with instructions to the trial court to sustain the motion for a new trial.

(70 Ind. App. 569)

OVERMYER v. BARNETT et al. (No. 9940.)(Appellate Court of Indiana, Division No. 2.
June 20, 1919.)**1. VENUE** ¶5(5)—**ACTIONS—RIGHT OF.**

Under Burns' Ann. St. 1914, § 1438, which was declarative of the common law, and in view of section 309, *held* that where plaintiff's premises which were located in one county were flooded by reason of the construction of a dam in the outlet of a lake in another county, the circuit court of the county in which the land was located had jurisdiction of an action for damages, etc., for under the circumstances venue could be laid in either county.

2. WATERS AND WATER COURSES ¶167(1)—**DAMS—OBSTRUCTING DRAIN.**

Where defendants constructed a dam which obstructed the flow of water from a lake through a public drain constructed 30 or 40 years ago, *held* that defendants cannot justify the obstruction on the ground that the dam or obstruction restored the lake to its former level, and Burns' Ann. St. 1914, § 6163, provides for the maintenance of lakes at their level, for the statute merely had reference to the maintenance of the lake at its level after the construction of the public drain.

3. NUISANCE ¶72—**PUBLIC NUISANCE—ACTION.**

Though the obstruction of an outlet of the waters of a lake amounted to a public nuisance because making marshes around the boundaries of the lake, a landowner whose premises were flooded and whose health and property was injured, etc., may maintain an action to abate the nuisance because of his special injury.

4. HEALTH ¶18—**LIABILITY OF HEALTH OFFICERS—TORTS.**

Where the secretary of the state board of health, without authority, caused or allowed the outlet of a lake to be obstructed, or participated in the building of the dam or obstruction, he is liable as an individual for injuries caused.

5. NUISANCE ¶73—**ACTIONS TO ABATE—ACQUIESCENCE.**

The doctrine of acquiescence does not apply to a nuisance, unless it has continued 20 years.

6. NUISANCE ¶75—**ACTIONS—ABATEMENT.**

In an action by a landowner whose premises were flooded by the construction of a dam which obstructed the outlet of a lake, complaint *held* sufficient to state a cause of action for damages against defendants, but not to justify a mandatory injunction directing abatement, not showing that defendants were at the time maintaining the dam or had any right to remove it.

Appeal from Circuit Court, Fulton County;
Smith N. Stevens, Judge.

Action by Lincoln Overmyer against John A. Barnett and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Holman, Bernetha & Bryant and M. A. Baker, all of Rochester, for appellant.

Elle Stansbury, Edward M. White, and Arthur Metzler, all of Indianapolis, for appellees.

NICHOLS, P. J. This action was brought by the appellant against the appellees in the circuit court of Fulton county, Ind.; the amended complaint is in one paragraph, and is in substance as follows:

The appellant is, and has been for the past 20 years, the owner of certain real estate located in Fulton county, Ind., containing in all 85.63 acres. This land borders upon, and extends into, a portion of what is known as Bruce Lake, in Fulton county, at the east and south-east end thereof.

In 1903 there was established in Fulton county, Ind., by the board of commissioners a public drain extending from the higher ground to the east and northeast of the plaintiff's said land, draining various ponds and wet lands, necessary to be drained for farming purposes, and the outlet of said ditch was and is into said Bruce Lake, across the lands of appellant, whose lands were assessed \$300, which was paid by him. Said drain was called the Overmyer ditch, and was sufficient to drain appellant's land and make it tillable so that he could raise thereon good corn and grass, and that it was worth \$60 per acre. At the west end of said land, in Pulaski county, there was a natural outlet in the way of a run or branch extending from the west end of said lake westward and northward into Tippecanoe river.

Under the Swamp Land Act of the state, 30 or 40 years prior to this time, a public drain was established which served as an outlet for said lake into Tippecanoe river, and at a later period, about 20 years prior to this date, the circuit court of Pulaski county established another public drain extending from the west end of said Bruce Lake along and upon the original run or branch, which deepened and widened and straightened the same by the use of a dredge, and thereby said ditch became the outlet for the water running into said lake from the east onto plaintiff's land, through said Overmyer ditch.

Said dredged ditch, so constructed, was maintained and recognized to be an established outlet for the drainage from the east and southeast of said lake through said Overmyer ditch and into Bruce Lake, and the water level was kept reduced, by reason of said dredged ditch at the west end of said Bruce Lake.

After the construction of said Overmyer ditch appellant put in a large quantity of tile on his said land, having the same outlet as the Overmyer ditch and put in lateral drains at an expense of \$500, all of which were efficient and did drain appellant's lands and make them tillable and valuable as farm lands.

In June, 1906, the Chicago, Richmond & Muncie Railroad Company, then operating along the side of said Bruce Lake and maintaining a station at said lake, for the purpose of increasing business and passenger traffic, endeavored to enlarge the area of said lake to make a resort for summer tourists, and thereby to enhance its income derived from the increased passenger traffic to and from said station; and

said railroad and the other defendants, without authority of law therefor, and without regard to the rights of the appellant, erected a dam at the outlet of said lake and adjacent to said lake, the west end of which is in Pulaski county, Ind., the remainder of said lake being in Fulton county. Such dam was in Pulaski county, and prevented the water from escaping from said lake into said outlet drain or natural course, and by reason of said dam said water was held back in the lake, causing the water level to rise from 12 to 18 inches, and thereby forcing the water back into plaintiff's said drain, destroying its efficiency and the efficiency of the Overmyer ditch and of the lateral drains, and causing appellant's said lands to be submerged, as well as other lands bordering on said lake. Said railroad company became insolvent and went into the hands of a receiver, and its property, rights, and franchises were eventually sold to the Chesapeake & Ohio Railroad Company of Indiana, who is now the owner thereof as successor of the said Chicago, Richmond & Muncie Railroad Company.

In the furtherance of their scheme to build said dam and to enlarge the area of said lake, without just cause and in utter disregard of appellant's rights and other landowners bordering said Bruce Lake, and without any notice whatever to appellant or other landowners, they obtained from the secretary of the board of health some order, the nature of which is unknown to the appellant, pertaining to the erection of said dam at an unreasonable elevation, thereby preventing the escape of water from the lake, and causing its water level to rise and submerge appellant's land and other lands along the shore, and to ruin the efficiency of the drain and improvement which had been established by the appellant, as well as that of other landowners. That said secretary of the board of health in the furtherance of his scheme directed the secretary of the board of health of Pulaski county to perform the things required by said railroad company with respect to said order, under the pretense that such action would tend to abate a public nuisance.

After said dam was constructed, it was in part washed out so that the water level was again reduced, but the appellees, directly or through others at their expense, particularly the railroad company, and over the protests of the appellant, and against his objections to such construction, rebuilt said dam, and said appellant at said time protested against it being built, and notified the appellees that the construction of the dam would be ruinous, and would destroy the efficiency of the drains and the efficiency of the Overmyer ditch, and cause him to lose the money he had expended in developing said land through drainage.

Said dam again went out in December, 1908, and thereby reduced the level of the lake to some extent, but that the appellees again in May, 1910, over the protests and objections of this plaintiff, acting for themselves and through others, rebuilt said dam of concrete, 6 inches thick to a height of 12 inches, above the original construction of the dam, thereby causing the said water level of said lake to rise 18 inches, and to shut off completely the outlet of said lake into the said public drain as established and constructed under the drainage laws of Indiana, in said county of Pulaski, and shutting

off the outlet of the said lake through its natural course.

That thereby the efficiency of appellant's drains was totally destroyed, and he can no longer farm his land bordering on said lake, 50 acres of which said lands are affected and entirely destroyed for farming purposes.

Appellant says that he is entitled to free and unobstructed flow of the water through his drains into said lake reduced to the water level existing prior to the time of the construction of the first-mentioned dam. He has a good house on said land, and barn and other buildings built in part after the construction of the Overmyer ditch. The cellar of his house drains into said lake, and the drain was efficient to drain said cellar and keep it dry and useful. Its efficiency is now destroyed by reason of the acts of the appellees as aforesaid, which caused the water to back up into appellant's cellar, making it wet, damp, and moldy, and making bad odors therefrom permeate appellant's house to the detriment of the health of himself and family.

Since the erection of said dam a large area of wet, boggy, and marshy lands around said Bruce Lake has been created, which affords a breeding place for mosquitoes and other insects and malaria and other disease germs, detrimental to the life and health of people living in and near the neighborhood of said lake, and during certain seasons of the year obnoxious odors and poisonous vapors arise, and the same has become a public nuisance, which did not exist before the said dam was built. That a large number of acres have been made wet and swampy and useless for any purpose. The conditions around said lake before the building of the first dam were not detrimental to public health or welfare, and did not constitute a public nuisance, but the conditions since are detrimental to public health and are a public nuisance.

Others around said lake have interest in the right to have restored the original good health conditions that existed prior to the construction of said first dam, and to have the public nuisance now existing removed.

The appellant is unable to realize anything from his said land, and his labor is lost, and he derives no profit whatever from 50 acres of his land. He has been damaged in the sum of \$5,000. His damages are recurring and continuous, and he has no complete and adequate remedy at law. He demands that the said nuisance be abated, and that the appellees be enjoined from maintaining said dam, and that he have damages in the sum of \$5,000.

To this amended complaint the appellees filed their demurrer upon the grounds:

- (1) That the court has no jurisdiction of the defendants or the subject-matter of the action.
- (2) The court has no jurisdiction over the subject-matter of the action.
- (3) There is a defect of parties defendant in this, that other parties are referred to in the complaint as having acted with the defendants in the construction of the dam, who should be made parties defendant and whose names are unknown and defendants are unable to state their names.
- (4) The complaint does not state facts sufficient to constitute a cause of action.

The appellees' demurrer was submitted to and sustained by the court, and, the appellant refusing to plead further, but electing to stand by his complaint, judgment was rendered in favor of the appellees and against the appellant on such demurrer, from which judgment this appeal is prosecuted.

The only error assigned is the ruling of the court upon the appellee's demurrer to the complaint.

[1] The land, the injury to which is involved in this suit, is located in Fulton county, while the dam, the construction of which resulted in the injury as alleged in plaintiff's complaint, is located in Pulaski county. It is the contention of the appellees that the trial court had no jurisdiction of them or of the subject-matter of the action; that such want of jurisdiction appears on the face of the complaint; that the action was for mandatory injunction and to abate a nuisance; and that the demand for damages is only incidental.

Appellees concede that by statute the courts have authority to make all proper judgments, sentences, decrees, orders, and injunctions, and to issue all processes, and to do such other acts as may be proper to carry into effect the same in conformity with the Constitution and laws of this state, but that such courts have no jurisdiction outside of their respective circuits to abate a nuisance by mandate or to enjoin its maintenance.

The appellees say that the subject-matter of this suit is wholly situate in Pulaski county, and that the Pulaski circuit court alone for that reason has jurisdiction. The appellant contends that the action is properly brought in the Fulton circuit court, and cites as his authority section 309, Burns' R. S. 1914, which provides that actions for the determination in any form of rights or interest in real property and for injuries thereto must be commenced in the county in which the subject of the action, or some part thereof, is situated.

It has been repeatedly held that actions for trespass upon land must be brought in the county in which the land is situated. The case of *Kinser v. De Witt*, 7 Ind. App. 597, 34 N. E. 1014 was an action for damages for depositing dirt upon land. *Keston v. Snider*, 14 Ind. App. 66, 42 N. E. 372, was an action for damages for the destruction of crops. *I. B. & W. Ry. Co. v. Foster*, 107 Ind. 430, 8 N. E. 264, was for damages by fire from a locomotive; *Dubrenil v. Pa. Co.*, 130 Ind. 137, 29 N. E. 909, was an action for damages resulting from fire from a locomotive; in this case the land being located in the state of Illinois. In each of the foregoing cases it was held that the action was properly brought in the county in which the real estate was located. But section 1438, Burns' R. S. 1914, provides that when the subject-matter of any suit shall be situate in two or more counties the court which shall first take cognizance there-

of shall retain the same. This enactment by the Legislature of our state was a common-law principle long before it became statutory by the action of our Legislature.

The subject-matter of this action consists of two principal facts; the one being the construction of a dam, which was located in Pulaski county, and the other the resultant injury, by such erection, to real estate which was located in Fulton county. Where two material facts are necessary to give a good cause of action, and they take place in different counties, the cause of action may be said to arise in either county, and, applying this principle of law, it has been held that where an injury has been committed in one county to real property situate in another, or where the action is founded on two or more material facts, which take place in different counties, the venue may be rested in either. *Footte v. Edwards*, 9 Fed. Cas. 358, No. 4908. 1 Saunders, Pl. and Ev. 413. The rule is stated in 1 Chitty on Pleading (16th Ed.) 281, as follows:

"Where * * * an injury has been caused by an act done in one county to land situate in another or whenever the action is founded upon two or more material facts which take place in different counties the venue may be laid in either."

The rule as stated in *Bulwer's Case*, 7 Coke, 2a, is as follows:

"That where the action is founded on two things done in several counties, and both are material and traversible and the one without the other doth not maintain the action, then the plaintiff may bring this action in which of the counties he will."

This rule is discussed at length in the case of *Rundle v. Delaware & R. Canal*, 21 Fed. Cas. 6, No. 12189, which case approves the doctrine.

The case of *Smith v. Southern Railroad Company*, 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (N. S.) 927, was an action for damages by the appellants against the appellees for damages resulting from the destruction of a building by an explosion of dynamite, the building destroyed being located in the state of Tennessee, while the negligent act resulting in such destruction was committed in the state of Kentucky, and in such case it was held that such an action may be brought at the option of the owner in the county and state where the land lies, or in the county and state in which the negligent act was committed, for the reason that the injury and the wrongful act must be deemed as having occurred together or in immediate connection.

The case of *Ruckman v. Green*, 9 Hun, 225, holds that an action may be maintained in the state of New York for an injury to land situate therein, though the business which occasions the injury and constitutes the nuisance complained of is carried on upon land situate in the state of New Jersey.

In the case of *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474, the act complained of was done in the state of Pennsylvania, the injury which was occasioned by the act was sustained in Ohio, and in that case it was held that the suit will lie in either state, the court stating that, "where an injury has been caused by an act done in one county, to land situated in another, the venue may be laid in either."

In the case of *Smith v. Southern Ry. Co.*, 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (N. S.) p. 927, it is held that a statute making an action for injury to real property local will not be arbitrarily enforced where the injury results from a cause or act arising or occurring in a state other than the one in which the property is situated. This case has an extended case note discussing jurisdictional questions such as the one in the instant case.

In the case of *Deseret Irr. Co. v. McIntyre*, 16 Utah, 398, 52 Pac. 628, which case is an action to determine the rights of the parties as to the waters of a stream flowing between a certain dam in Santete county and the canals of the plaintiffs in Miller county, and for a perpetual injunction to prohibit the defendants from using or interfering with the water of the river to which the plaintiffs claim to be entitled. In this case it was held that where a cause of action arises in two or more counties the plaintiffs may elect in which county they will bring their action, and that water wrongfully diverted in one county to the injury of plaintiffs' rights in another county constitutes one cause of action.

It will be readily seen that under either of the sections of the statutes above quoted, or under either of the line of authorities cited above, the plaintiff's action was properly brought in Fulton county, for an injury sustained to his lands in that county by a trespass committed in Pulaski county, and we hold that the circuit court of Fulton county had jurisdiction of the action.

[2] Appellees contend that the complaint is bad for the reason, that it fails to aver that the dam as constructed in June, 1905, and reconstructed thereafter, maintained the water level of the lake above the original water level of the lake as it existed prior to the time when the water therefrom was permitted to find its own way out of the lake into the drain below. But it is averred in the complaint that 30 or 40 years prior to the time of this action the state established and constructed a public drain as an outlet for the lake involved, and that about 20 years prior to the date of this action there was established by the decree of the Pulaski circuit court a public drain extending from the west end of Bruce lake substantially along the line of the original drain, deepening and widening and straightening said original

drain, and that such dredged ditch carried off the water from the plaintiff's lands and drains and from the Overmyer ditch, and kept the level of said lake reduced. The statute which appellee cites, being of Acts of 1905, p. 447, and in force March 6, 1905, and being section 6163, Burns' R. S. 1914, provides only for maintaining the water level of the lake at its established level.

This level, of course, was the level at which the lake was left by the construction and reconstruction of the ditch which was the outlet for the lake, and it was this level with which the defendants are charged with having interfered by the construction of the dam in June, 1905, and by the reconstruction thereof in 1910, in the first instance the water in said lake being raised from 12 to 18 inches above said established level, and in the second to a height of 12 inches above the height occasioned by the original construction. This action has nothing to do with the level of the lake as determined by its natural outlet.

It is specifically averred in the complaint that the public drain constructed 30 or 40 years before this action was commenced, and reconstructed about 20 years before, served as the outlet for the lake into the Tippecanoe river, and that the dam was erected at the outlet of the lake and adjacent to said lake, and though appellees contend that there is no averment in the complaint that the dam as constructed and reconstructed crossed any ditch, or any part of the same as it was originally constructed, it does not require any serious stretch of the imagination for us to conclude that the dam constructed at the outlet of the lake was constructed across such outlet, which was the ditch involved. At the time of the construction of such artificial outlet to the lake, it was not a violation of law to so construct it, and when the statute aforesaid was passed it only provided against a disturbance of the level of lake as established by such drainage. Under the facts averred in the complaint, the removal of the dam would not reduce the level of the lake below that which had been established by law, and therefore such removal could not be a violation of said section 6163, Burns' R. S. 1914.

[3] Appellees insist that, under the averments of the complaint, the nuisance complained of is a public nuisance only, and that therefore it can only be abated at the instance of the public; but while the averments of the complaint are sufficient to show that the conditions growing out of the construction of the dam created a public nuisance, yet such averments also show that such condition constitutes a private nuisance to the appellant in this, that his and his family's health, his buildings and his lands have been injured thereby, and it is a rule of law that where one's property is injured by a nuisance creat-

ed by another, the fact that the nuisance is a public one is no defense in an action for damages, and such person can sue to abate such a nuisance if he thereby suffers some special injury peculiar to himself. *Haller v. Pine*, 8 Blackf. 175, 44 Am. Dec. 762; *Schell v. Law*, 65 Ind. 332; *Dwenger v. Chicago & G. T. Ry. Co.*, 98 Ind. 153; *Waltman v. Rund*, 94 Ind. 225; *Haggart v. Stehlin*, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577.

[4] The appellees contend that the complaint fails to show a cause of action against either the secretary of the state or the county board of health. Instead of the county board of health, the action seems to be against George Thompson, secretary of the board of health. By the averments of the complaint, the charge is that the original construction was by "the Railroad Company and the other defendants herein," and that, after the dam was washed out as averred in the complaint, the defendants rebuilt it in a more substantial manner, and raised the dam 12 inches higher than it ever was before. Appellees say that the court judicially knows that the secretary of the state board of health has no power to make orders for the board of health, and that he is only one member of the board. If he had authority to make such orders, and he made them in the due course of his official duties, and injury resulted therefrom, it could hardly be said that he would be liable therefor; but if he acted, as appellees contend, wholly without authority, he would then be liable for every such act contrary to, or in excess of, the authority conferred upon him by virtue of his official position. 29 Cyc. 1441.

[5] Appellees say that because of the acquiescence of the appellant in the nuisance alleged to have been created by the appellees from the year 1910, until the time of bringing this action, which was in the year 1914, no injunction should now be entered; but it is held in the case of *Merchants' Mutual Telephone Co. v. Hirschman*, 43 Ind. App. 283-290, 87 N. E. 238, that the doctrine of ac-

quiescence does not apply to a nuisance unless it has continued for 20 years.

[6] We find no averment in the complaint that the appellees or any one of them at the time of the commencement of this action had any control over the dam in question, or that they were at said time maintaining it or had any right to destroy it or molest it. Without such averments and the proof thereof we do not see how the appellant expects to obtain the equitable relief by way of abatement and injunction which he seeks by his complaint.

In its present form we hold that the complaint is sufficient for the recovery of damages against the defendants, but that it is insufficient for the equitable relief by way of abatement and injunction which the plaintiff seeks, and under the authority of *Miller v. Gates*, 62 Ind. App. 37, 112 N. E. 538, *supra*, we hold that the complaint, although insufficient for injunctive relief, states facts sufficient to entitle the plaintiff to a judgment for damages, and therefore it will withstand the demurrer for want of facts. The demurrer to the complaint should have been overruled.

The judgment is reversed, with instructions to the trial court to overrule the demurrer to the complaint and for further proceedings.

H. LOHSE CO. v. DUDDENHAUSEN. (No. 10495.)

(Appellate Court of Indiana. June 19, 1919.)

Appeal from Industrial Board.

Proceeding before the Industrial Board between William C. Duddenhausen and the H. Lohse Company. From an award of the Board against it, the H. Lohse Company appeals. Award affirmed, with penalty.

J. W. Hutchinson, of Indianapolis, for appellant.

PER CURIAM. Award affirmed, with 5 per cent. penalty.

(236 N. Y. 450)

GROVES v. WARREN.

(Court of Appeals of New York. June 6, 1919.)

1. SALES $\$218\frac{1}{2}$ —PASSING OF TITLE—EVIDENCE.

In a suit by the buyer of a stock of goods for the conversion of the goods by the seller, plaintiff's evidence held at least to raise a jury question whether the title had passed though the purchase price was to be paid from the proceeds of sale by the buyer, any deficit to be made up by the buyer, so that it was error to dismiss the complaint at the close of the plaintiff's evidence.

2. SALES $\$199$ — PASSING OF TITLE — INTENT OF PARTIES.

The intent of the parties to a contract for the sale of a stock of goods in bulk as to the time title shall pass must control.

Chase, Collin, and McLaughlin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by George W. Groves against Guy S. Warren. A judgment of the Trial Term dismissing the complaint at the close of plaintiff's case was affirmed by the Appellate Division (178 App. Div. 333, 164 N. Y. Supp. 925), and plaintiff appeals. Reversed, and new trial ordered.

Martin S. Lynch, of Oswego, for appellant.
Frederick E. Hawkes, of Waverly, for respondent.

CRANE, J. This case was brought to recover the value of property consisting of boots and shoes taken from the possession of the plaintiff and converted by the defendant to his own use.

The plaintiff was a resident of the city of Buffalo, where he was trading under the firm name and style of G. W. Groves & Co. The defendant had a shoe store at 304 Broad street in the village of Waverly, Tlaga county, N. Y.

These parties entered into a business transaction by which the plaintiff claims that he purchased all of the defendant's stock and took the same into his own possession. The defendant says that the transaction did not amount to a purchase and sale, that he never parted with the title or possession of his goods, and that his disposition of them could not have amounted to a conversion.

At the end of the plaintiff's case the trial judge dismissed the complaint, and the Appellate Division has affirmed the judgment for the defendant by a divided court.

[1] The documentary evidence, together with the testimony, in our opinion, established a completed sale and delivery of the defendant's goods to the plaintiff, or at least presented a question for the jury as to wheth-

er or not there had been such an executed sale. To present the reason for our conclusion it will be necessary to state somewhat in detail the transaction between the parties.

Groves was engaged in conducting large sales of merchandise or in buying and selling stock on speculation. Warren, who had been conducting a retail shoe store, wanted to sell out and close up. He appealed to Groves as a means to this end. On July 9, 1915, Warren wrote to Groves:

"I received letter from you some time ago stating that you bought shoe stock and put on sale now. I have between five and six thousand dollar stock that I want to sell as I want to go out of business as I have too much other work to do. * * * What do you pay for entire stock?"

Groves answered the next day asking for a price on the stock. This was followed by a letter from Warren beginning:

"Your letter at hand and note what you say about buying my stock."

Then follows a description of the stock.

On the 20th of the month Groves writes a long letter, too long to be quoted in full, the pertinent part of which runs as follows:

"There is little need of us going to look your stock over unless you would be willing to sell the stock to us, and you can sell it to us if you will name the right price, but you will have to make a liberal sacrifice to sell it to us, as we buy stocks on speculation to make money and not with a view of continuing on with your business. If we bought your stock we would go there, start our own sale and sell the stock all out right where it is. We seldom ever move a dollar's worth of goods away."

Then follows a statement of what would be done in case Groves sold the goods on commission for Warren instead of buying his stock outright. He says:

"Our terms for conducting a sale are 10% commission on the gross sales, that is, on a small stock like yours and you to pay all expenses connected with the sale. We know that we advertise to pay one-half of the advertising expense of a sale, and we do, but we do not do it on such a small stock as yours. * * * We are inclosing you a contract, and if you will sign same and return it to us at once, we will give you quick action."

The inclosed contract was never executed.

On August 3d Groves again wrote to Warren a letter in which he said:

"If you do not want a sale, sell us your stock, or let us get up the advertising matter for you to operate a sale."

Seven days later Warren answered as follows:

"I have received several letters from you since I wrote you about my stock. Now I want to

close out all of it, as I have other business to attend to, but do not want to put on sale, as the expense is too much, and then I would have some stock left on my hand and my stock is all good. If you want it I will sell it out to you and then you can do as you please. The store could be had as long as you want at the same as I pay for it and will close it out to you at 80 ct. on the dollar, and I cannot see why there could not be good margin for you, as the stock is advancing all the time. Hoping to hear from you soon, as I want to get out as soon as possible. Perhaps it might pay you to come and see my stock."

Being impatient to sell, and not receiving a reply to this letter, Warren again wrote on September 2d, saying that he had not heard from Groves as to how much he would give him for his stock. On the 4th Groves wrote that he would send a man to look over the stock the following week. One or two other letters were exchanged, and finally, on October 26th, Groves made a proposition to purchase the entire stock. He wrote:

"Now, I have thought your proposition all over and have decided to make you one more proposition. We will give you 70 cents on the dollar for your stock. * * * If you accept this offer we will then start a big sale of that stock and we will pay you for the stock with the money we take in for the goods we sell during the sale, that is, the goods that belong to you, and we to pay the running expenses of the sale, which means clerk hire and advertising. If this is satisfactory to you we are ready to do business. It would seem to me that we could turn that stock into money inside of ten days. In fact, we feel we could get you the money that would be due you from the stock inside of one week."

Then follow these very important words:

"If you do not feel like selling us your stock at our price, you may feel like employing our services to put on a sale for you with a view of turning your stock into money, and if you do you can sign the contract we sent you July 20th and we will carry it out."

Three days later Warren closed the matter in these words written under date of October 29th:

"Well, I will take your offer."

There can be but one conclusion from this correspondence. Groves made two propositions—one to purchase Warren's stock outright as a speculation; the other to sell Warren's stock for him on a 10 per cent. commission basis, Warren to pay all expenses. The first proposition was the one accepted.

The contract was thereupon drawn up and executed reading as follows:

"Made and entered into this 10th day of December, 1915, between G. W. Groves & Co., of Buffalo, N. Y., party of first part, and Guy Warren, of Waverly, N. Y., party of second part, witnesseth: Party of first part agrees to

and by this contract does purchase of party of second part a certain stock of shoes and rubbers, etc. (not including fixtures), at inventory or cost from manufacturers or jobbers to second party, less 30 per cent. of said inventory or cost price, except a certain specified few pairs of shoes and rubbers, a list and inventory of which is attached hereto, and party of second part shall receive inventory or cost for these few pairs, being stock purchased by second party during last part of 30 days. Party of first part agrees to put on sale of above-mentioned stock in the store of second party at 304 Broad Street, and party of second part agrees to take his pay in the following manner: At the close of each day's sale, parties of first and second part shall count up and check the cash taken in during the day, and party of second part shall keep such cash until he shall have received the amount due him on this contract, and in case sales of entire stock should not equal purchase price of stock, party of first part agrees to make up said difference at close of sale. Party of first part agrees to pay the clerk hire and advertising expense of conducting the sale, such expenses to start from the time the inventory is completed. Party of second part by this agrees to give his services without charge until his claims are satisfied and he shall have received all his money due him under this contract, and also to give possession of store without charge until the end of sale."

An inventory of the shoe store in Waverly was thereupon made by Groves and his employees, and sales advertised and conducted until Warren had received \$3,525.23 upon the purchase price according to the contract. The sales began on the 15th of December, going somewhat slower than had been anticipated, so that the stock had not been fully disposed of by February of the following year. It was conceded upon the trial that the inventory value of the stock was \$5,901.33. The purchase price, therefore, being 70 per cent. of this amount, equaled \$4,130.93, and the balance due the defendant, Warren, at the times herein mentioned was about \$605.70. On February 28th Warren, over the protest of Groves and his representatives, removed the balance of the goods from the store and disposed of them. These were valued at about \$2,600.

I fail to appreciate the defendant's position or to understand how he considered himself to have either the possession or title to these goods. The correspondence we have read. The contract is plain and direct in terms, and the acts of the parties under it speak a completed sale. The key to the store Warren delivered to Johnson, the plaintiff's employé in charge. The inventory made up was dictated by Guy S. Warren and was headed, "George W. Groves, December 10th;" that is, the inventory showed the property of George W. Groves. The expenses of the sales were met by Groves; the defendant merely paying rent for the store. When the defendant arranged for the leasing from

month to month, he told Harry W. Knapp, the agent, that he had sold out to Groves.

In our opinion here was evidence of a completed sale. Warren wanted to sell; he accepted an offer made for his stock; he turned it over to the vendee who had possession for the purpose of resale as contemplated by the parties. The larger part of the purchase price had been paid, and the acts and admissions of the defendant show that he understood that his goods had been sold to Groves. We can think of nothing that the vendor was obliged to do to make delivery complete, and the only thing remaining undone by the vendee was the payment of the balance of the purchase price. In fact, by the articles of agreement he had undertaken to pay the difference between his purchase price and the amount received from the auction sale should the latter not equal the purchase price which Groves had agreed to pay. This certainly is inconsistent with the claim that no title was to pass until the sales amounted to the purchase price.

[2] The rule in all these cases is that it is the intention of the parties which must control. *E. S. T. F. Co. v. Grant*, 114 N. Y. 40, 21 N. E. 40; *Burrows v. Whitaker*, 71 N. Y. 291, 27 Am. Rep. 42. It is quite evident that an executed contract of sale was the intention of both Groves and Warren. When the terms of a sale are agreed on and the bargain is struck, and everything that the seller is to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or the delivery of the property, and the risk of accident to the goods vests in the buyer. *Groat v. Gile*, 51 N. Y. 431.

We have in this case more than mere intention; we have the parties acting and speaking upon the assumption of a completed sale.

As the matter stood at the end of the plaintiff's case it was error for the court to dismiss the complaint. In our opinion, for the reasons above stated, Warren had sold his goods to Groves, and was not justified in taking them back. His action amounted to a conversion of them. Only one side of this case has been heard. On a new trial evidence for the defendant may in some particular contradict or modify the record as it now stands, and we do not desire to be understood as stating that upon the correspondence and agreement a verdict should be directed for the plaintiff. It may be that the intention of the parties will become a question of fact, and that the jury must pass upon it. All we hold at this time is that on the record as it now comes before us the complaint should not have been dismissed, but at least the question whether or not the parties intended a completed sale should have been submitted to the jury.

The judgment should be reversed, and a new trial ordered; costs to abide the event.

HISCOCK, C. J., and CUDDEBACK and HOGAN, JJ., concur.

CHASE, COLLIN, and McLAUGHLIN, JJ., dissent.

Judgment accordingly.

(226 N. Y. 338)
STRUZEWSKI et al. v. FARMERS' FIRE INS. CO.

(Court of Appeals of New York. May 20, 1919.)

1. PLEADING \S 248(5) — AMENDMENT — NEW CAUSE OF ACTION.

In an action on a fire policy, it was error to permit plaintiff to amend to allege an oral contract with the insurer, through its agent, to renew his insurance at the end of each expiring three-year period.

2. INSURANCE \S 131(1) — FIRE INSURANCE — ORAL AGREEMENT TO INSURE.

An agreement to insure against fire need not necessarily be in writing.

3. INSURANCE \S 145(2) — FIRE INSURANCE — AUTHORITY OF AGENT.

Real estate broker, also agent under written appointment for a fire insurer, held unauthorized to make an oral contract, with a purchaser of realty through him, to forever renew a fire policy at the expiration of successive three-year periods.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John Struzewski and another against the Farmers' Fire Insurance Company. From a judgment for plaintiffs, defendant appealed to the Appellate Division, which affirmed (179 App. Div. 318, 166 N. Y. Supp. 362), and defendant appeals. Reversed, etc.

Vernon Cole, of Buffalo, for appellant.

Joseph A. Wechter, of Buffalo, for respondents.

CRANE, J. The plaintiff was the owner of a two-story frame building in Depew, N. Y., which he had purchased through Elwin B. Rowley, an agent in the real estate transaction. Rowley was also in the insurance business, and in behalf of the plaintiff insured this house in the Farmers' Fire Insurance Company for three years in the sum of \$800. The first policy was dated October 22, 1903, and expired on the same day of the month in 1906. The house burned down on October 24, 1915, and this action was commenced by the plaintiff to recover the insurance, on the assumption that he had a renewal policy for

three years from October 22, 1915. He had no such policy; his last renewal having expired two days before the fire.

His complaint alleged a cause of action upon a policy of insurance, as though it had been issued and renewed by the defendant, but upon the trial he was permitted to amend his pleading, so as to allege an oral contract with the defendant, through its agent, Rowley, to renew his insurance at the end of every expiring three-year period.

[1] To this amendment the defendant's counsel seriously objected as wholly changing the cause of action. In this he was right. The case of *Walrath v. Hanover Fire Insurance Co.*, 216 N. Y. 220, 110 N. E. 426, decided that it was error to amend a complaint upon the trial setting up an agreement to insure when the action was brought upon an executed contract of insurance. This would of itself require a reversal of the plaintiff's judgment, but we pass on to the other points which we deem vital to any recovery.

The plaintiff's recovery was based entirely upon an alleged contract, of which his testimony furnishes the only evidence, and is as follows:

"A. When I got the title, received my deed, I want to get fire insurance, too, and I asked him about this company, that is, the Farmers' Fire Insurance Company, and he says it is the best fire insurance what he knows. He says he is going to renew it every time; he says he can renew it every three years, and he is going to send it to me, and renew it every three years, and send it up to me. Q. Did he say in what company he would keep you insured? A. Yes, sir. Q. In what company? A. The Farmers' Fire Insurance Company."

Thereafter, at the expiration of the policy, Rowley did send renewals to the plaintiff through the mail up to October 22, 1915, when he failed to do so because, as he said, the plaintiff had moved without leaving his address. In our opinion the plaintiff's recovery cannot be sustained, for the reason that there is no evidence that Rowley had any authority from the insurance company, as its agent, to make such a broad and sweeping contract for the future.

The authority which Elwin B. Rowley had to act for the Farmers' Fire Insurance Company was contained in a certificate of agency reading in part as follows:

"This certifies that Elwin B. Rowley, of Depew, county of Erie, state of New York, is hereby appointed and duly constituted as agent of the Farmers' Fire Insurance Company, of York, Pa., during the pleasure of said company, and as such agent is hereby authorized and empowered to receive proposals for insurance against loss or damage by fire, and countersign and issue policies of insurance and renewals in the city of Depew and vicinity, to receive money, to join in assignments and transfers and indorsements made thereon, and to do and transact all business and duties pertaining

to said appointment in the manner and form prescribed from time to time by the company."

[2] There is nothing here to indicate that he had authority to bind the defendant by oral agreements running indefinitely into the future. The case of *Sculer v. Hanover Fire Insurance Co.* of N. Y., 162 N. Y. 552, 57 N. E. 93, 76 Am. St. Rep. 349, holds that where an agent has power to issue a renewal policy, and on the eve of expiration agrees to renew, the company is bound by such an agreement. If in this case Rowley had agreed to renew the plaintiff's policy at or near the time of expiration, his failure so to do would be charged to the company. An agreement to insure need not necessarily be in writing. *International Ferry Co. v. American Fidelity Co.*, 207 N. Y. 350, 101 N. E. 160.

[3] We are here, however, dealing with a question of authority which must have reasonable limitations, and we find nothing in the evidence of any practice or custom which would justify an agent in binding his principal by an oral agreement to renew a policy at the expiration of every three years without further notice. The extent to which such a rule would carry us is illustrated by the charge to the jury in this case wherein the court said:

"He [the agent] should ascertain or make some attempt to ascertain where he [the insured] had moved to, and not let a valuable contract expire to the possible loss of his client."

The agent may bind himself personally to an agreement which would not be binding upon his company, and in this case the agent did this very thing. He was interested in the sale of the house to the plaintiff; he was the real estate agent, and agreed with the purchaser that he (Rowley) would keep the premises insured, and would renew it every time. This was his individual contract, and not that of the defendant. He had, as we have already stated, no authority to make an oral contract to forever renew the policy at the expiration of each three-year period without further notice. The renewals are expected to be in writing, the same as the original policy of insurance, and it is only when the insured relies upon the statements of an agent, made within the scope of his authority, that the company may be held for those acts which the agent should have performed, but failed to do. An immediate renewal, or an agreement to issue a renewal policy for one about to expire, upon which agreement the insured relies, is an entirely different thing from an agreement to keep premises forever insured by renewals for years to come. This reasoning is in line with the authorities. *Shank v. Glens Falls Insurance Co.*, 4 App. Div. 516, 40 N. Y. Supp. 14; *Wood v. Prussian National Insurance Co.*, 99 Wis. 497, 75 N. W. 173; *Brown*

v. Dutchess County Mutual Insurance Co., 64 App. Div. 9, 71 N. Y. Supp. 670; Benner v. Fire Association of Philadelphia, 229 Pa. 75, 78 Atl. 44, 140 Am. St. Rep. 706; American Central Insurance Co. v. Hardin, 148 Ky. 246, 146 S. W. 418; Underwood v. Penn. Fire Insurance Co., 134 N. Y. Supp. 105.

We do not consider the case of Trustees of the First Baptist Church v. Brooklyn Fire Insurance Co., 19 N. Y. 305, an authority to the contrary. The agreement in that case was apparently made by the company itself, and involved no question of an agent's authority. Besides, the plaintiff offered to prove a usage of the defendant to make verbal agreements to renew policies until further notice.

For these reasons, and without discussing the other questions and points which have been raised, the judgment in this case must be reversed, and a new trial granted, with costs to abide the event.

COLLIN, CUDDEBACK, CARDOZO, POUND, and ANDREWS, JJ., concur. HIS-COCK, C. J., not sitting.

Judgment reversed, etc.

(226 N. Y. 453)

PEOPLE ex rel. BRIGGS v. HANLEY, Warden, etc.

(Court of Appeals of New York. June 6, 1919.)

1. RECEIVING STOLEN GOODS — GUILTY.

Where a clerk in the transfer department of a trust company feloniously obtained a credit with another trust company, the credit belonging in fact to the firm defrauded, a woman who received from the clerk, with knowledge of the facts, money drawn from the trust company against the credit, was guilty, under Penal law, § 1308, of receiving stolen goods.

2. LARCENY — BY CLERK — DRAWING ON FALSE CREDIT.

A clerk of a trust company, who fraudulently obtained possession of certificates of stock, forged the necessary signatures thereon, and procured a loan and the entry of a credit with another trust company to the amount of the loan, and drew on such credit, committed larceny as to the amount so drawn.

Appeal from Supreme Court, Appellate Division, First Department.

Habeas corpus by the people of the State of New York, on the relation of Elizabeth D. Briggs, against John J. Hanley, Warden, etc. From an order of the Appellate Division (185 App. Div. 667, 173 N. Y. Supp. 693) affirming an order of the Special Term sustaining the writ and discharging relator, the People appeal. Orders reversed.

Edward Swann, Dist. Atty., of New York City (Robert C. Taylor, of New York City, of

counsel), for appellant. David J. Wagner, of New York City, for respondent.

McLAUGHLIN, J. On the 24th of July, 1917, upon a charge of criminally receiving stolen property, the relator was committed by a magistrate of the city of New York to the city prison to answer to the Court of General Sessions. She procured a writ of habeas corpus, and after a hearing thereon an order was made sustaining the writ and discharging her from custody. On appeal to the Appellate Division the order was affirmed, one of the justices dissenting, and the people now appeal to this court.

The facts upon which the warrant was issued for the arrest of the relator, and upon which she was held to await the action of the grand jury, were not controverted upon the hearing which resulted in her discharge in the habeas corpus proceeding. The question presented on this appeal, therefore, is whether, upon such facts, the magistrate erred in committing the relator.

The determination of this question necessitates a statement of the facts involved in or immediately connected with relator's arrest, commitment, and discharge. In this connection it appeared that in October and November, 1913, one Foye, who was a clerk employed in the transfer department of a trust company in the city of New York, fraudulently obtained possession of and forged the necessary signatures to certain certificates of stock of a corporation, by means of which he obtained from Charles T. Brown & Co., of Philadelphia, three loans aggregating \$100,000. The transaction which resulted in the loans was by correspondence; Foye giving his promissory notes and putting up the forged certificates of stock as collateral security for their payment. Charles T. Brown & Co., upon receipt of the notes and certificates of stock, paid to certain banks or trust companies in Philadelphia the amounts called for, and they in turn telegraphed their correspondents in New York to place such amounts in the Knickerbocker Trust Company of New York to the credit of Foye, which they did by means of checks payable through the clearing house. When the transaction was completed, Foye thus had to his credit in the Knickerbocker Trust Company, by reason of the fraud practiced upon Brown & Co., \$100,000, less commissions and interest, and this is all the credit he had. No other moneys were ever paid to the trust company or mingled with the credit thus given. Some time prior to Foye's obtaining this credit he had formed an acquaintance with the relator, which had ripened into relations which it is unnecessary to state, it being sufficient to say that he had told her how he could "steal" from \$10,000 to \$100,000, but to do so might result in his being sent to prison. She urged him to do it, and when he had obtained the loan of the first \$10,000, he in-

formed her. She congratulated him on his success and suggested that they elope to California. This he declined to do until he had gotten "some more of this easy money." He told her he expected to get in the neighborhood of a quarter of a million dollars, and where and how easy it would be to get it. After he had obtained the loans of \$100,000, he told her he had given his wife \$20,000 to protect her in case he were arrested, and she thereupon suggested that he also give her \$20,000 to protect her in case of his arrest. Thereupon he agreed to give her \$20,000 to open a bank account and later to invest in stocks and a further sum of \$1,000 for expenses and clothing for her use on their prospective trip to California. Having obtained the credit in the trust company in the manner indicated for nearly \$100,000, he drew a check, payable to his own order, on the trust company for \$25,000, which amount was paid to him. He then telephoned the relator, they met at a restaurant, and he told her he had drawn out \$25,000 of the "easy money," \$21,000 of which he had in an envelope in his pocket for her. After having lunch they entered a taxicab for the purpose of going to the Astor Trust Company, where she was to deposit the money under the name of Elizabeth B. Austin. On the way to the trust company she asked to see the money. He took it out of the envelope, showed it to her, counted it, and then gave it to her, telling her how to deposit it and after doing so to meet him at a place designated. She entered the trust company, made the deposit as directed, subsequently met him at the time and place agreed upon, and exhibited to him the passbook of the trust company with the \$21,000 credited thereon. Shortly thereafter Foye was arrested on a warrant issued in the commonwealth of Pennsylvania, extradited to that state, and convicted of fraudulently making a written instrument, for which he was sentenced to a term of from five to ten years in the state penitentiary.

[1] The facts presented before the magistrate clearly and unmistakably demonstrated that the relator knew when Foye gave her the \$21,000 mentioned that it was a part of his credit in the trust company, obtained through his fraud upon Brown & Co. Did the relator's receiving this money, with such knowledge, constitute receiving stolen property within the meaning of the statute? I have no doubt it did. The statute (Penal Law [Consol. Laws, c. 40] § 1308) provides that:

"A person, who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this article, knowing the same to have been stolen or so dealt with, or who corruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this article, if such misappropriation has been committed

within the state, whether such property were so stolen or misappropriated within or without the state, * * * is guilty of criminally receiving such property. * * *

Her act in receiving the money and appropriating it to her own use brought her fairly within the meaning of the statute. In criminal as well as civil cases the law looks to substance, and not to form. Thus it has been held in civil cases that whisky made from corn wrongfully and unlawfully taken from the owner may be seized by him (*Silsbury v. McCoon*, 8 N. Y. 379, 53 Am. Dec. 307); that the owner of negotiable securities stolen and afterwards sold by the thief may follow and claim the proceeds in the hands of the felonious taker, or his assignee with notice (*Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152); that where money is obtained from another by fraud and felony, the wrongdoer obtains no title, and the owner may reclaim it if found in the possession of the wrongdoer, or he may follow it into the hands of any person who received it without consideration, or with notice of the fraud by which the same was obtained; that, if such money be deposited in a bank, it still remains the money of the owner, the bank being a mere depository, and, while it so remains, the owner can compel the bank to restore it to him (*Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511; *Tradesman's Bank v. Merritt*, 1 Paige, 302; *Mechanics' Bank v. Levy*, 3 Paige, 606; *Pennell v. Duffell*, 4 De Gex, M. & G. 372).

In the present case, when the facts are stripped of legal fiction as to the identity of money, the transaction amounted to this: Foye, by means of a felonious act practiced upon Brown & Co., obtained a credit in the Knickerbocker Trust Company. This credit, however, as between him and Brown & Co., belonged to the latter. It was a stolen credit, and money drawn from the trust company by reason of it was stolen money. *People v. Lammerts*, 164 N. Y. 137, 58 N. E. 22; *People v. Dimick*, 107 N. Y. 13, 14 N. E. 178. The money, in fact, belonged, not to him, but to Brown & Co. (*Rothschild v. Mack*, 115 N. Y. 1, 21 N. E. 726), who could have retaken the same from him or any other person who took the same with notice.

[2] When Foye drew \$25,000 from the trust company, he committed a larceny. When the relator accepted \$21,000 of the same money, knowing it had been stolen, she was guilty of receiving stolen property, and the magistrate did not err in committing her to await the action of the grand jury.

The orders of the Appellate Division and Special Term should therefore be reversed, the writ of habeas corpus dismissed, and the relator remanded to the custody of the defendant.

CHASE, COLLIN, CUDEBACK, HOGAN, and CRANE, JJ., concur.
HISCOCK, C. J., not voting.

Ordered accordingly.

(233 Mass. 321)

KIMBALL v. WHITNEY.**SAME v. BATES.**(Supreme Judicial Court of Massachusetts.
Suffolk. June 26, 1919.)**1. TRUSTS ⇨179—CONDUCT OF TRUSTEES—STANDARD OF GOOD FAITH AND DISCRETION.**

Good faith and sound discretion, as those terms should be understood by reasonable men of good judgment, are the standard by which the conduct of trustees is to be measured.

2. TRUSTS ⇨217(4)—DUTY OF TRUSTEE—INVESTMENT.

Though some investment of trust funds in certain securities might be justified, a disproportionate amount of the total should not be embarked in a single kind of stock or bonds.

3. TRUSTS ⇨217(4)—INVESTMENT OF FUNDS—PROPRIETY.

Investment of trust funds in preferred shares of the Massachusetts Electric Companies in February, 1903, held not improper and unwarranted as matter of law.

4. TRUSTS ⇨217(4)—INVESTMENT OF FUNDS—PARTNERSHIP.

Investment of trust funds in preferred shares of the Massachusetts Electric Companies, a trust owning controlling stock interests in various public utilities, was not unwarranted as a matter of law, even if the electric companies' trust was a partnership.

5. TRUSTS ⇨217(4)—INVESTMENT OF FUNDS—RETENTION OF FALLING SHARES.

Trustee's retention of shares in the Massachusetts Electric Companies, and failure to sell them before the end of his period of accounting, held not improper as matter of law under all the circumstances, though the market had been falling.

Report from Supreme Judicial Court, Suffolk County.

Petition by Benjamin Kimball, trustee under the will of Mary Bates, for allowance of his account, opposed by Harriet A. Whitney and by Mary E. Bates. From a decree allowing the modified first account, opponents appealed to the Supreme Judicial Court. On report by a single justice for the consideration of the Full Court. Decree of probate court affirmed.

John Noble, of Boston, for appellants.
Warner, Stackpole & Bradlee, of Boston (John G. Palfrey and Howland Twombly, both of Boston, of counsel), for appellee.

RUGG, C. J. These are two appeals from a decree of the probate court allowing an account of a trustee under the will of Mary Bates. The matters now in controversy relate to certain aspects of the propriety of an investment made by the trustee in February, 1903, of a part of the principal of the trust

in so-called preferred shares of the Massachusetts Electric Companies at the market price then prevailing, and to the retention of this investment to the end of the period of the account in 1917. The case comes before us by report upon agreed facts. The facts now pertinent to the decision are that the Massachusetts Electric Companies was an unincorporated association organized and existing under a written instrument entitled "Agreement and Declaration of Trust," dated in June, 1899. The general features of this agreement were similar to those which have come before the court in numerous cases. Property is transferred to trustees, who hold the legal title to all the assets belonging to the trust and exercise the exclusive management and control of it under the terms of the agreement. Certificates of part ownership, resembling shares of stock in a corporation, are issued to those who are the ultimate owners of the property. See *Peabody v. Treas. & Recvr. General*, 215 Mass. 129, 102 N. E. 435, and cases there collected, and *Kennedy v. Hodges*, 215 Mass. 112, 114, 102 N. E. 432.

The Massachusetts Electric Companies acquired all or a large and controlling majority of the capital stock of thirty-six street railway and electric light corporations in Massachusetts, Rhode Island and New Hampshire. "The companies were merged from time to time and in 1906 consisted of the Boston & Northern Street Railway Company, the Old Colony Street Railway Company, and the Hyde Park Electric Light Company. Prior to 1912 the stock of the Hyde Park Electric Light Company was sold and the two other companies were merged, and the name of the consolidated company was changed to the Bay State Street Railway Company, of which the Massachusetts Electric Companies owned substantially all the common stock, being a large and controlling majority of all the stock. The Massachusetts Electric Companies did not act as an operating company except through its control of the subsidiary corporations, which operated the properties in question. The business of the Massachusetts Electric Companies consisted of holding the stock of the subsidiaries and supervising their management by means of stock control, and assisting in their financing. * * *

Previous to February 26, 1903, a large number of trustees in Massachusetts had invested trust funds in the preferred shares of the Massachusetts Electric Companies and held those investments on that date. Before making the investment in question, the trustee made reasonable inquiry among bankers and brokers to ascertain how they regarded the investment, and received favorable opinions. He acted in entire good faith and so far as the financial and general business conditions and prospect of earnings of the Massachusetts Electric Companies and of the prop-

erties controlled by it were concerned there was then no reason to believe the investment to be otherwise than financially sound." Regular dividends out of earnings at the rate of 4 per cent per annum were paid on these shares to and including July 1, 1904. After that none were paid until January, 1909, and since July 1, 1910, in general they have been paid at the rate of 2 per cent. In 1912 an issue of new preferred shares was made to take up 17½ per cent of dividends then accumulated. The market value has much diminished.

[1] The rule of law in this commonwealth governing the conduct of trustees in the investment of the principal of their funds was stated in these words in 1830 in *Harvard College v. Amory*, 9 Pick. 446, 461:

"All that can be required of a trustee to invest is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested."

Good faith and sound discretion, as these terms ought to be understood by reasonable men of good judgment, were thus made the standard by which the conduct of trustees is to be measured. That is a comprehensive principle. It is wide in its scope. It is not limited to a particular time or a special neighborhood. It is general and inclusive, so that while remaining itself fixed, it may continue to be a safe guide under new financial institutions and business customs, changed commercial methods and practices, altered monetary usages and investment combinations. It avoids the inflexibility of definite classification of securities, it disregards the optimism of the promoter, and eschews the exuberance of the speculator. It holds fast to common sense and depends on practical experience. It is susceptible of being adapted to whatever conditions may arise in the evolution of society and the progress of civilization. Although more liberal to investing trustees than the law of some states and countries, it has frequently been reaffirmed and never doubted in this jurisdiction. *Lovell v. Minot*, 20 Pick. 116, 32 Am. Dec. 206; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Pine v. White*, 175 Mass. 585, 590, 56 N. E. 967; *Green v. Crapo*, 181 Mass. 55, 62 N. E. 956; *Corkery v. Dorsey*, 223 Mass. 97, 101, 111 N. E. 795.

[2] In the application of this rule to varying facts it often has been held that, while some investment of trust funds in certain securities might be justified, a disproportionate amount of the total ought not to be embarked in a single kind of stock or bonds. *Dickinson, Applt.*, 152 Mass. 184, 25 N. E. 99, 9 L. R. A. 279; *Davis, Appeal of*, 183 Mass. 499, 67 N. E. 604. That particular point is not within the present report and therefore

is not before us. Several cases have arisen where the facts showed improper investments in improvements upon real estate. *Brigham v. Morgan*, 185 Mass. 27, 69 N. E. 418; *Warren v. Pazolt*, 203 Mass. 328, 89 N. E. 381. In *Taft v. Smith*, 186 Mass. 81, 70 N. E. 1031, a second mortgage upon real estate, and in *Thayer v. Dewey*, 185 Mass. 68, 69 N. E. 1074, land in another state were held not improper investments as matter of law upon the facts disclosed. It was decided in *Kinmonth v. Brigham*, 5 Allen, 270, 279, that the investment in a trading partnership could not be sanctioned.

The precise point reported for our determination is "whether the organization of the Massachusetts Electric Companies was such on February 28, 1903, that the investment of any portion of the trust funds in its preferred shares was as matter of law improper." Put in another way, it is, whether a finding that such investment was proper as matter of fact must be pronounced wrong as matter of law. The form of the report imports a finding of all facts, so far as the facts can go, in favor of the investment.

[3] Tested by the standard established by our law, it cannot quite be said that in February, 1903, the investment of any portion of trust funds in preferred shares of the Massachusetts Electric Companies was improper and unwarranted as matter of law.

It might have been found from the nature of the properties held by the companies, the character of the agreement and the general purposes of the so-called trust, that it was designed as a permanent investment, that the combination in a single ownership of the stock of so many different public service corporations covering such extent of territory and serving as matter of common knowledge numerous populous communities, was expected to equalize fluctuations of earnings and to stabilize the rate of dividends. The corporations whose securities were held were not in process of construction but were completed properties in actual operation. The extent of their earnings is not shown, but regular payments in way of dividends were made until a considerable period after the present investment was made. The form in which the case is presented to us warrants and even requires the assumption that the earning power of the public service corporations whose securities were owned had been sufficiently tested so that at the time of the investment prudent and sagacious men of experience made purchases of these shares for permanent holding.

[4] In the light of the agreed facts and the form of the report it is not necessary to determine whether the agreement and declaration of trust constituted a partnership among the shareholders as in *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808; *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009 (see *Dana v. Treasurer & Receiver General*,

227 Mass. 562, 116 N. E. 941), or a trust as in *Williams v. Milton*, 215 Mass. 1, 102 N. E. 355, where most of the earlier cases are reviewed. Assuming for the purposes of this decision that it was a partnership does not render the investment unwarranted as matter of law. On that assumption it was a partnership of a peculiar kind. It was not an ordinary business, commercial or trading partnership. The nature of its authorized investments seemingly removed it as far as possible from the common incidents of a co-partnership adventure. Apparently it was guarded as fully as was practicable from speculative features and the oscillations of value incident to varying conditions of trade. There is nothing in the record to indicate that the amount of shares issued exceeded a conservative valuation of the securities owned. The rights of the shareholders were carefully guarded by the terms of the agreement. Their responsibility was reduced to a minimum so far as possible by written statement of obligations. It was expressly stated that the trustees had no power to bind the shareholders personally. All persons dealing with the trustees were confined by the agreement to the property of the so-called trust to the exoneration of shareholders. See *Hussey v. Arnold*, 185 Mass. 202, 204, 70 N. E. 87; *Williams v. Boston*, 208 Mass. 497, 501, 94 N. E. 808; *Carr v. Leahy*, 217 Mass. 438, 440, 105 N. E. 445; *Rand v. Farquhar*, 226 Mass. 91, 96, 115 N. E. 286. It was required of the trustees to stipulate in every obligation into which they might enter that the shareholders should not be held liable personally. Whatever may be held ultimately as to the force and effect of those terms in the trust agreement, they manifest an effort to reduce the liability of the shareholders to the lowest limit. In any event, such liability of shareholders was not greater than the liability of stockholders in manufacturing corporations at the time the investment was made, which was before the court in *Harvard College v. Amory*, 9 Pick. 446. See *Child v. Boston & Fairhaven Iron Works*, 137 Mass. 516, 50 Am. Rep. 328, for an historical review of our statutes respecting stockholders' liability for debts of the corporation. The exercise of sound judgment and good faith and a strict compliance with the terms of the agreement by the trustees would have a strong tendency to relieve the shareholders from all responsibility. The kind of corporations in which the trustees were to hold stock were chiefly and primarily public service corporations operating mainly in this commonwealth, and of corporations incidental to or furnishing supplies to such public service corporations. The law of this commonwealth for many years has made provision for careful supervision of the issue of stocks and bonds of public service corporations to the end that such securities may rep-

resent only honest investment necessary for valuable use to the public.

The agreed facts show that good faith and sound discretion, measured by the prevailing practice of men of experience and good judgment in such matters, was exercised in making the investment here assailed. That is the standard as established by the authorities to which reference has been made. Giving due weight to all the considerations affecting the trust agreement, no sufficient reason appears for declaring the investment unwarranted. The case is close, but falls within the rule of *Harvard College v. Amory*, *ubi supra*.

[5] The retention of these shares and the failure to sell them before the end of the period of accounting cannot be pronounced improper as matter of law under all the circumstances. The decision of the question whether to sell an investment of trust funds on a falling market is a perplexing one. The agreed facts are that "except in so far as the propriety of retaining the investment was affected by the character of the organization in contemplation of law, there was nothing in the future outlook for the Massachusetts Electric Companies and its subsidiaries which required the trustee as matter of sound discretion to dispose of the shares." The case upon this point is governed in principle by *Bowker v. Pierce*, 130 Mass. 262.

Decree of probate court affirmed.

(233 Mass. 232)

DRISCOLL v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 24, 1919.)

STREET RAILROADS §93(4) — INJURIES ON TRACK — LIABILITY.

Where a pedestrian started to cross a well-lighted street, not near a crosswalk in front of a trolley car moving about 10 miles an hour, 50 to 75 feet away, and the motorman rang his gong and braked the car down to 4 or 5 miles an hour, doing all he could to stop, the street railway was not liable for the death of the pedestrian, when struck by the corner of the car without walking in front of it.

Report from Superior Court, Suffolk County; Lloyd E. White, Judge.

Action by Julia B. Driscoll, administratrix, against the Boston Elevated Railway Company, resulting in directed verdict for defendant. On report to the Supreme Judicial Court. Judgment for defendant on the verdict.

Herbert A. Kenny, of Boston, for plaintiff.
Fletcher Ranney and Thomas Allen, Jr., both of Boston, for defendant.

PER CURIAM. This is an action to recover damages for the death of John Walsh. The evidence in its aspect most favorable to the plaintiff tended to show that on a clear November evening the deceased started to cross a well-lighted Boston street, not near a stopping place for cars or crosswalk, when a trolley car of the defendant, properly lighted and then proceeding at about 10 miles an hour, was 50 to 75 feet away. The motorman sounded his gong repeatedly and was seen to be "working his brake handle." "The car slowed down to about 4 or 5 miles an hour." The deceased paid no attention to the car and, without walking in front of it, came into collision with its forward corner. The car stopped within 4 or 5 feet. The testimony of the motorman was that he "shut off the power * * * and threw over the reverse lever, and put on a notch or two of power, at the same time putting on his brake. * * * As soon as his reverse was set he eased his brake a little, to give the reverse a chance to work. * * * When going forward you have first to overcome the forward motion of the wheels before they will revolve backward. He did all he could to stop the car, but did not have space enough."

It is manifest that as matter of law there was no evidence to warrant a verdict for the plaintiff. *Boyle v. Worcester Consolidated Street Railway*, 231 Mass. 184, 120 N. E. 398, *Anger v. Worcester Consolidated Railway*, 231 Mass. 163, 120 N. E. 399, and decisions collected in each opinion; *Pigeon v. Massachusetts Northeastern Street Railway Co.*, 230 Mass. 392, 119 N. E. 762.

Judgment for defendant on the verdict.

(233 Mass. 210)

EASTERN FUR & SKIN CO. v. STERNFELD et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 23, 1919.)

1. GARNISHMENT §205—CLAIM TO PROPERTY.

In an action of contract, begun by trustee process, an alleged trustee rightly called the attention of the court to the claim of a bank to certain property in its hands as trustee, and it was proper to admit the bank as a claimant.

2. GARNISHMENT §110—TRUSTEE AS STAKEHOLDER.

An alleged trustee is merely a stakeholder, and has no further interest in the proceeding when once plaintiff and all claimants of the property trusted are before the court, except to see that he is put in no worse position by reason of the trustee proceeding than he would have been if it had not been instituted.

3. GARNISHMENT §204—MOTION BY CLAIMANT FOR DISCHARGE OF TRUSTEE.

Claimant of trusted property rightly was permitted to move that the trustee be discharged

on its answers, not being precluded from showing there was no fund in the hands of the alleged trustee.

4. GARNISHMENT §144—ANSWER OF TRUSTEE.

In trustee proceedings, on motion of a claimant for discharge of the trustee on its answers, such answers, based somewhat on hearsay and on information and belief, but made fairly, were entitled to consideration.

5. GARNISHMENT §148—FACTS STATED BY TRUSTEE—CONCLUSIVENESS.

Assertions concerning facts stated by the trustee merely on information and belief do not bind plaintiff, or prohibit him from showing the facts.

6. GARNISHMENT §165—DISCHARGE OF TRUSTEE.

In an action of contract wherein a warehouse company was trustee, held that, on its answers, such trustee should have been discharged on motion of a claimant, such answers showing a transfer of the receipts representing the trusted property prior to the attachment.

Exceptions from Superior Court, Suffolk County; William Cushing Wait, Judge.

Action by the Eastern Fur & Skin Company against Henry Sternfeld and others to recover from defendants a balance alleged to be due for goods sold to them, resulting in an order allowing the motion of adverse claimant, the Tradesmen's National Bank, for discharge of the trustee, and plaintiff excepts. Exceptions overruled, and order affirmed.

W. E. Waterhouse and G. L. Mayberry, both of Boston, for plaintiff.

R. G. Dodge, of Boston, for claimant.

RUGG, C. J. This is an action of contract. The defendants are nonresidents, upon whom no personal service has been made. The Lynn Storage Warehouse Company, amongst others, was summoned as trustee. It filed an answer to the effect that it had no goods, effects, or credits of the principal defendants in its hands at the time of the service of the writ. It answered certain interrogatories propounded by the plaintiff. Thereafter the Tradesmen's National Bank of Philadelphia was admitted as a claimant, in its own right and adversely to the plaintiff, to certain goat skins in the hands of the warehouse company.

The answers to interrogatories showed that the principal defendants stored with the warehouse company certain goat skins in July, 1917, and nonnegotiable warehouse receipts were issued to them; that "about noon on October 4, 1917, somebody purporting to act for Sternfeld, Weil & Co. requested that receipts for the lots of goatskins, heretofore referred to, be sent to the Tradesmen's National Bank of Philadelphia, and upon being informed that the warehouse would not do this until the outstanding receipts had been surrendered, an appointment was made to

meet D. J. Monaghan, manager of the warehouse, at 1:15 p. m. The appointment was kept at 1:15 p. m.; "an agent purporting to come from Sternfeld, Weil & Co. surrendered the receipts saying that the skins represented thereby were transferred to the Tradesmen's National Bank of Philadelphia, and requested warehouse receipts covering such goatskins be issued to said Tradesmen's National Bank of Philadelphia;" that new warehouse receipts in the name of the Tradesmen's National Bank were issued and it has paid storage charges to the warehouse company. The precept in the present action was served upon the warehouse company as an alleged trustee at 50 minutes past 4 o'clock on the afternoon of the same day. The bank as claimant moved that the warehouse company be discharged as trustee. No evidence was introduced by any party except the trustee's answer and its answers to interrogatories and the case was heard on these alone.

[1, 2] The alleged trustee rightly called the attention of the court to the claim of the bank to the property in question. It was proper to admit the bank as a claimant. *Wardle v. Briggs*, 131 Mass. 518. The alleged trustee is merely a stakeholder and has no further interest in the proceeding, when once the plaintiff and all the claimants are before the court, except to see that he is put in no worse position by reason of the trustee proceeding than he would have been if it had not been instituted. *Cavanaugh v. Merrimac Hat Co.*, 213 Mass. 384, 100 N. E. 662.

[3] The claimant rightly was permitted to move that the trustee be discharged on its answers. A claimant is not precluded from showing that there is no fund in the hands of the alleged trustee. This point is settled by *Wilde v. Mahaney*, 183 Mass. 455, 67 N. E. 337, 62 L. R. A. 813, where earlier cases are reviewed.

[4-6] On the answers of the trustee, it was discharged rightly. Its answers were based somewhat upon hearsay, upon information and belief. Such answers when made fairly are entitled to consideration in a proceeding like the present. *Fay v. Sears*, 111 Mass. 154, 156; *Seward v. Arms*, 145 Mass. 195, 13 N. E. 487; *Cox v. Central Vermont Railroad*, 187 Mass. 596, 602, 73 N. E. 887. Assertions concerning facts stated by the trustee merely upon information and belief do not bind the plaintiff, or prohibit him from showing the facts. *Mertland v. Little*, 137 Mass. 339, 341. The plaintiff did not seek to introduce further evidence on the point whether the apparent transfer of the goatskins to the claimant was colorable or genuine. In the absence of any evidence beside that which was disclosed by the answers of the trustee, the trustee ought to have been discharged. *Jordon Marsh Co. v. Hale*, 219 Mass. 495, 107 N. E. 357. Manifestly there

are numerous legitimate transactions whereby the bank might have become the owner of the property, even though not retaining all the while the possession of it. *People's National Bank v. Mulholland*, 224 Mass. 448, 451, 113 N. E. 365; s. c., 228 Mass. 152, 155, 117 N. E. 46, and cases collected.

Exceptions overruled.

Order discharging trustee affirmed.

(233 Mass. 281)

ORBACH v. PARAMOUNT PICTURES CORPORATION.

(Supreme Judicial Court of Massachusetts.
Middlesex. June 25, 1919.)

1. DAMAGES \S 176—EVIDENCE OF PROFITS.

In an action by a motion picture exhibitor for breach of contract to furnish him "star" films, plaintiff's evidence of his net profits during the period involved was admissible.

2. DAMAGES \S 208(1) — LOSS OF PROFITS—QUESTIONS FOR JURY.

In an action by a motion picture exhibitor for damages for breach of contract to furnish "star" films, evidence held not, as matter of law, to afford no satisfactory basis on which a jury would be warranted in finding more than nominal damages on account of loss of profits.

3. DAMAGES \S 218 — INSTRUCTION — LOSS OF PROFITS.

In an action by a motion picture exhibitor for breach of contract to furnish him "star" films, an instruction that in determining plaintiff's damages the jury should consider the possibility that the contract might have been terminated under a clause providing for termination on notice held sufficiently favorable to defendant, which never exercised its option thus to limit its liability, but expressly repudiated the existence of any contract.

4. DAMAGES \S 118 — CONTRACT TO FURNISH PICTURES—PROVISION AS TO TERMINATION—CONSTRUCTION.

Where a contract to furnish "star" motion pictures provided that either party by notice by registered mail within 10 days after the exhibition of any picture might limit the contract to one additional picture, and on delivery of such additional picture the contract would terminate as if the picture were the last contemplated, such contract did not give the party furnishing pictures the alternative to repudiate its contract from the beginning, or to perform it in part and to permit it in either event to confine the exhibitor's damages to the loss occasioned by nonperformance of the alternative least beneficial to him.

Exceptions from Superior Court, Middlesex County; Loranus E. Hitchcock, Judge.

Action by Samuel Orbach against the Paramount Pictures Corporation. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Defendant's refused requests for rulings follow:

(1) On all the evidence the defendant is entitled to a verdict.

(2) The plaintiff has not established that a contract had been approved and executed by an authorized officer of the defendant company.

(6) If a contract for the delivery of motion pictures is for a given period but could be canceled at any time, by either party, which cancellation to take effect after the delivery of two pictures, then the value of the contract is limited to two pictures.

(7) If the jury shall find that the contracts between the parties had been completed, they shall find that the same were for the delivery of two pictures under each contract which by their terms contained the option of cancellation by either party after the delivery of two pictures.

(8) If the jury finds that the contracts were executed by the defendant, then notice by the defendant to the plaintiff on June 27, 1917, that his contracts had been rejected for the delivery of pictures must be construed as a limitation of the contracts to the delivery of two pictures only under each contract, and the defendant would be liable only for the nondelivery of two pictures for three days each under each contract.

(9) If the jury shall find that the contracts were executed by the defendant company, then the damages, if any, must be limited to the failure to deliver the pictures of the several stars in the aggregate for 36 days or 6 weeks.

(12) If the jury finds that the contracts had been executed by the defendant, then the fact that the plaintiff brought suit on September 14, 1917, shows an admission on the part of the plaintiff that the defendant had exercised its option to limit its contract to two pictures.

(17) If the jury finds that the contracts had been completed between the parties, then there is no satisfactory basis of comparison on which to reckon the profits, if any, which might have been received by the plaintiff if the defendant had fulfilled the contract.

(18) There are too many elements of uncertainty and conjecture to make it safe to rely on evidence such as the plaintiff offered.

(21) If on all the evidence the jury shall find that there was a contract between the plaintiff and defendant, then the plaintiff is entitled to nominal damages only for the breach of the same.

Qua, Howard & Rogers, Albert S. Howard, and Bennett Silverblatt, all of Lowell, for plaintiff.

Bates, Nay, Abbott & Dane and Max L. Levenson, all of Boston, for defendant.

DE COUROY, J. The plaintiff, who owned and operated the Owl Theater in Lowell, seeks to recover damages from the defendant, a distributor of motion picture films, for breach of six written contracts. Under these agreements the defendant, during the year beginning September 1, 1917, was to release a certain number of films or plays, in which designated well-known "stars" enacted the

leading rôle, and to license the plaintiff to exhibit one copy of the films at his theater for three successive days, at a specified price. The defendant now concedes that there was evidence which, if believed, warranted the jury in finding that the alleged contracts were executed and delivered. No films were actually furnished, the defendant contending at the trial that no contract was executed. This disposes of the first and second requests for rulings, dealing with the issue of liability.

While admitting that the plaintiff is entitled to prevail, the defendant strongly urges that the evidence of loss sustained by the plaintiff by reason of the breach of contract was too remote and speculative to sustain a verdict for more than nominal damages. The trial judge in instructing the jury as to the general rule applicable adopted the following language of this court in *Lowrie v. Castle*, 225 Mass. 37, 51, 113 N. E. 206, 210:

"Prospective profits may be recovered in an appropriate action when the loss of them appears to have been the direct result of the wrong complained of and when they are capable of proof to a reasonable degree of certainty. They need not be susceptible of calculation with mathematical exactness, provided there is a sufficient foundation for a rational conclusion. * * * But such damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty."

There was evidence that at the time when the defendant repudiated its contracts and refused to furnish the films which it controlled, and which were of moving picture "stars" especially popular with theatrical patrons, it was too late for the plaintiff to secure adequate substitutes for the coming theatrical year, and that as a natural result, and one presumably within the contemplation of the parties, the audiences attracted to the Owl Theater were diminished in number and the income correspondingly reduced. Speaking accurately, such loss would be the ordinary damage consequent on the defendant's failure to furnish the pictures as agreed, rather than a loss of "special profits."

[1, 2] In proving the loss he sustained, the plaintiff offered evidence (1) of the net profits of his theater during the period involved, and (2) of what the net profits probably would have been during that period if the defendant had carried out its contracts. As to (1) he presented a detailed report of the gross receipts from September 1, 1917, until he sold out his theater in March, 1918, and it could be found that he obtained all the income he reasonably could. The actual expenses during this period were \$250 a week for film service, and \$250 for other expenses. Plainly this was competent. As to (2) the expenses

of running the theater if the plaintiff had obtained the defendant's pictures would not differ from those actually incurred, except in the larger sum to be paid for films, which item could readily be ascertained. The only uncertain element to be established was the probable additional income which would have accrued if the plaintiff had been allowed to exhibit the films specified in the contracts. On that issue he showed the gross receipts of his theater, week by week, during the preceding year, as well as after September 1, 1917, thus indicating what his theater, located and appointed as it was, could earn even with pictures of a grade inferior to Paramount films. *Loughery v. Huxford*, 206 Mass. 324, 92 N. E. 328; *Nelson Theater Co. v. Nelson*, 216 Mass. 80, 102 N. E. 926. Most significant was the evidence that the Merimac Square Theater, situated on a side street in the same city, while exhibiting these same Paramount pictures, and at the very time that the defendant had contracted to let the plaintiff have them, drew crowded houses and people were turned away. This theater had a larger seating capacity than the Owl, and was subject to the same conditions and competition. There was also evidence that the patronage of a theater depends on the particular "star" who is being exhibited, that the Paramount had the "finest stars," as compared with those of other companies, and that the contracts contemplated "first run" pictures, that is pictures which never before had been exhibited in Lowell. Unlike cases such as *Todd v. Keane*, 167 Mass. 157, 45 N. E. 81, we cannot say as matter of law that the evidence afforded no satisfactory basis on which a jury would be warranted in finding more than nominal damages. We find no error in the refusal to give the defendant's requests numbered 17, 18 and 21 and no exception was taken to the judge's charge. *Weston v. B. & M. R. R.*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825; *Gagnon v. Sperry & Hutchinson Co.*, 206 Mass. 547, 92 N. E. 761; *Neal v. Jefferson*, 212 Mass. 517, 99 N. E. 334, 41 L. R. A. (N. S.) 387, Ann. Cas. 1913D, 205; *Nelson Theater Co. v. Nelson*, supra; *Barry v. N. Y. Holding & Construction Co.*, 226 Mass. 14, 114 N. E. 953.

[3, 4] The remaining requests are based upon paragraph "tenth" in the several contracts, which reads: "either party to this agreement may, by notice by registered mail, given within ten days after the exhibition of

any picture of said series in the exhibitor's theater, limit this contract to one additional picture, and upon the delivery for exhibition of said additional picture, this contract will terminate with the same effect as if said picture were the last of the series above referred to." The trial judge instructed the jury that in determining the plaintiff's loss they should take into consideration this possibility that his contract might be terminated. It seems to us that this was sufficiently favorable to the defendant. By the express terms of the mutual cancellation provision the option was to be applicable only after the exhibition of at least one picture under the contract; and after notice by registered mail, within ten days after such exhibition, of the decision to limit the contract to one additional picture. As matter of fact the defendant never exercised its option to thus limit its liability. On the contrary, it expressly repudiated the existence of any contract. See *R. H. White Co. v. Remick & Co.*, 198 Mass. 41, 49, 84 N. E. 113. When at the trial it contended for the first time that the plaintiff's damages must be limited to the failure to deliver for three days two pictures under each of the six contracts in suit, the option had continued in existence during the entire contract year without any attempt by the defendant to exercise it. See *Whiting v. Price*, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262. The jury well might believe that if the defendant had once begun the delivery of pictures under its contract, acting in good faith and in accordance with sound business judgment, in all probability it would have furnished the full measure of performance under the contract, as being most profitable to itself in the circumstances. *Speirs v. Union Drop Forge Co.*, 180 Mass. 87, 90, 61 N. E. 825; *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 380, 99 N. E. 221. We do not construe said paragraph 10 as giving the defendant the alternative to repudiate its contract from the beginning, or to perform it in part, and to permit it in either event to confine the plaintiff's damages to the loss occasioned by the nonperformance of the alternative least beneficial to him. See 1 *Sedgwick on Damages* (9th Ed.) §§ 421, 424a; *Watson v. Russell*, 149 N. Y. 388, 44 N. E. 161. It provided the defendant with an option which it never exercised, and which it cannot now exercise after repudiating the contract in its entirety.

Exceptions overruled.

(233 Mass. 310)

CARDOZA et al. v. LEVERONI.(Supreme Judicial Court of Massachusetts.
Suffolk. June 25, 1919.)**1. GIFTS ⇨ 33(2) — INCOMPLETE GIFT OF MORTGAGE.**

Where a mortgagee intended to absolve the mortgagors from future payments and to make a gift to them of the note and mortgage, but this intent was never carried out, and the note remained in the possession of the mortgagee's agent, there was no completed gift, and the mortgage is enforceable against the mortgagors, who cannot successfully ask for its cancellation.

2. TRUSTS ⇨ 30½(1)—CREATION—ACTS AND STATEMENTS.—SUFFICIENCY.

Acts and statements of mortgagee evidencing her intention to give the mortgagors the note and mortgage, which were overdue, and on which a balance was unpaid, *held* insufficient to create a trust by constituting the mortgagee a trustee of the note and mortgage for the benefit of the mortgagors; any such plan, if contemplated, not being executed or fully declared.

Appeal from Superior Court, Suffolk County.

Suit by Matthew E. Cardoza and another against Frank Leveroni, administrator. From decree dismissing the bill, complainants appeal. Affirmed.

William H. Lewis and Isidore H. Fox, both of Boston, for appellants.

Samuel L. Bailen and Frank Leveroni, both of Boston, for appellee.

CARROLL, J. The defendant's intestate, Mary De Castro, was the owner of a mortgage on the real estate of the complainant, Matthew E. Cardoza. The bill alleges that she made a gift to the complainant "of the balance then remaining unpaid on the mortgage." The plaintiffs seek to restrain the defendant from foreclosing this mortgage, which matured three years after its date, and while held by Miss De Castro was twice renewed. The mortgagor paid the interest to Mary Cass, an agent of the mortgagee, and made the last interest payment on October 14, 1914. On this date Cardoza delivered to Miss De Castro a policy of insurance in the sum of \$3,000, payable to the mortgagee as her interest may appear. On the following day Miss De Castro signed and delivered to Miss Cass an assignment of the mortgage and an order on the Cardozas to pay her the interest and principal of the mortgage when due. The order and assignment were executed solely for the purpose of authorizing Miss Cass to collect the interest or principal which Miss De Castro might demand of the mortgagor.

The master found that when these instruments were signed Miss De Castro was "undecided as to whether or not she would ask

the Cardozas to pay anything further toward the balance then remaining due on the mortgage, but felt that they should pay at least \$500, in order to entitle them to a release from all further obligation thereunder, and so expressed herself to Miss Cass"; that in November of the same year, when Miss Cass asked Miss De Castro what, if anything, she was to do with the Cardoza mortgage, Miss De Castro "replied by the single word, 'Wait'"; that after the papers were signed, Miss De Castro began to regret her action and to distrust Miss Cass; that she became hostile to her and this hostility lasted until the death of Miss De Castro, although "Miss Cass at no time did anything to justify the attitude which Miss De Castro adopted toward her."

As soon as Miss De Castro began to distrust Miss Cass she decided to make a gift of the mortgage to the Cardozas. On or about October 21, 1914, she told them:

"That she was not going to renew the mortgage which was then overdue because they had paid enough; she also informed them that at her last interview with Mary Cass she had told her that it was no more than right to leave the mortgage to the Cardozas."

In March, 1915, Cardoza told Miss De Castro that interest would be due the following April, to which she replied:

"I told you the last time I was here that I was going to discharge the mortgage to you because I considered that mortgage paid by you, that you had paid enough, and don't you go down to Mary Cass to pay any money at all."

Subsequently, on one or two occasions, she said she considered the mortgage paid and intended to give it to the Cardozas. A few days before she died, in February, 1917, she requested Cardoza to call and see her on a matter of business and expressed much displeasure at his failure to respond. No interest was paid or demanded after October 14, 1914. The master found that Miss De Castro considered the mortgage paid and intended to deliver the note and mortgage to the petitioners; but that no delivery or assignment of the mortgage was made, the mortgage remained undischarged of record, the note and mortgage were in the possession of Miss Cass until the death of Miss De Castro, and no request was made to deliver them.

[1] From the master's findings it is clear that Miss De Castro intended to absolve the Cardozas from further payment and to make a gift to them of the note and mortgage; but this intent was never carried out. The gift was not perfected. The note remained in the possession of her agent and there was no delivery of the instruments; her purpose was never executed. There was no consideration to support the parol promise to make the

gift; and words alone, without a delivery, are insufficient to complete it. The contemplated gift to the Cardozas rested in the intention of Miss De Castro to transfer the title in the future. "An intent to give is not a gift; nor is an executory agreement or promise without consideration a gift." *Gerry v. Howe*, 130 Mass. 350; *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319; *Buswell v. Fuller*, 156 Mass. 309, 31 N. E. 294; *Duryea v. Harvey*, 183 Mass. 29, 67 N. E. 351. A gratuitous promise to discharge a debt does not extinguish it. Although the intestate intended to discharge the debt, her intention never became effective. See *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274; *Smith v. Johnson*, 224 Mass. 50, 112 N. E. 644.

[2] Nor were the acts and statements of Miss De Castro sufficient to create a trust, by constituting herself a trustee of her own property for the benefit of the Cardozas. While the language and acts indicated an intention to bestow a gift on the Cardozas there is nothing in the evidence or findings of the master to show that she clearly manifested a desire to hold the note and mortgage in trust for them. Even if such a plan were contemplated, it was never executed or fully declared. Although no particular form of words is necessary to create a trust, a mere executory purpose is not enough. There must be a complete intention, shown and expressed with sufficient clearness. See *Supple v. Suffolk Bank*, 198 Mass. 393, 84 N. E. 432, 126 Am. St. Rep. 451. The statements of Miss De Castro indicate either that she considered the mortgage paid, or that she contemplated a transfer of the title in the future by discharging the mortgage or by making a gift to the Cardozas. Her declarations that Cardoza had paid enough and that she considered the mortgage paid are insufficient to establish a trust; and if she contemplated the making of a gift in the future, a trust does not arise from this circumstance; for an imperfect gift cannot be converted into a declaration of trust. In the case of a voluntary disposition of property the settlor must complete the transfer in order to make it binding upon him; and if it is intended that the settlement is to be perfected as a gift, the court will not make it operative as a trust.

"If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust." *Milroy v. Lord*, 4 De G. F. & J. 264. *Welch v. Henshaw*, 170 Mass. 409, 49 N. E. 659, 64 Am. St. Rep. 309.

We find nothing in the Massachusetts cases cited by the complainants contrary to what is here decided. If anything is to be found in the decided cases of other ju-

risdictions, in conflict with the well-settled law of this commonwealth which governs the case at bar, we must decline to follow them.

It follows that as there was no perfected gift, nor a sufficient declaration of trust, the plaintiff cannot prevail.

Decree affirmed.

(233 Mass. 341)

MAGEE v. MAGEE et al.

(Supreme Judicial Court of Massachusetts.
Essex. June 30, 1919.)

1. TRUSTS ⇨84—RESULTING TRUST—FURNISHING CONSIDERATION FOR CONVEYANCE—PARTNERS.

Where plaintiff, with his brother and another, was an equal owner of lots constituting two-thirds of the profits of the enterprise in which they were engaged, and so furnished a definite part of the consideration for a conveyance to his brother and such other, a resulting trust arose in plaintiff's favor of a third interest in the land conveyed as against the grantees, the brother and the other, named in the deed.

2. PARTNERSHIP ⇨3—DEALING IN LAND.

Where plaintiff, his brother, and another agreed to become owners of a single tract of realty, holding as tenants in common, and to divide the profits of disposing of it, the brother and the other not being entitled to share in plaintiff's commissions, no partnership existed as between the three parties, whatever their relations may have been as to third parties.

3. PARTNERSHIP ⇨298—ACCOUNTING—DEMAND BY PERSONAL REPRESENTATIVES.

The personal representatives of a deceased partner, and not the heirs, are the parties to ask for a partnership accounting.

4. APPEAL AND ERROR ⇨694(1)—REVIEW—FINDING ON UNSUPPORTED EVIDENCE.

Where the evidence is not reported, a finding of the master must stand.

5. TRUSTS ⇨362—RESULTING TRUST—ENFORCEMENT—DEFENSE—CONCEALMENT OF INTEREST.

In plaintiff's suit to enforce a resulting trust in his favor in land conveyed to his brother and another as commission on a sale of land by the grantor company, defendants, claiming in the right of the brother and such other, cannot deprive plaintiff of his rights in the land because he concealed from the grantor company that he was interested personally in the conveyance.

6. TRUSTS ⇨374—RESULTING TRUST—ENFORCEMENT—RELIEF—TAXES AND WATER RATES.

In suit to enforce a resulting trust in land, where defendants have been in possession, and have held adversely to plaintiff, and received rents and profits, plaintiff should not be compelled to contribute to the payment of taxes and water rates.

Case Reserved from Supreme Judicial Court.

Suit by John Magee against Helena Buhkert Magee and others. On reservation by a single justice of the Supreme Judicial Court. Decree ordered for plaintiff.

The bill was to establish in plaintiff's favor a resulting trust in land, and to require defendants to execute and deliver a conveyance of a one-third interest in such land.

Dunbar, Nutter & McClennen, of Boston (George R. Nutter and Hugh W. Babb, both of Boston, of counsel), for plaintiff.

John M. Maguire, of Boston (Hale & Dorr, of Boston, of counsel), for defendants.

CARROLL, J. In 1906 the plaintiff was employed in the purchase and sale of lands in Montana by the Bitter Root District Irrigation Company, hereinafter called the District Company. In 1907 Julian Dodge and the plaintiff's brother, George Magee, made a contract with the District Company for the purchase of 330 acres of land and part payment of \$400 was made by George Magee. At or before the time the contract was made, it was agreed that the plaintiff should share equally in the enterprise with his brother and Dodge. In November, 1907, the District Company went into receivership and later was reorganized. The new company was called the Bitter Root Valley Irrigation Company, hereinafter referred to as the Valley Company. After the receiver was appointed the plaintiff opened an office in Chicago for the sale of western lands, he was not employed by the Valley Company. This company accepted the contract of the District Company and was ready to convey to George Magee and Dodge 250 of the 330 acres. In July, 1908, payment was called for under the terms of the contract. George Magee and Dodge then interested one Thatcher in the purchase of a large tract of land in the Bitter Root Valley and at their request the plaintiff accompanied Thatcher to Montana, at his own expense, and the sale of 1,000 acres of land was arranged. The 250 acres comprised in the Dodge-Magee contract was included in this larger tract.

Dodge and George Magee made a contract with the Valley Company, by which they were to assign their right to purchase the 250 acres to Thatcher and his associates and were to receive from the Valley Company \$12,500 for this tract at the price of \$50 an acre; this being the amount by which the Valley Company's price to Thatcher—\$150 an acre—exceeded the price fixed in the Magee-Dodge contract. The sum of \$12,500 was to be paid one-third in cash and two-thirds in the securities of the Thatcher Company. The money was paid and divided equally between George Magee, Dodge and the plaintiff; the plaintiff at the same time paying his brother one-third of the \$400 paid by him. Each

party assumed his own expenses in promoting the Thatcher plan.

After some correspondence the Valley Company agreed to convey the remaining 80 acres claimed by Magee and Dodge under the original agreement with the District Company, in consideration of the transfer to it of the securities of the Thatcher Company. By deed of January 30, 1909, the Valley Company conveyed to George Magee and Julian Dodge 80 acres of land in consideration of the release of the securities. The title was taken in the name of Dodge and George Magee at the request of the plaintiff, with the understanding that one-third of the property should be conveyed to him on his demand. The plaintiff's bill is brought to establish a trust in his favor of an undivided one-third interest in this 80-acre tract, and to require the defendants to execute and deliver to him a conveyance of this one-third share.

Dodge and George Magee died intestate. John T. Dodge and Mehtable P. Dodge are the father and mother of Julian Dodge. Helena B. Magee is the widow of George Magee. It is agreed that, aside from the question of partnership, the real estate of Dodge belongs to his father and mother and the real estate of George Magee belongs to his widow.

When the negotiations for the transfer of the 80 acres were pending, the plaintiff wrote to Dodge saying to arrange it "in your name and George's name without appearing in it myself," and that, when the business was closed, he was to secure his one-third portion. He also wrote his brother, "I wish to keep out of the transaction," "and after it is all closed, I will have another deed made out by which you and Julian deed back to me an undivided third interest."

[1] The plaintiff with his brother and Dodge were equal owners of the notes of the Thatcher Company, which notes constituted two-thirds of the profits of the enterprise in which they were engaged. As the plaintiff owned a one-third interest in these securities, he furnished a definite part of the consideration for the conveyance of the land to George Magee and Dodge. From these facts a resulting trust arises in the plaintiff's favor of a third interest in the 80-acre tract against the grantees named in the deed. *Davis v. Downer*, 210 Mass. 573, 575, 97 N. E. 90; *Howe v. Howe*, 199 Mass. 598, 600, 85 N. E. 945, 127 Am. St. Rep. 516. See *Pollock v. Pollock*, 223 Mass. 382, 111 N. E. 963. All the defendants are before the court and it has jurisdiction to enforce the trust. *Clark v. Seagraves*, 186 Mass. 430, 438, 439, 71 N. E. 813, and cases cited.

[2] The defendants contend that the three associates were between themselves, partners. There was not sufficient evidence to support this contention. They were equally to share the losses and equally to participate

in the profits, but they did not agree nor intend to become partners. By the agreement of the parties they were to become owners of a tract of real estate and hold the title as tenants in common. The agreement related to a single transaction—to buy a particular piece of land—and the correspondence shows that Dodge and George Magee were not to share in the plaintiff's commissions and whatever their relations may have been to third parties, as between themselves they were not partners. *Wheelock v. Zevitas*, 229 Mass. 167, 118 N. E. 279; *Williams v. Knibbs*, 213 Mass. 534, 100 N. E. 668.

[3] The defendants hold the land as the heirs of Dodge and George Magee or in the right of their heirs. The personal representatives and not the heirs are the parties to ask for a partnership accounting. *Mason v. Mason, Ex.*, 76 Vt. 287, 56 Atl. 1011. There was no error in allowing the motion to strike out the part of the defendant's answer based on the allegations of partnership, and the demurrer to the cross-bill to quiet the title and take an account between the parties was properly sustained. See *Burnside v. Merrick*, 4 Metc. 537. If the defendants were entitled to relief for the water rates and taxes paid by them, this relief is sought by the amended answer, and in this respect the cross-bill is unnecessary. See *Bogle v. Bogle*, 3 Allen, 158.

The plaintiff received a commission from the Valley Company for the sale of the 250-acre tract and unsuccessfully attempted to secure a commission for the sale of the 80-acre tract. The defendants contend that the plaintiff cannot recover because of his fraud in concealing from both companies his interest in the joint undertaking in order to recover the commissions.

[4] The master found that the District Company knew the plaintiff was jointly interested with his brother and Dodge in the purchase of the land, and that no concealment was practiced on this company. This evidence is not reported and the finding of the master must stand.

The Valley Company knew that the plaintiff was part owner of the 250 acres, and with this knowledge paid him a commission on the sale. It was further found that the plaintiff did not keep secret from this company his participation in the speculation; that he did attempt to conceal from the Valley Company the fact that he was part owner of the 80 acres, in order that he might secure a commission on this sale; that "while the officers of the Valley Company knew of the plaintiff's interest with Dodge and George Magee, it was not entirely clear that the

company was conveying the 80 acres because of any obligation under the agreement, * * * and the sale of the 80 acres may have had to some extent the aspect of a new transaction." The plaintiff was unsuccessful in his attempt to collect this commission; and it appeared that both Dodge and George Magee knew that the plaintiff was seeking to keep from the company his connection with the transaction, and in order to do this the co-operation of his associates was necessary.

[5] Even if this attempt amounted to a fraud on the Valley Company, it was not a fraud on his brother and Dodge for they knew of the attempt and purpose of the plaintiff. And further, the plaintiff does not seek relief from a fraud or to enforce an agreement based on fraud. The transaction which he seeks to enforce did not result from fraud. Even if a fraud were attempted on the Valley Company, it is not a defense to the plaintiff's bill; his case is made out without reference to this fraud, and the defendants cannot deprive him of his rights in the land because of the concealment practiced on a third party. *Murphy v. Moore*, 228 Mass. 565, 117 N. E. 918; *Lufkin v. Jakeman*, 188 Mass. 528, 74 N. E. 933.

[6] The taxes and water rates from November 2, 1909, to November 28, 1916, have been paid by the defendants. In March 1909 the plaintiff wrote to Dodge asking for a deed of his share and also wrote to the administrator of his brother's estate. The land was unproductive until 1916 when it was leased. It does not appear what rentals were received and there was no evidence that any effort was made to make the land productive until that time. The legal title is in the defendants. They have been in possession of the land which they have held adversely to the plaintiff and have received rents and profits, and there is no reason why the plaintiff should now be compelled to contribute to the payment of these taxes and water rates. *Sunter v. Sunter*, 204 Mass. 448, 454, 90 N. E. 561; *Clute, Adm'r, v. Clute*, 197 N. Y. 439, 90 N. E. 988, 27 L. R. A. (N. S.) 146, 134 Am. St. Rep. 891; *O'Hara v. Quinn*, 20 R. I. 176, 38 Atl. 7.

There was no error in refusing the defendant's motion that the master be instructed to make additional findings and report the evidence. *Cook v. Scheffreen*, 215 Mass. 444, 448, 102 N. E. 715.

A decree is to be entered for the plaintiff, directing the defendants to convey to the plaintiff one undivided one-third part of the land in controversy with costs.

So ordered.

(233 Mass. 254)

McNEIL v. MIDDLESEX & B. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Middlesex. June 24, 1919.)**1. TRIAL §214—REQUESTED INSTRUCTION—EVIDENCE.**

In an action against a street railway for injury to a horse, milk wagon, and contents in collision, even if it was a correct statement of law, the court was not required to give plaintiff's request that there was no absolute rule of law that a person driving across a street must look and listen for an approaching car, etc.

2. TRIAL §252(9)—INSTRUCTION—NONSUPPORT BY EVIDENCE.

In an action against a street railway for injury to a horse, milk wagon, and contents in collision, instruction that there was no absolute rule of law that a person driving across a street must look and listen for an approaching car *held* properly refused, in view of the testimony of the driver of the team.

3. TRIAL §244(4)—INSTRUCTION—EMPHASIS OF DISPUTED FACT.

In an action against a street railway for injuries to plaintiff's horse, milk wagon, and contents in collision, the trial court could not rightly have adopted the language of plaintiff's request for instruction emphasizing the fact that the car was going at a high rate of speed, a disputed fact.

4. TRIAL §260(1)—INSTRUCTIONS—REPETITION.

Where the jury were fully instructed on a point of fact, there was no error in refusing a requested charge involving it.

5. APPEAL AND ERROR §1068(5)—QUESTION NEEDLESS TO CONSIDER—REFUSAL OF INSTRUCTION.

Where the jury found for defendant, any error in the refusal of plaintiff's request for instruction on the question of damages need not be considered.

6. APPEAL AND ERROR §1056(4)—HARMLESS ERROR—EVIDENCE.

In an action against a street railway for injuries to plaintiff's milk wagon and horse in collision, exclusion of the question asked plaintiff's driver as to how much the horse had depreciated in value by reason of the accident, and of the question asked plaintiff as to how much his new horse cost, *held* harmless to plaintiff, in view of other testimony and the jury's finding for defendant.

7. TRIAL §63(2)—EVIDENCE IN CHIEF OFFERED IN REBUTTAL.

In an action against a street railway for injuries to plaintiff's milk wagon and horse in collision, it was within the discretion of the trial judge to exclude, when offered in rebuttal, part of plaintiff's case in chief, consisting of testimony of plaintiff's driver as to whether the car struck the front of the wagon.

8. APPEAL AND ERROR §6—EXCEPTIONS—FAILURE TO ANSWER INTERROGATORIES.

The preferable and well-recognized way to present the question of any error on the part

of the court in refusing plaintiff's motion seeking to have defendant further answer certain interrogatories is by exceptions.

9. APPEAL AND ERROR §858—REVIEW—APPARENT ERRORS.

An appeal in an action at law brings before the court only errors of law apparent on the record.

10. TRIAL §18—NAMES AND ADDRESSES OF WITNESSES—DISCLOSURE.

Plaintiff's request for the names and addresses of defendant's witnesses was a matter largely within the discretion of the trial court, for only when justice seems to require it is a party to disclose the names and addresses of his witnesses.

Exception from Superior Court, Middlesex County; W. P. Hall, Judge.

Action by Allan J. McNeil against the Middlesex & Boston Street Railway Company. Verdict for defendant, and plaintiff excepts and appeals from decree overruling his motion to default defendant for failure to answer interrogatories, etc. Exceptions overruled; appeal dismissed.

Plaintiff's requests for instructions follow:

(1) Upon all the evidence in the case the plaintiff is entitled to recover.

(2) Ordinarily the questions of due care of the plaintiff and negligence of the defendant are issues of fact for the jury.

(3) There is no absolute rule of law that a person driving across a street in a city, in crossing the tracks of a street railway in a public street where the cars have not an exclusive right of way, but are run in common with other vehicles and with travelers, must look and listen for an approaching car before entering upon the tracks of the electric railway.

(4) If the jury find that the defendant's car struck the plaintiff's team at the foot of a hill, while the car was going at an excessive rate of speed and was crossing the junction of Bowen and Gibbs streets, and while the driver of the team was driving in the public street across said railway track from Bowen to Gibbs street, they will be warranted in finding that the defendant was negligent.

(5) If the jury find that the accident was caused by the negligence of the defendant while the plaintiff was in the exercise of due care, and that the plaintiff's horse, wagon, and contents were damaged as a direct result of the accident, the plaintiff is entitled to recover therefor the difference between the value of each immediately prior to the accident and the value of each after the accident as affected by the accident.

H. B. Mackintosh, of Needham, for plaintiff.

Pitt F. Drew, of Boston, for defendant.

CARROLL, J. The plaintiff sues to recover for injury to his horse, milk wagon and contents, caused by a collision with one of the defendant's cars. The evidence was conflicting. The plaintiff contended

that, while driving at the rate of four miles an hour from an intersecting street across the defendant's tracks, one of its cars moving at a rapid rate of speed and without any signal of its approach ran into his team. The defendant contended that the plaintiff's horse was going at a high rate of speed, and that the car had stopped when the plaintiff's wagon was driven over the fender. The jury found for the defendant.

The case properly was submitted to the jury. The plaintiff's first request could not have been given rightly; and the questions raised by the second request were left to the jury. The judge instructed the jury regarding the duties of the plaintiff and of the defendant. No exception was taken to his charge.

[1, 2] He was not required to give the plaintiff's third request, even if it be assumed to be a correct statement of law. In addition to this, the driver of the team testified that before crossing the track he looked in the direction from which the car was coming and did not see any car; that he first saw the car when it was about six feet from him. With this evidence in the case the request was not appropriate. *Howes v. Gmush*, 131 Mass. 207, 211; *Coles v. B. & M. R. R.*, 223 Mass. 408, 416, 111 N. E. 893; *Hooper v. Cuneo*, 227 Mass. 37, 40, 116 N. E. 237, and cases cited.

[3, 4] The fourth request was based on the speed of the car. The judge could not adopt rightly the plaintiff's language emphasizing the fact that the car was going at a high rate of speed. That fact was disputed; and as the jury were fully instructed on the point there was no error in refusing the request. *Altavilla v. Old Colony St. Ry.*, 222 Mass. 322, 110 N. E. 970.

[5, 6] The fifth request relates to the question of damages. Here, also, the jury were carefully instructed; and as they found for the defendant the request need not be considered. There was no reversible error in excluding the question asked the plaintiff's driver, as to how much the horse had depreciated in value by reason of the accident; or the question asked the plaintiff, "How much did the new horse cost?" The plaintiff was not harmed thereby; he was permitted to testify how much his property was worth before and after the accident; and the exception, relating as it does to the subject of damages, becomes immaterial in view of the jury's finding for the defendant. *Geary v. Stevenson*, 169 Mass. 23, 47 N. E. 508; *Carroll v. Boston Elev. Ry.*, 200 Mass. 527, 535, 86 N. E. 793.

[7] In direct examination the driver of the team testified that the car struck the left rear wheel of the plaintiff's wagon. In rebuttal he was asked if the car struck the front of the wagon. This evidence was excluded, and the plaintiff excepted. There was no error in excluding the evidence of-

ferred in rebuttal. It was a part of the plaintiff's case in chief, and it was within the discretion of the trial judge to exclude it when offered in rebuttal. *Jewett v. Boston Elevated Ry.*, 219 Mass. 528, 532, 107 N. E. 433. In addition to this, the plaintiff testified in rebuttal that "he couldn't see a scar on the front wheel and that there was no evidence that it was struck." See *McCafferty v. Lewando's French Dyeing & Cleansing Co.*, 194 Mass. 412, 80 N. E. 460, 120 Am. St. Rep. 562.

[8-10] The plaintiff filed interrogatories to be answered by the defendant; and moved that the defendant be ordered to "expunge, amend, and answer" certain interrogatories, and to disclose the names of the defendant's witnesses and their addresses. It appeared that interrogatories 4, 5, 10, 11 and 21 were ordered to be further answered "by consent and order," and that the motion to disclose the names and addresses of witnesses was denied. It is not shown that there was any further order of the court in reference to interrogatories 17, 19 and 24. The plaintiff appealed from so much of the order as refused the motion seeking to have the defendant further answer interrogatories 17, 19 and 24, and to disclose the names and addresses of witnesses. If it be assumed in favor of the plaintiff that questions of this sort can be raised by appeal and not alone by exceptions, which in any event is the preferable and well recognized way of presenting such questions (*Brooks v. Shaw*, 197 Mass. 376, 84 N. E. 110), no error is shown. An appeal in an action at law brings before the court only errors of law apparent on the record. *Moran v. Murphy*, 230 Mass. 5, 118 N. E. 915. There is no error of law apparent on this record. It is not shown that any order was entered directing the defendant or refusing to direct the defendant to answer further the three interrogatories referred to, and the request for the names and addresses of witnesses was a matter largely within the discretion of the trial court. It is only when "justice seems to require it" that a party is to disclose the names and addresses of his witnesses. See in this connection *St. 1913, c. 815, § 3*. *Looney v. Saltonstall*, 212 Mass. 69, 72, 98 N. E. 698; *Nickerson v. Glines*, 220 Mass. 333, 107 N. E. 942.

After the case was tried and a verdict returned, the plaintiff moved to amend the record so as to read that the court refused to order "expunged, amended and further answered interrogatories 17, 19 and 24" the court having denied the motion, from which order denying the motion the plaintiff appealed. He also filed a bill of exceptions. Here again assuming, but without deciding, that the plaintiff can raise the question by appeal, no error of law is shown. *Moran v. Murphy*, supra.

The exceptions must be overruled. The assistant clerk testified that if the court had

refused to order the interrogatories to be further answered, this order would have appeared on the record. The judge was not bound to believe the evidence offered by the plaintiff.

Exceptions overruled.
Appeal dismissed.

(233 Mass. 264)

VARNUM v. KOGIOS et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. June 25, 1919.)

MECHANICS' LIENS §73(3)—"WRITTEN CONTRACT."

Written agreement or memorandum between plaintiff's intestate, the contractor to erect a building for defendant, and the owner, held not such a "written contract" as required by the mechanics' lien statute.

[Ed. Note.—For other definitions, see Words and Phrases, Written Contract.]

Case Reserved and Report from Superior Court, Middlesex County; Loranus E. Hitchcock, Judge.

Bill to enforce mechanic's lien by Nellie Jennison Varnum, administratrix of the estate of Percy E. Varnum, against Alex Kogios and others. On reservation and report, on the pleadings, the master's report, and all questions of law therein, to the Supreme Judicial Court. Bill dismissed.

John J. & Fred. S. Harvey and Frederic S. Harvey, all of Lowell, for petitioner.

Qua, Howard & Rogers and Albert S. Howard, all of Lowell, for defendants.

CARROLL, J. This is a bill in equity under St. 1915, c. 292, as amended by St. 1916, c. 306, to enforce a mechanic's lien on the property of the defendant Kogios. The case was referred to a master.

The plaintiff's intestate, Percy E. Varnum, on October 17, 1917, made a written contract with Kogios, a copy of which appears in a footnote.¹ On November 1, 1917, before be-

ginning the work upon the building, Varnum signed and recorded in the registry of deeds this notice:

"Notice is hereby given that by virtue of a written contract, dated October 27, 1917, between Alex Kogios, owner, and Percy E. Varnum, contractor, said contractor is to furnish labor and material for the erection, alteration, repair, or removal of a building on a lot of land described as follows: Situated in Lowell, Middlesex county, Massachusetts, on Little street, and more particularly described and set forth in a deed to said owner given by Robert G. Bartlett, dated September 18, 1916, and recorded in the registry of deeds for the Northern district of said county in Book 561, page 311, to which deed reference is hereby made for a more particular description of the premises hereby referred to. Said contract is to be completed on or before May 1, 1918."

The master found that no specific date was agreed upon for the completion of the work, and also, that from October 27, 1917, to May 1, 1918, was a reasonable time for the performance of the work mentioned in the contract. At or about the time the agreement was signed, the parties orally agreed that Varnum should supply certain lime, cement, sand, iron and steel, and all labor and material necessary to complete the carpenter work, and Kogios was to furnish all additional material and labor.

Varnum began work November 5, 1917, and continued until December 8, 1917, having to that time furnished labor and materials to the value of \$2,750. On December 27, 1917, the defendant Sullivan loaned Kogios \$2,200, which was paid to Varnum, being the sum due him December 1, 1917. At this time Kogios executed to Sullivan a mortgage on the premises for \$6,000, to secure a loan of \$2,200 and further sums to be thereafter advanced by Sullivan to Kogios. On the same date, a written agreement was made by which Varnum was to complete the work "as carpenter upon said building." He was to begin at once and "continue until finished with reasonable allowance for weather." Varnum completed the work April 22, 1918.

St. 1915, c. 292, as amended by St. 1916, c. 306, provides that when a contractor has furnished labor or material in the erection, alteration, repair, or removal of a building, in order to establish a lien for labor and material supplied he must show that he made a written contract with the owner and that notice of the contract was filed or recorded in the registry of deeds. If there is an extension of the written contract, a notice thereof stating the date to which it is extended, is required to be filed in the registry of deeds prior to the date "stated in the notice of a contract for the completion thereof." The statute requires not only the existence of a contract, but that the contract be in writing. The agreement of October 27, 1917, is

¹"Lowell, Mass. Oct. 27, 1917.

"I herewith agree to furnish all necessary material for building on Little street, Lowell, Mass., for Mr. Alex. Kogios as follows:

"All carpenters to cost 72 cts. per hour.

"All laborers to cost 55 cts. per hour.

"All material furnished and all subcontracts carried by me will be charged to owner at the rate of 10% on lowest submitted price as approved by owners and architect.

"Payments to be made upon certificate of architect between the first and tenth day of each month for 80% of amount of work done.

"Balance to be thirty-one days after work is finished.

"Contractor—Percy E. Varnum.

"Owner—Alex Kogios.

"Witness for both:

"Harry P. Graves, Architect."

not sufficient to fulfill the requirements of the mechanic's lien law. It is in effect a mere memorandum of a contract to be made in the future, where all the essential elements are not included and its terms are left uncertain. It does not show whether the work was to be done in the erection of a building, or in the repair or alteration of an existing structure. If, as matter of fact, it was understood a building was to be erected, it is not shown of what material it was to be constructed; if a building was to be repaired, it does not appear what repairs were to be made; and if any labor in addition to that of carpenters and laborers was to be supplied, it is not set out in the agreement. The agreement dated October 27, 1917, is not such a written contract as is required by the mechanic's lien statute. See *Parker v. Anthony*, 4 Gray, 289; *Sanderson v. Taft*, 6 Gray, 533; *Wilder v. French*, 9 Gray, 393.

As the plaintiff cannot prevail for the reasons stated, it is unnecessary to consider the other objections to the maintenance of the bill which were argued by the defendant. St. 1915, c. 292, §§ 1, 2, 7, 8, 9; St. 1916, c. 306, § 2.

No notice was filed or recorded in the registry of deeds under the contract of November 27, 1917, and it is not contended that the plaintiff can recover under that agreement.

Bill dismissed

(233 Mass. 255)

NEW YORK CENT. R. CO. et al. v. STONEMAN et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 24, 1919.)

1. EVIDENCE §461(1)—PAROL EVIDENCE AFFECTING WRITING—AMBIGUITY OF LEASE.

In suit for specific performance of a covenant to heat to a proper warmth for office purposes the freight offices leased by defendants, the covenant being ambiguous, evidence was admissible to show the conditions and circumstances under which it was made in order to ascertain whether it was intended to obligate for heating during the night as well as the day.

2. CONTRACTS §155 — AMBIGUITY — CONSTRUCTION AGAINST PERSON RESPONSIBLE.

If the true import and meaning of a written instrument are doubtful, and the intention of the parties cannot be determined from its language, it will be construed most strongly against the person using the uncertain language.

3. LANDLORD AND TENANT §42—OBLIGATION TO HEAT—EVIDENCE.

In suit by a railroad for specific performance of a covenant to heat freight offices leased to it by defendants, evidence held not to justify a ruling that the railroad was not entitled to have the premises heated 24 hours in the day, including Sundays and holidays.

4. LANDLORD AND TENANT §41—LEASE—INTERPRETATION BY PARTIES.

In suit by railroad for specific performance of covenant to heat freight offices leased to it by defendants' mortgagees, the lease being uncertain as to the length of time each day heat was to be furnished, evidence that from the time plaintiff entered into possession the original lessors kept the premises heated continuously 24 hours each day until defendants entered to foreclose their mortgage held admissible to show the interpretation of the lease by the original parties.

5. LANDLORD AND TENANT §41—AMBIGUOUS COVENANT—CONSTRUCTION BY PARTIES.

In suit by a railroad for specific performance of a heating covenant of a lease of freight offices by defendants, mortgagees, evidence that defendants, after foreclosing and taking possession, continued to furnish heat without objection until a certain date, and paid for coal furnished by the railroad to heat the building, held admissible to show the construction which defendants, after taking possession, placed on the heating covenant, which was ambiguous.

6. LANDLORD AND TENANT §41—ASSENT TO AMBIGUOUS LEASE — MORTGAGEES — CONSTRUCTION BY ORIGINAL PARTIES.

Where a lease was ambiguous in its heating covenant, but the lessor's mortgagees assented in writing to it and agreed to be bound by its terms, they cannot avoid its provisions and interpret the heating covenant differently from the interpretation placed upon it by the original parties, as shown by extrinsic evidence.

Report from Superior Court, Suffolk County; John F. Brown, Judge.

Suit by the New York Central Railroad Company and others against David Stoneman and others, resulting in ruling that the bill could not be maintained. On report to the Supreme Judicial Court. Ruling reversed, and case ordered to stand for further hearing.

George H. Fernald, Jr., of Boston, for plaintiffs.

Stoneman, Gould & Stoneman, of Boston, for defendants.

CROSBY, J. The plaintiffs leased from the owners the second and third floors and part of the first floor and basement of a building, to be occupied as a freight office for their freight terminal in Boston. The lease was in writing and the defendants as mortgagees of the property, assented to it and agreed to be bound by its terms if they foreclosed the mortgage before the expiration of the lease. The bill seeks to enforce specific performance of the lease which provides "that the demised premises shall be heated by the lessors to a proper warmth for office purposes." The judge of the superior court before whom the case was tried ruled that upon the facts recited in the report the bill

could not be maintained, and reported the case to this court.

It is recited in the report that "it is necessary for the proper operation of the railroad for it to operate freight trains on Sundays and at night"; and that "it appeared in evidence that other transportation companies in Boston, namely, the Boston & Maine Railroad, the New York, New Haven & Hartford Railroad and the American Railway Express Company keep their freight offices open twenty-four hours in the day, Sundays and holidays included, and properly heated, although the force of clerks on duty at night and on Sundays and holidays is smaller than on week days and varies according to the amount of business, and that it is necessary for the handling of freight to keep a force of clerks at the freight offices continuously"; and further, that the plaintiffs entered into possession of the premises in August, 1917, and have continued in possession ever since, except that since December 28, 1917, the railroad has been operated by the federal Director General of Railroads.

The lessors kept the premises heated to a proper warmth for office purposes continuously twenty-four hours in the day including Sundays and holidays until February 16, 1918, when the defendants made an entry on the premises for the purpose of foreclosing their mortgage, but left the building in charge of the lessors who continued to furnish heat as previously. The defendants' agent in charge of the building in March, 1918, learned that heat was furnished night and day and continued to so furnish it until November, 1918, when the defendants notified the plaintiffs that they would not thereafter furnish heat at night or on Sundays or holidays. During the previous winter the lessors had difficulty in obtaining coal for heating the building and the plaintiffs furnished them with about twenty-five tons for that purpose. The lessors promised to pay for the coal but failed to do so; and afterwards the plaintiffs, with the consent of the defendants' agent, deducted from the rent due, the defendants the cost of the coal.

The broker of the lessors, who negotiated the lease with the plaintiffs' representative, was told by the latter that the premises were to be used by the railroad as a freight office for its freight terminal in Boston, and would be occupied by a night force as well as a day force; and while the lessors were not told by their broker that the office would be open night and day, still they knew that the premises were to be used by the railroad as a freight office for its freight terminal.

[1-3] The provision in the lease "that the demised premises shall be heated by the lessors to a proper warmth for office purposes," relates only to the degree of heat to be furnished and not to the time during which heat is to be furnished. Upon that question the lease is silent. In this respect the covenant

is ambiguous and of doubtful meaning, and evidence was properly admitted to show the conditions and circumstances under which it was made in order to ascertain the true meaning of its language as it was used by the parties. If the true import and meaning of a written instrument is doubtful and the intention of the parties cannot be determined from its language, it will be construed most strongly against the person using the uncertain language. *Foternick v. Watson*, 184 Mass. 187, 68 N. E. 215; *Bascom v. Smith*, 164 Mass. 61, 41 N. E. 130; *Barney v. Newcomb*, 9 Cush. 46. The evidence of the custom in Boston of heating office buildings from eight o'clock in the mornings until six o'clock in the evening, and manufacturing establishments from seven o'clock in the morning to six o'clock in the evening, is not decisive as to the rights of the parties. The report shows that the lessors knew before the lease was executed that the premises would be used by the plaintiffs as a railroad office at its freight terminal; it also appeared that it was necessary for the proper operation of the railroad for it to run freight trains on Sunday and at night when passenger traffic is light, and there was evidence that for the handling of freight it was also necessary to keep a force of clerks at the freight offices continuously. Upon this evidence it could not have been ruled that the plaintiffs were not entitled to have the premises heated twenty-four hours in the day, including Sundays and holidays. *Reynolds v. Boston Rubber Co.*, 160 Mass. 240, 245, 35 N. E. 677; *Strong v. Carver Cotton Gin Co.*, 197 Mass. 53, 83 N. E. 328, 14 L. R. A. (N. S.) 274, 14 Ann. Cas. 1182; *W. T. Tilden Co. v. Denstein Hair Co.*, 216 Mass. 323, 103 N. E. 916.

[4, 5] As the language of the lease was uncertain and doubtful as to the length of time heat was to be furnished, the evidence that from the time the plaintiffs entered into possession in August, 1917, the lessors kept the premises heated continuously twenty-four hours each day until February 16, 1918 (when the defendants made an entry for the purpose of foreclosing their mortgage), was admissible to show the interpretation which the original parties placed upon the lease. The evidence that the defendants after taking possession continued to furnish heat continuously, without objection, until November, 1918, and paid the plaintiffs for coal furnished by them so to heat the building, was also admissible to show the construction which the defendants after taking possession placed upon the provision of the lease in question. Where the terms of a written instrument are not clear and explicit, the interpretation which the parties have placed upon it is of great importance in determining its true meaning. *Stone v. Clark*, 1 Metc. 378, 35 Am. Dec. 370; *Lovejoy v. Lovett*, 124 Mass. 270; *Jennings v. Whitehead & Atherton Machine Co.*, 138 Mass. 594; *Slack v.*

Knox, 213 Ill. 190, 72 N. E. 746, 68 L. R. A. 606.

[6] Aside from the conduct of the defendants as mortgagees, they having expressly assented in writing to the lease and agreed to be bound by its terms cannot now avoid its provisions and place upon it an interpretation different from what the original parties intended. As the meaning of the covenant was doubtful and its true construction depended upon extrinsic evidence to explain it, and thereby show the intention of the original parties, the defendants under their agreement were bound by the construction adopted by the parties. *Bascom v. Smith*, 164 Mass. 61, 78, 41 N. E. 130. While it appears that the heating plant was so arranged that heat could not be furnished to the plaintiff without heating the rest of the building, still there was nothing to show that provision could not be made to limit the heat furnished to other tenants to such times as they were entitled to it.

As in the opinion of a majority of the court it properly could not have been ruled that the bill could not be maintained, the entry must be, ruling reversed, and case to stand for further hearing. The nature of the relief to which the plaintiff is entitled, if it turns out that it is entitled to relief, is not now before the court.

So ordered.

(233 Mass. 347)

KNOWLES v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 30, 1919.)

1. TRIAL \S 105(1)—INCOMPETENT EVIDENCE—ABSENCE OF OBJECTION.

Incompetent evidence admitted without objection is entitled to its probative force.

2. CARRIERS \S 302(3)—CARRIAGE OF PASSENGERS—INJURIES—LIABILITY.

Where plaintiff entered defendant street railway's car when most of the seats were filled, and so many boarded the car it became so crowded the guard had to press the doors in, and at a stop when the door was opened near which plaintiff was standing she was precipitated out on the street by the pressure of the crowd, the railway was not liable for her injuries.

Report from Superior Court, Suffolk County; Richard H. Irwin, Judge.

Action for tort for personal injuries by Sarah M. Knowles against the Boston Elevated Railway Company, resulting in verdict for defendant. On report to the Supreme Judicial Court. Judgment ordered for defendant.

John J. Scott, of Boston, for plaintiff.

Fletcher Ranney and Thomas Allen, Jr., both of Boston, for defendant.

CARROLL, J. [1] The plaintiff was injured by falling from one of the defendant's cars when the door was opened for her to alight. There was evidence that the plaintiff entered the car at Harvard Square Station; that "most of the seats were filled"; that in the presence of the guard and starter many people boarded the car and it became so crowded that the guard "had to press the doors in"; that at this hour in the morning, at Harvard Square, the cars were always filled, and "everybody was rushing wild, trying to get on"; that the plaintiff was injured at Bigelow avenue, in Watertown, which was about twelve minutes run from Harvard Square, and there was no intervening stop. The evidence of what happened at Harvard Square was not objected to (see *Seale v. Boston Elev. Ry.*, 214 Mass. 59, 60, 100 N. E. 1020); and even if it were incompetent, having been admitted without objection, it is entitled to its probative force (*Hubbard v. Allyn*, 200 Mass. 166, 171, 86 N. E. 356).

[2] The plaintiff testified:

"That as the car stopped or was about to stop at Bigelow avenue 'the door went open, and I landed on the street, on my shoulder. * * * I had an umbrella and a handbag in my hand. Just before the door opened, it [the car] was crowded, and each one was pressing forward to get to the door. At the time the door opened, there was pressure upon me * * * from the crowd. * * * I was in the same position when the door opened and when I was thrown as I was when the car started. * * * I couldn't move from the time the car started at Harvard Square."

A witness for the plaintiff testified that when the car stopped at Bigelow avenue the motorman opened the door and "the people all try more pressure."

Considering all the evidence, there is nothing to show that the plaintiff was injured by reason of the defendant's negligence. In *Seale v. Boston Elevated Ry.*, supra, the plaintiff offered to show that "before she entered the crowded car at Scollay Square," "and that as she was standing after the other passengers had entered the rear door of the next to the last car, the guard put his hand behind her back and pushed her into that rear door against the crowd." She testified that when the train reached Park Street Station, the car door was opened and she "went to step" and before she "had a chance to step the crowd pushed" her and she fell out, her leg going down between the car and a portion of the station platform which curved away from the car about two feet." It was decided that the plaintiff was not

prejudiced by the exclusion of her offers of proof and could not recover. This case cannot be distinguished from the case at bar, and is decisive of it.

The plaintiff's case really rests on the fact that the car was crowded. It was said in *Burns v. Boston Elevated Ry.*, 183 Mass. 96, at page 97, 66 N. E. 418: "The fact that the car was crowded is immaterial." This has been said in substance in numerous cases and is implied in many other decisions. *Jacobs v. West End St. Ry.*, 178 Mass. 116, 59 N. E. 639; *McCumber v. Boston Elev. Ry.*, 207 Mass. 559, 93 N. E. 698, 32 L. R. A. (N. S.) 475.

In *Willworth v. Boston Elev. Ry.*, 188 Mass. 220, 222, 74 N. E. 333, it was held that the defendant was not in fault in failing to take measures to prevent passengers from crowding, in passing from the car, if the passengers were not disorderly, and where there is no reason to expect that anything unusually dangerous would happen. *Field v. Boston Elev. Ry.*, 188 Mass. 222, 74 N. E. 334; *Marr v. Boston & Maine R. R.*, 208 Mass. 446, 94 N. E. 692; *MacGillivray v. Boston Elev. Ry.*, 229 Mass. 65, 118 N. E. 166. These cases govern the case at bar.

Chase v. Boston Elev. Ry., 122 N. E. 174, is to be distinguished. In that case the person in charge of the elevator, without warning, opened the elevator door against which the plaintiff was leaning, which appeared to be a part of the wall of the elevator. The elevator was stopped about four inches above the level of the floor, and there was a settee in the way over which the plaintiff fell. In *Kelley v. Boston Elevated Ry.*, 210 Mass. 454, 96 N. E. 1031, and *Bryant v. Boston Elevated Ry.*, 212 Mass. 62, 98 N. E. 587, 40 L. R. A. (N. S.) 133, the plaintiff was injured in a crowded subway station where the conditions could have been foreseen and provided for. *Kuhlen v. Boston & Northern St. Ry.*, 193 Mass. 341, 79 N. E. 815, 7 L. R. A. (N. S.) 729, 118 Am. St. Rep. 516, rests on the fact of violent conduct at a subway waiting station. *O'Day v. Boston Elev. Ry.*, 218 Mass. 515, 106 N. E. 144, depends on *Stevens v. Boston Elev. Ry.*, 184 Mass. 476, 69 N. E. 338, where there was a violation of a rule by a servant of the defendant, established by it for the protection of passengers. In *Treat v. Boston & Lowell R. R.*, 131 Mass. 371, *Glennen v. Boston Elev. Ry.*, 207 Mass. 497, 93 N. E. 700, 32 L. R. A. (N. S.) 470, *Coy v. Boston Elev. Ry.*, 212 Mass. 307, 98 N. E. 1041, *Morse v. Newton Street Ry.*, 213 Mass. 595, 100 N. E. 1007, and *Nute v. Boston & Maine R. R.*, 214 Mass. 184, 100 N. E. 1099, there was evidence of disorderly and unruly conduct on the part of passengers, which should have been foreseen and guarded against by the defendant. No such facts appear in the case at bar, and these cases do not support

the plaintiff's contention. St. 1906, c. 463, pt. 3, § 96, was not applicable to the plaintiff's case and we need not consider it.

According to the report judgment is to be entered for the defendant.

So ordered.

(233 Mass. 186)

MURRAY v. JUSTICES OF MUNICIPAL COURT OF CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts. Suffolk. June 23, 1919.)

1. OFFICERS ⇐69—CIVIL SERVICE—"REMOVAL WITHOUT PROPER CAUSE."

"Removal without proper cause," as used in St. 1918, c. 247, § 3, relative to the removal, suspension, and rejection of persons in the classified civil service, includes a removal for reasons which are insufficient, frivolous, or irrelevant, and a removal grounded upon evidence which to fair-minded persons appears inadequate to justify the conclusion reached but falling short of an exercise of bad faith.

2. OFFICERS ⇐72(2)—CIVIL SERVICE—REMOVAL—REVIEW.

On petition, pursuant to St. 1918, c. 247, § 3, to review removal of petitioner from employment under the civil service, the municipal court, hearing the petition, does not try the case de novo, but merely reviews the action of the removing officer or board, to prevent a result appearing not to be based on the exercise of an unbiased and reasonable judgment; that is, a removal without proper cause or in bad faith.

3. OFFICERS ⇐72(2)—CIVIL SERVICE—REVIEW OF REMOVAL—BURDEN OF PROOF.

The burden of proof rested on petitioner to the municipal court, pursuant to St. 1918, c. 247, § 3, to review his removal from employment as assistant engineer at a state hospital, to establish the essential statutory facts of removal without proper cause or in bad faith.

Report from Supreme Judicial Court, Suffolk County.

Petition for writ of certiorari by Thomas P. Murray against the Justices of the Municipal Court of the City of Boston. Case reported. Petition dismissed.

Frederick W. Mansfield and Edmund R. Mansfield, both of Boston, for petitioner.

Henry C. Attwill, Atty. Gen., and Max L. Levenson, Asst. Atty. Gen., for respondents.

RUGG, C. J. The petitioner was removed from his employment as assistant engineer at the Boston State Hospital after hearing had in conformity to the civil service law. Thereafter he filed a petition in the municipal court for the city of Boston under St. 1918, c. 247, § 3. It there is enacted that a person removed from such employment may file a petition praying that the action of the officer or board in making such removal may

be reviewed by the court, and that after appropriate notice the court shall "review such action, hear the witnesses, and shall affirm said order unless it shall appear that it was made without proper cause or in bad faith, in which case said order shall be reversed and the petitioner be reinstated. * * *

The return shows that the judge who heard the petition among other matters found that the order of removal was made in good faith. Other findings and rulings are in these words:

"As to the specifications assigned under the head of 'Incompetence,' while I should not have arrived on a careful consideration of the entire evidence presented at the public hearing, at the conclusion reached by the trustees, but should on this evidence have found that these charges were not sustained, yet I find, if the trustees believed the testimony of the chief engineer, and the evidence offered in corroboration thereof, in preference to that offered by the petitioner in refutation thereof, that evidence taken by itself was sufficient to justify a finding that said charges of incompetence had been sustained. I find that the testimony of the chief engineer was fairly and honestly given, that in giving it he was actuated by no improper or unworthy motive, that he honestly believed the charges which he had preferred against the petitioner to be true, that in giving his evidence he showed no bias or hostility toward the petitioner, and that his testimony was believed by the board of trustees and in the main formed the basis of the decision at which in good faith they arrived, that the petitioner should be discharged. I rule that under the law the burden is on the petitioner to establish affirmatively by a fair preponderance of evidence that in removing him the trustees acted either in bad faith or without proper cause, and that this burden has not been sustained."

The order of removal was affirmed. This petition for a writ of certiorari to quash the record of the municipal court of the city of Boston for errors of law was thereupon brought.

[1-3] The case turns upon the interpretation of the crucial part of the statute, which has already been quoted. The correct meaning must be gathered from the words used and the end apparently aimed at by the general court in passing the statute. The requirement, that the court shall "review" the action of the officer or board making the removal, must be construed in connection with the further mandate that, after hearing the witnesses, he "shall affirm the order unless

it appears that it was made without proper cause or in bad faith." Treating these provisions in relation to each other they are not equivalent to common provisions of law respecting hearings on appeal, where the whole matter is reopened and tried again regardless of the initial decision. The order of removal is to be reversed only when "made without proper cause or in bad faith." That provision differs manifestly from one providing for a complete new trial or a full hearing of the matter upon its merits. Removal without proper cause includes a removal for reasons which are insufficient, frivolous or irrelevant, and a removal grounded upon evidence which to fair-minded persons appears inadequate to justify the conclusion reached but falling short of an exercise of bad faith. This may not be an exhaustive definition, but it is sufficient for the present case. The word "review" does not in this connection imply a retrial upon the merits. It indicates a reexamination of a proceeding, already concluded, for the purpose of preventing a result which appears not to be based upon the exercise of an unbiased and reasonable judgment. It does not import a reversal of the earlier decision honestly made upon evidence which appears to an unprejudiced mind sufficient to warrant the decision made although of a character respecting the weight of which two impartial minds might well reach different conclusions, and upon which the reviewing magistrate, if trying the whole issue afresh, might make a different finding. It was entirely consistent for the judge of the municipal court to feel that he would decide the case differently on its merits, if it had been within his jurisdiction to do so, and yet to find that the decision of the superintendent and board of trustees of the hospital did not appear to have been "made without proper cause." *Swan v. Justices of the Superior Court*, 222 Mass. 542, 111 N. E. 386. He ruled correctly that the burden of proof of establishing the essential statutory facts rested upon the petitioner. That also is involved in the words of the statute.

Cases relating to the course of procedure upon writs of review are not controlling in this connection, because it there is expressly provided that the case shall be tried anew.

It follows that as matter of law the entry must be:

Petition dismissed.

(233 Mass. 275)

WHEELER v. CITY OF BOSTON et al.
KIMBALL v. WOODWARD, Health
Com'r, et al.

(Supreme Judicial Court of Massachusetts.
 Suffolk. June 25, 1919.)

MUNICIPAL CORPORATIONS—607—TRANSPORTATION OF GARBAGE—VALIDITY OF REGULATION PROHIBITING.

Boston Revised Ordinances 1914, c. 40, § 14, providing that no person shall transport kitchen swill or garbage through the alleys or streets of the city, municipal collection and removal of the entire mass of garbage being necessary to preserve the public health, passed by the board of health under the authority of Rev. Laws, c. 75, § 65, is a valid exercise of police power by the city, justifying the refusal of permits to farmers to convey garbage and swill through the streets.

Report from Supreme Judicial Court, Suffolk County.

Petitions for writs of mandamus by Joseph Wheeler against the City of Boston and others and by James F. Kimball against Francis X. Mahoney (by amendment, William C. Woodward), Health Commissioner, and others. Cases reported, and ordered consolidated. Petitions dismissed.

O. P. Sampson and Clarence F. Eldredge, both of Boston, for petitioners.

John A. Sullivan, of Boston, for respondent Boston Development & Sanitary Co.

Joseph P. Lyons, of Boston, for respondents Sullivan and Woodward.

RUGG, C. J. These are petitions for writs of mandamus. They are brought to compel the appropriate public officers of the city of Boston to grant and approve permits to the petitioners, who are farmers doing business in neighboring towns, to convey garbage through the streets of Boston on its way to their farms, there to be fed to swine. The pertinent facts are, that the petitioners have for the collection and transportation of garbage modern and sanitary appliances, which are kept clean and wholesome, and that they have been accustomed for several years to do this work in a careful and entirely satisfactory manner without offense to the senses or harm to the health of the community. They have made mutually advantageous arrangements for the collection of their garbage with the proprietors of certain large hotels and restaurants in Boston, who desire to have the petitioners continue to do this work. The petitioners have been granted permits from the municipal officers of Boston for several years. Their methods in the use of the permits have always been approved by the health authorities. In 1912 the city of Boston made a contract with the Boston Development & Sanitary Company, one of the

defendants, wherein it agreed to collect garbage from the part of Boston wherein are located the hotels and restaurants from which the petitioners have been collecting garbage, and to deliver it to that company at designated stations. This contract is still in force. In 1914 the city of Boston made a contract with the same company for the collection of hotel and restaurant garbage within the same area. That company has a reduction plant at Spectacle Island in Boston Harbor and declines to permit the petitioners to collect garbage under its patronage.

By R. L. c. 25, § 14, a city may make contracts "for the disposal of its garbage." R. L. c. 26, § 2; *Clarke v. Fall River*, 219 Mass. 580, 583, 107 N. E. 419.

It is provided by the Revised Ordinances of Boston of 1914, c. 40, § 14, that—

"No person other than employees of the city * * * shall in any street carry * * * house offal or other refuse matter * * * except in accordance with a permit from the commissioner of public works approved by the board of health."

In 1914 the board of health of Boston passed this regulation:

"At a meeting of the board of health held this day, it was voted to adopt the following regulations: Whereas, kitchen swill and garbage in the city of Boston are a source of filth and are capable of containing and of conveying contagion and of creating sickness, thereby endangering the public health and safety; and, whereas, in the opinion of the board, municipal collection and removal of the entire mass of kitchen swill and garbage in the city of Boston is necessary to preserve the public health and safety: Ordered, that no person, firm or corporation, other than the city of Boston or the city contractors or their agents, shall carry, convey or transport through the alleys, streets or public places of the city of Boston any kitchen swill or garbage consisting of any refuse accumulation of meat, fish, fowl, fruit or vegetable matter."

This regulation was adopted for the reasons therein set forth as a health measure, because of difficulty experienced in placing responsibility for nuisances created by failure of persons theretofore holding permits, other than the petitioners, to collect garbage regularly and in a sanitary manner, but who were irregular, slovenly and offensive in their methods. After the passage of this regulation the commissioner of public works refused to issue permits to the petitioners, not because they did not or were not able to comply with all proper rules respecting the collection of garbage, and not because of any complaint against their methods, but because he refused longer to issue any permits to any such persons. The board of health refuses to act in behalf of the petitioners. No permits to transport garbage through the streets of Boston have been granted since the

adoption of the regulation by the board of health. The situation as summarized by the auditor is this:

"There is little controversy as to the facts. The city, having the responsibility of removing or causing to be removed offal and garbage that may be a menace to the public health, has adopted a system both of removal and disposal, employing as its agencies its own employees, its contractors, and the Boston Development & Sanitary Company, and as its agent for disposal it has adopted the Boston Development & Sanitary Company, under a contract. In order to carry out and make effective its policy, it has undertaken to refuse permission to anybody except one of its own agencies to transport garbage through the streets. The Boston Development & Sanitary Company has erected a large reduction plant on Spectacle Island, and furnished scows for the transportation of garbage from the water-front stations to the Island. At the Island it treats all the garbage by a 'reduction' process, and extracts from it grease, oil, and other products of commercial value. The garbage is therefore of value to it."

There is nothing in the record which requires the inference that there is any bad faith in any of the conduct of the city officers. The natural import of all the facts is that the regulation has been passed and enforced in an honest effort to conserve the public health and promote the general welfare.

The petitioners denounce the action of the commissioner of public works and of the board of health in refusing to grant them permits as unreasonable, and the enforcement of the regulation of the board of health as an unauthorized exercise of the police power.

The regulation of the board of health was passed under the authority conferred by R. L. c. 75, § 65, which requires that the board of health—

"shall examine into all nuisances, sources of filth and causes of sickness within its town, * * * which may in its opinion be injurious to the public health, * * * and shall make regulations for the public health and safety relative thereto and relative to articles which are capable of containing or conveying infection or contagion or of creating sickness which are brought into or conveyed from its town."

This section has been treated as applying to the board of health of Boston. *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; *Commonwealth v. Drew*, 208 Mass. 493, 94 N. E. 682, 33 L. R. A. (N. S.) 401. See *Lynn v. County Commissioners*, 153 Mass. 40, 26 N. E. 409.

It was held in *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351, that a by-law forbidding the removal of house dirt and offal from Boston, except by those duly licensed, was a valid exercise of the police power in the interest of the public health. Much the same

arguments there were considered and disposed of as have been urged by the present petitioners. That case goes far toward the decision of the case at bar. To the same effect is *Schultz v. State*, 112 Md. 211, 76 Atl. 592.

The precise question here presented has never arisen in this commonwealth. It has been decided, however, in numerous other jurisdictions. An exactly similar case in principle, and one remarkably like in all its salient facts, is *Gardner v. Michigan*, 199 U. S. 325, 331, 26 Sup. Ct. 106, 108 (50 L. Ed. 212). It there was said:

"The court may well take judicial notice that table refuse, when dumped into receptacles kept for that purpose, will speedily ferment and emit noisome odors, calculated to affect the public health. * * * The defendant insists that it is part of the common knowledge of the country that the refuse from kitchens, tables, hotels, and restaurants is valuable as food for swine, and is property within the meaning of the constitutional provision which forbids the taking by any state of private property for public use without compensation. Of course, all know that such a use of refuse is not uncommon in some localities. * * * Looking at the matter in a practical light, we are unable to say that the means devised by the city council, and indicated by its action, were plainly unreasonable or unnecessary, or did not have a real, substantial relation to the protection of the public."

It has been found by the auditor that title to the garbage vested in the petitioners. So far as concerns the property rights of the petitioners in the garbage after they had taken it from the hotel and restaurant keepers, it may be disposed of by what was said in the same opinion (199 U. S. at page 333, 26 Sup. Ct. at page 109 [50 L. Ed. 212]):

"If it be said that the city might have adequately guarded the public health and at the same time saved the property rights of its owner, on whose premises garbage and refuse were found, the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case and exceeded their proper functions when they passed the ordinance in question."

This decision was rested in part upon *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, at page 322, 26 Sup. Ct. 100, at page 105 (50 L. Ed. 204), where it was said respecting the rights of the collector of garbage:

"Still less has the licensed scavenger a right to complain; for his right to convey garbage and refuse through the public streets, in covered wagons, was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt."

The exact point here presented was decided in *Rochester v. Gutberlett*, 211 N. Y. 309,

105 N. E. 548, L. R. A. 1915D, 209, Ann. Cas. 1915C, 483, after a full discussion, in favor of the validity of the ordinance. The underlying principle upon which were decided the Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394, supports the validity of the present regulation. Other decisions upon facts almost identical with those at bar, and which uphold the reasonableness of the regulation, are *Dupont v. District of Columbia*, 20 App. D. C. 477; *State v. Orr*, 68 Conn. 101, 110, 35 Atl. 770, 34 L. R. A. 279; *Walker v. Jameson*, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 679, 683, 49 Am. St. Rep. 222; *Atlantic City v. Abbott*, 73 N. J. Law, 281, 62 Atl. 909; *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269; *O'Neal v. Harrison*, 96 Kan. 339, 150 Pac. 551, L. R. A. 1915F, 1609; *Smiley v. MacDonald*, 42 Neb. 5, 60 N. W. 355, 27 L. R. A. 540, 47 Am. St. Rep. 684; *Smith v. Spokane*, 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220; *Ex parte Howell*, 71 Tex. Cr. R. 71, 158 S. W. 535. So far as we are aware, there are no contrary decisions. These decisions rest in general upon the idea that garbage is widely regarded as an actual and potential source of disease or detriment to the public health, and that therefore it is within the well-recognized limits of the police power, for the municipality, acting for the common good of all, either to take over itself or to confine to a single person or corporation the collection, transportation through the streets and final disposition of a commodity which so easily may become a nuisance. Private interests must yield to that which is established for the general benefit of all. *Commonwealth v. Alger*, 7 Oush. 53; *Commonwealth v. Wheeler*, 205 Mass. 384, 91 N. E. 415; *Commonwealth v. Titcomb*, 229 Mass. 18, 118 N. E. 328. Of course police regulations must be reasonable both as to the end sought and the means employed. But in view of this great weight of authority in support of the validity of the regulation here assailed it does not seem necessary to discuss the matter further, or to review and distinguish cases where the exercise of police power as to other objects has been held to transcend constitutional limitations. Let the entry in each case be:

Petition dismissed.

(233 Mass. 243)

CRONIN v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 24, 1919.)

1. TRIAL \Leftrightarrow 295(1) — INSTRUCTIONS — CONSIDERATION AS A WHOLE.

If, taken as a whole, the instructions were not erroneous, a single sentence or paragraph cannot be separated from the text as ground for reversible error.

2. TRIAL \Leftrightarrow 295(9) — INSTRUCTIONS — CONSTRUCTION AS A WHOLE — WEIGHT OF EVIDENCE.

In an action for personal injury, instructions that the jury might pick out one of two of the medical witnesses to stand by, etc., *held* not erroneous, as neglecting the question of the weight of all the evidence, in view of the charge as a whole, which clearly stated plaintiff must prove her case by a fair preponderance of the evidence, etc.

3. TRIAL \Leftrightarrow 295(9) — INSTRUCTIONS — CONSTRUCTION AS A WHOLE — WEIGHT OF EVIDENCE.

In an action for personal injuries, remark of the trial court in instructing that the jury had got a very important witness, if there was anybody among all of defendant's witnesses who inspected the stair which caused the accident on the night of its occurrence, etc., *held* not erroneous, in view of the context, as directing a verdict on the testimony of one witness alone.

Exceptions from Superior Court, Suffolk County; W. P. Hall, Judge.

Action by Annie Cronin against the Boston Elevated Railway Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Wilson, Juggins & Murphy, of Boston, for plaintiff.

Fletcher Ranney and Thomas Allen, Jr., both of Boston, for defendant.

CARROLL, J. The plaintiff was a passenger on one of the defendant's cars and when descending the exit stairway of its station at Beach street, on July 30, 1916, fell and was injured. The plaintiff testified that the cause of her fall was a loose screw which projected from the tread of the top step and that the metal tread of this step was loose. She was cut and bruised as the result of the fall, and claimed she was so bruised as the result of her fall that a cancer developed on her right breast, which was later removed by an operation.

It was not questioned that the plaintiff was a passenger and by her fall was slightly injured. The defendant produced several witnesses who testified that they examined the steps upon which the plaintiff said she had fallen and could find no loose screw or tread or other defect in them. The experts called by the plaintiff testified that the injury to the breast, caused by the fall, was a sufficient cause of the cancer, one of these witnesses saying "that the possibility of recurrence is relatively high." Drs. Whitney and Fairbanks, for the defendant, testified that the blow and injury to the right breast would not be an adequate cause for a cancer. Dr. Fairbanks further stated that when he examined the plaintiff in the presence of her physician, Dr. Granger, in February, 1917, nothing was said by either the plain-

tiff or her physician about a bruise on the breast. There was a verdict for the plaintiff.

The defendant excepted "to so much of the charge as said that the jury should try to pick out one witness because it seems to neglect the question of weight of the evidence. 'I would single out one;' that is, both on the question of liability and damages."

In *Tufts v. Seabury*, 11 Pick. 140, where the defense was that the goods sold and delivered were sold on credit, the defendant produced a witness, Chamberlain, who so testified, which testimony was denied by the plaintiff; the judge instructed the jury, if they believed Chamberlain they ought to find for the defendant, unless from the other evidence and circumstances they should find that the offer of credit was withdrawn and other terms of sale substituted. This instruction was considered erroneous because the proper instruction would have been, "that they should find for the defendant if upon the whole evidence they believed that a credit had been given." See in this connection *Gray v. Boston Elevated Railway*, 215 Mass. 143, 148, 102 N. E. 71.

In that part of the charge where the judge was considering the question of damages, referring to the medical experts in the case he said to the jury, "You may pick out one or two of these men that you say you will stand by;" and when discussing the issue of liability after directing attention to the statements of the various witnesses called by the defendant on this question he said, "Is there anybody * * * of whom you can say: I am convinced by that person?" These instructions would have been objectionable, if they directed the jury to select one or two witnesses and decide the case on their testimony alone, without weighing and considering all the evidence in the case.

[1, 2] To determine the question the entire charge must be considered, and, if taken as a whole the instructions were not erroneous, a single sentence or paragraph cannot be separated from the text as ground for reversible error. "General exceptions to specific portions of the charge where no requests are asked for, will not be sustained, unless substantial error or injustice plainly appears." *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997; *Dewey v. Boston Elevated Railway Co.*, 217 Mass. 599, 604, 105 N. E. 366; *Conners Bros. v. Sullivan*, 220 Mass. 600, 607, 108 N. E. 503; *Adams v. Nantucket*, 11 Allen, 203. Taking the charge as a whole, the jury were clearly told many times that the plaintiff must prove her case by a fair preponderance of evidence that the burden of proof was upon her to demonstrate her case to their satisfaction. There was no substantial error in the charge, it does not appear that any injustice was done the defend-

ant and we do not think the jury were misled.

[3] As we have said, it was denied by the defendant that the stairway was defective and several witnesses were called by the defendant to prove that there was no loose tread or screw. The judge, in calling the jury's attention to what appeared to be a disagreement in the testimony of some of the defendant's witnesses, referred to one witness who claimed the tread was bolted down by screws to the bed plate, and asked the jury to decide who was right about that, "because the plaintiff has got to have a situation here that would demonstrate to your satisfaction that a condition of looseness existed upon that tread, and that there was a projecting screw." Following this he said, "It is pretty important for you to determine whether or not it was bolted down to the bed plate, as Frederick says it was," or "it hung over some," as claimed by the defendant's roadmaster.

After referring to other witnesses called by the defendant, the judge said:

"Now is there anybody there that you say among all those witnesses * * * inspected those stairs that night * * * and to see the situation exactly as it was? If you do, you have got a very important witness in the case."

Then referring to the question whether there was a projecting screw and a loose tread, he said:

"It is not a question of imagination on either side. You have got to meet it exactly where it lies. * * * You have got to test out the persons upon the one side and upon the other, and sift them down if you can—see if there is anybody, one or more, that is reliable, of whom you can say, 'I am convinced by that person.'"

In this part of the charge relating to the defect, the jury were fully instructed to weigh all the evidence and to test all the witnesses.

The remark concerning the testimony of the witness and being convinced by some one person cannot be disconnected from the context and relied on as showing that the jury were misled or directed to decide upon the testimony of one person alone. In this part of the charge the jury's attention was at the time directed to the defendant's side of the case. They were then considering the defendant's witnesses and they could not have understood by this single sentence, in view of all that was said to them, that they were to eliminate all the other evidence in the case.

On the question of damage there was no dispute that the plaintiff had a cancer, but it was disputed that it was caused by the fall. Here again the judge said:

"It is for the plaintiff to show you, by a fair preponderance of the evidence, that the cancer resulted from the blow."

In charging the jury on this aspect of the case, after referring to the experts called by the plaintiff and defendant, he said, "You may pick out one or two of these men that you say you will stand by." Then in considering the question of recurrence of the cancer he told the jury:

"The burden of proof is on the plaintiff to prove that to you. * * * Satisfy yourself in this case as abstractly as you can look at it, that what she alleges she has proved. If you are satisfied, if your minds are convinced that the predictions are based on the medical experience and history, that she is ultimately going to have another cancer, with its results, she is entitled to damages for that."

And as he neared the close of the charge the judge said:

"As long as the burden is sustained by the plaintiff, even to the end, she is entitled to have you follow. Wherever that burden fails—then you have got to stop."

We have referred to the charge at some length, but even on the question of the plaintiff's damages, although there was one sentence authorizing the jury to pick out one or two men to stand by, the whole tenor and purport of the charge was to decide the case according to all the evidence, remembering that the burden of proof was upon the plaintiff to satisfy them on all the features of the case. From the beginning of the charge to the end it was frequently stated that having heard all the evidence the jury must be satisfied by a fair preponderance of it that the plaintiff's case was established. They could not have understood from the sentence referring to the selection of one or two witnesses that they were to decide upon the question of the plaintiff's damages without reference to all the other facts and testimony bearing on this issue.

Construing the instructions in their entirety, we think the jury were properly directed and there was no reversible error.

Exceptions overruled.

(188 Ind. 373)

DUNVILLE v. STATE. (No. 23401.)

(Supreme Court of Indiana. June 25, 1919.)

1. CRIMINAL LAW \Leftrightarrow 9—MANSLAUGHTER—ADOPTION OF COMMON-LAW DEFINITION.

Burns' Ann. St. 1914, § 2239, defining manslaughter, is adopted bodily from the common law.

2. CRIMINAL LAW \Leftrightarrow 11—MANSLAUGHTER—COMMON-LAW CONSTRUCTION.

The Legislature, in adopting common-law definition of manslaughter by Burns' Ann. St. 1914, § 2239, must have intended to adopt common-law meaning of words used.

3. HOMICIDE \Leftrightarrow 74—MANSLAUGHTER—WANTON RECKLESSNESS—"UNLAWFUL ACT."

Under Burns' Ann. St. 1914, § 2239, defining manslaughter as act committed while doing some "unlawful act," the quoted words include conduct involving wanton recklessness, as well as acts prohibited by statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unlawful Act.]

4. HOMICIDE \Leftrightarrow 5—MANSLAUGHTER—PROXIMATE CAUSE.

Under Burns' Ann. St. 1914, § 2239, defining manslaughter as act committed while doing some unlawful act, etc., it is necessary to show that unlawful act proximately caused the death.

5. HOMICIDE \Leftrightarrow 235—MANSLAUGHTER—EVIDENCE.

Evidence regarding circumstances under which accused, while on a motorcycle, ran into and killed a 2 year old child, who suddenly started across street, held not to show that accused's alleged unlawful conduct in violation of the Motor Vehicle Act (Burns' Ann. St. 1914, § 10476c) proximately caused the death.

Appeal from Criminal Court, Marion County; James A. Collins, Judge.

James Dunville was convicted of manslaughter, and he appeals. Reversed, with directions to grant a new trial.

James M. Leathers, of Indianapolis, for appellant.

Ele Stansbury and Edward M. White, both of Indianapolis, for the State.

TOWNSEND, J. Appellant was tried by the court, convicted of involuntary manslaughter and sentenced. The questions are presented by a motion for new trial: (1) Finding not sustained by sufficient evidence; (2) finding contrary to law.

The indictment is in two counts, and it will be necessary to set out the substance only of so much of each count as will make understandable the questions discussed in this opinion.

The first count charges, in substance, that appellant drove a motorcycle north on Dear-

born street, in the city of Indianapolis, at a speed in excess of 25 miles per hour, which was greater than was reasonable and prudent, having regard to the traffic and use of the street at the time and place; that this rate of speed was such as to endanger the life and limb of persons traveling on or using the street at the time and place; that as a result of this speed he lacked control of the motorcycle; that as a result of all of this he ran his motorcycle upon and against the person of Frances Held, inflicting injuries which caused her death on the following day.

So much of the substance of the second count as is necessary charges that he ran his motorcycle at a speed of 30 miles per hour on this street; that by reason of this speed he lacked control; that he operated his motorcycle without regard to the safety of other persons lawfully using said street; that as a result of his speed and lack of control he ran upon and against Frances Held, inflicting the injuries of which she died the following day.

The statute is:

"Whoever unlawfully kills any human being without malice, express or implied, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter, and, on conviction, shall be imprisoned in the state prison not less than two years, nor more than twenty-one years." Section 2239, Burns 1914.

[1] The above declaration of the crime of manslaughter is adopted bodily from the common-law definition. Blackst. Comm. vol. 4.

[2] While it is true that all crimes in this state are statutory, yet the Legislature, having adopted the common-law definition of manslaughter, must have intended to adopt the content of each and every word in the act as defined at common law.

[3,4] Appellant is here charged with involuntary manslaughter. Each count of the indictment charges a violation of the Motor Vehicle Act as to speed. Section 10476c, Burns 1914. The two words "unlawful act," contained in the statutory definition of involuntary manslaughter, must be taken to be as broad in their content as they were at common law. These words embody more than an act prohibited by positive statute. One may be guilty of involuntary manslaughter if he conducts himself, in a given set of circumstances, with such willful disregard for the rights of others as to show a wanton recklessness as to the life and limb of other persons. It is also true that, if he is acting in violation of a positive statute under circumstances that show a reckless disregard for the life and limb of others, and this violation is the proximate cause of the death, the law then implies an intent to do the injury and makes him guilty of involuntary manslaughter.

ter. Whether the unlawful act committed is the one which we have first above indicated, or the second one pointed out, it is always necessary that the evidence show that the unlawful act is the proximate cause of the death. *People v. Barnes*, 182 Mich. 179, 199, 148 N. W. 400.

[6] The evidence in this case shows that Frances Held, the little girl who was killed, was 2 years and 9 months old. The evidence shows that appellant on the 8th day of September, 1918, between 5:30 and 6 o'clock, was driving his motorcycle north on Dearborn street, in the city of Indianapolis; that he ran upon and against Frances Held in the block between Pratt and St. Clair streets. It is not definitely disclosed by the evidence where in the block this accident occurred, other than that the little girl came into the street opposite the Reynold's sidewalk. Witnesses testified to the speed of appellant at points not definitely disclosed by the evidence, but shown to be from a half block to $2\frac{1}{2}$ blocks south from the scene of the accident. The evidence does not disclose anything as to the condition of the traffic on the street, or the length of block or blocks talked about by the witnesses. In fact, it affirmatively appears from the evidence, if anything, that the only person upon the street within that block was the little child, Frances Held; and the evidence shows that she ran suddenly across the street and stopped immediately in front of appellant's motorcycle; that he tried to avoid her; that he tripped his machine down, throwing his companion, who was on the rear seat, against the curb, rendering him unconscious; that this all occurred so suddenly that he did not have time to shut the engine off, and it drove the motorcycle, while resting upon its pedal, across the street, and kept running until appellant went over and shut it off. One witness testified that the child, Frances Held, came from the west side of the street. It is not made to appear how far away appellant was when she came, or whether he was any appreciable distance south of where the accident occurred. Another witness testified that she came from the east side of the street, but it is not made to appear how far appellant was away when she came, or what opportunity he had to see her. All the witnesses agree that the accident occurred near the east curb of the street at a point on the street where appellant had a right to be in going north. It is not shown how far away the witness was who testified that the child came from the west side of the street, nor is it made to appear that appellant had the same opportunity to see her, if she came from that side of the street that this witness did. It is not shown how far the witness was away who testified that the child came from the east side of the street, nor is it made to appear that appellant had the opportunity to see the child that this witness did. There is not a syllable of evi-

dence in the record as to the width of the street; no evidence as to whether the child came from a hidden position with reference to appellant. All of the witnesses who testified about the accident appear to have been south on the street anywhere from a half block to $2\frac{1}{2}$ blocks—how far from the point of accident is not further disclosed. There is not a syllable of evidence in the record as to how long the block is where the accident occurred.

The testimony of the appellant is that he had just passed around a wagon which was standing on the east side of the street; that as he passed around this wagon he shut off the power on his motorcycle; that he was back to his position on the east side of the street, and had proceeded about 200 feet, when he discovered immediately in front of him this child, who stopped right in front of his wheel. He says that he tried to avoid her, but she stopped in front of his wheel. All of the witnesses agree that he tried to avoid her, but that she ran suddenly into the street and stopped in front of his wheel. The testimony as to his speed at the south corner of this block and for two blocks farther south is rather remote, considering the fact that nothing appears to show how far these points were from the scene of the accident. It is a matter of common knowledge that motor vehicles may be accelerated and retarded very rapidly. But whatever may be said as to the inferences that the lower court drew from the testimony about appellant's speed, and whether the lower court was warranted in drawing the inference that he was exceeding the speed limit of 15 miles per hour at the time the child was struck becomes material only when it is shown that the accident would not have occurred just as it did had appellant been going at a lawful rate.

Counsel for the appellant, in a very able brief in which many authorities are collated, sets out the law of involuntary manslaughter. Counsel for the state admit that this exposition of the law is a correct one, but they wholly deny that the conduct of this child in suddenly coming into the street has anything to do with this case. Their contention is, if we understand them, that if it was shown that appellant was violating the speed law, and that, as some of the evidence shows, he was looking back, or looking to the side at some men who attracted his attention on the east side of the street, and for that reason did not see the child, that he is therefore guilty of manslaughter. Counsel for the state say that contributory negligence of the child has nothing to do with the case. This is true in a sense. It is not a question of contributory negligence. Of course, we know that a child 2 years and 9 months old is not *sui juris*, and cannot be guilty of negligence, or contributory negligence, in the ordinary sense of those terms; but the conduct of this child, in the circumstances shown by the evi-

dence, is just as cogent in breaking down the intent which the law imputes to appellant after the event as like conduct on the part of an adult in like circumstances would be in repelling such imputation. It is not a question of contributory negligence, but it is one of proximate cause.

So the question is, Did appellant conduct himself at the time and place in such a manner as to show a willful and wanton disregard for the rights of others, from which the law infers an intent to cause death, and did his conduct cause the death. It will be conceded that, if appellant were driving his motorcycle down the street, and the facts showed that he saw, or had reason to know that, little children were upon the street who were of such tender age as not to know the dangers or heed warning signals it would be his duty so to conduct himself as not to injure them, and in the event that he willfully and wantonly disregarded that duty and his conduct resulted in the death of one of them, he would be guilty of involuntary manslaughter. Circumstances could well be conceived in which he would be guilty of involuntary manslaughter if he drove the motor vehicle even at 1 mile an hour in a street crowded with little children, or even crowded with adults.

The most the evidence discloses is negligence on the part of appellant. For aught that appears in this case the proximate cause of Frances Held's death was the fact that she ran in front of appellant's motorcycle and suddenly stopped. For aught that is shown by the evidence, the accident would have occurred had appellant been proceeding in the most careful manner.

An apt authority involving most, if not all, of the salient principles here discussed is found in *People v. Barnes*, 182 Mich. 179, 148 N. W. 400, cited above.

The finding of the court is not sustained by sufficient evidence, and is therefore contrary to law.

The judgment is reversed, with instructions to sustain appellant's motion for a new trial.

(188 Ind. 353)

BANKS v. STATE. (No. 23535.)

(Supreme Court of Indiana. June 24, 1919.)

1. CRIMINAL LAW § 884—VERDICT—CERTAINTY—PLACE OF PUNISHMENT.

A verdict finding defendant guilty as charged, and assessing his punishment at "\$300 fine, imprisonment in the county jail for 3 months, 90 days in the penal farm," is not so defective, indefinite, and uncertain as to the place of imprisonment that judgment under Burns' Ann. St. 1914, § 9926h, could not be rendered thereon, for under the express provisions of act of 1913 it was the duty of the court to sentence

defendant to the Indiana State Farm, the punishment being fixed at 90 days.

2. INTOXICATING LIQUORS § 140—UNLAWFUL KEEPING—"DISPOSAL."

Where defendant, who with his son-in-law and their respective families was going on a fishing trip, purchased liquor for use of the party, the son-in-law furnishing half of the money, held that, though defendant be considered the agent of the son-in-law, and that title to half the liquor passed to him on the purchase, yet defendant was guilty of unlawfully keeping intoxicating liquor with intent to barter, exchange, give away, furnish, and otherwise dispose of the same, in violation of Acts 1917, c. 4, § 4, for the delivery of the liquor to the son-in-law would be a "disposal," etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Disposal.]

Appeal from Circuit Court, Sullivan County; Wm. H. Bridwell, Judge.

John Banks was convicted of violating Acts 1917, c. 4, § 4, relating to intoxicating liquors, and he appeals. Affirmed.

Arthur D. Cutler, of Sullivan, for appellant.

Ele Stansbury and Dale F. Stansbury, both of Indianapolis, for the State.

LAIRY, C. J. [1] Appellant was charged by indictment in the trial court with violating section 4 of the act of 1917 relating to intoxicating liquors. Acts 1917, p. 15. The indictment charged that appellant at the county of Sullivan and the state of Indiana did, on the 24th day of May, 1918, unlawfully keep intoxicating liquor, with intent then and there to barter, exchange, give away, furnish and otherwise dispose of the same in the state of Indiana in violation of the laws of the state of Indiana. A trial by jury resulted in a verdict of guilty. Omitting the formal parts, the verdict of the jury is in the words following:

"We, the jury find the defendant guilty as charged in the indictment and assess his punishment at a fine of \$300, and imprisonment in the county jail for a period of three months, 90 days in the penal farm."

Appellant filed a motion for a venire de novo based on the ground that the verdict was so indefinite, uncertain, ambiguous, and defective that no judgment could be rendered thereon. This motion was overruled, and this ruling is assigned as error.

The court did not err in overruling this motion. Section 8 of the act of 1913, providing for the establishment of the Indiana State Farm, makes it the duty of all judges of circuit, superior, and criminal courts to commit to that institution all male persons, above the age of commitment to the Indiana Boy's School, who have been con-

victed of the violation of any criminal law or of any ordinance the punishment for which formerly consisted of imprisonment in the county jail. Under the proviso of this section the court has a discretion to commit to either the county jail or the state farm, where the imprisonment is 60 days or less; but in this case, where the term of imprisonment was 90 days, it was the absolute duty of the court to commit the defendant to the state farm. In the light of this statute the verdict was not ambiguous or uncertain as to the place of imprisonment. Section 9926h, Burns 1914.

[2] Error is also assigned on the action of the court in overruling the motion of appellant for a new trial, which was based on the grounds that the verdict is contrary to law, that the verdict is not sustained by sufficient evidence, and that the court erred in giving to the jury instruction No. 7.

The evidence most favorable to appellant shows that a few days before he was arrested he had a conversation with his son-in-law, in which a fishing trip was planned for the following Saturday, in which both of their families were to participate. It was agreed between them that they would take some beer and whisky along to be used by them and their families on that occasion, and appellant agreed to procure the liquor. His son-in-law gave him \$4, and appellant bought \$8 worth of liquor, using the money given him by his son-in-law and an equal amount of his own money. At the time he was arrested, he had the liquor so purchased in his possession with intent to carry out the arrangement and for no other purpose. For the purpose of the appeal the state admits that the evidence is undisputed, and the whole transaction occurred just as appellant said it did.

Under this state of facts appellant asserts that he acted as agent for his son-in-law in purchasing the portion of liquor intended for the use of him and his family, that the title therein passed to him at the time of the purchase and not to appellant, and that a future delivery to him would not constitute a sale, barter, exchange, gift, or a furnishing or other disposition of intoxicating liquor within the meaning of the act. He cites a number of cases to sustain his position. *State v. Cunningham*, 25 Conn. 195; *Du Bois v. State*, 87 Ala. 101, 6 South. 381; *Garbracht v. Commonwealth*, 96 Pa. 449, 42 Am. Rep. 550.

The state admits that, under the authorities cited, appellant could not be held guilty of an intent to sell, barter, exchange, or give away the liquor in his possession, but it is asserted that the facts show that he intended to furnish or otherwise dispose of it.

The sole question for decision is thus presented. Do the facts show that appellant intended to furnish the liquor in his posses-

sion to others, within the meaning of the word as used in the act?

To furnish means to supply for use. It does not necessarily imply a change in title. The master may furnish tools to a workman for use, the title remaining in the master. This common use of the term shows that the owner of property may furnish it to another by a mere delivery for use, but does a person furnish a thing to another by carrying and delivering to him an article of which he is already the owner? In deciding a question involving such a nice distinction in meaning, the definition of a word in the abstract is seldom of controlling influence. The court is generally required to consider the word in the concrete as used in the statute to be construed, keeping in mind the general purpose of the act and the evils it was intended to remedy, as well as other rules of statutory construction.

The statute under consideration does not make it unlawful for a person to have intoxicating liquor in his possession in this state for his own use, and it expressly provides that it does not prohibit a person having liquor in his possession from giving it to a guest in his own home; but it was apparently the intention of the Legislature to make it impossible for a person to obtain possession of liquor in this state. It seems to have been the purpose of the Legislature to protect the people of the state from the temptation to drink intoxicating liquors by cutting off every avenue through which possession of such liquors could be obtained. Once a person has obtained possession and control of liquor, the statute does not make it unlawful to use it, but it does make it unlawful to furnish it to others, except as specifically provided in the act.

In the case of *Commonwealth v. Davis* (1876) 75 Ky. (12 Bush) 240, the defendant below was charged with giving spirituous liquor to a minor. The evidence showed the liquor was bought by the defendant with money furnished in whole or in part by the minor. The court said:

"In its strict and primary sense the word 'give' signifies 'to confer or transfer without any price or reward; to bestow.' In its more enlarged sense it signifies 'to furnish, to supply,' and it was in this latter sense that the word was used in the statute.

"The statute was not enacted because the mere act of selling, loaning, or giving spirituous, vinous, or malt liquors to minors was in and of itself mischievous, but because such acts place the liquor in their hands and enable them to drink it, whereby they become debauched and ruined."

In the case of *State v. Reese* (1912) 69 Wash. 437, 125 Pac. 363, the court construed a statute making it unlawful to sell, give away, dispose of, exchange or barter intoxicating liquor to an Indian. The court said:

"It would seem that when the Legislature used the words 'sell,' 'give away,' 'dispose of,' 'exchange,' and 'barter,' practically every imaginable method of an Indian acquiring intoxicating liquor was described. If the allegations of this information are true, then the defendant was the direct voluntary instrument of the disposition of the liquor to the Indian. Even assuming that the defendant was the mere agent of the Indian, and that the person from whom he purchased the liquor with the Indian's money had knowledge of the purpose of the purchase, yet the defendant acquired possession and control over the liquor, and this possession and control he transferred to the Indian. Surely by that act he disposed of the liquor. True, he did not 'sell' or 'give away' the liquor; but the very fact that the Legislature used the words 'disposed of' in addition to 'sell' and 'give away' shows the intent of the Legislature to include every possible subterfuge by which an Indian might acquire liquor through the voluntary act of another."

The same rule has been applied to the construction of statutes relating to dry territory, where the acts forbidden by the statutes included the furnishing or otherwise disposing of intoxicating liquor. *State v. Hassett*, 64 Vt. 46, 23 Atl. 584; *People v. Lapham* (1910) 162 Mich. 394, 127 N. W. 366.

Conceding that the title to the portion of the liquor for the son-in-law was in him from the time it was purchased and came into the hands of appellant, it cannot be asserted that it had ever been in his possession or control. The purpose of the statute, as heretofore stated, was to protect the health and morals of the inhabitants of the state by keeping intoxicating liquors out of their possession and beyond their control. If appellant had delivered the liquor in accordance with his declared purpose, he would have been the active means by and through which the liquor in question would have been placed in the custody and control of persons whom the statute was enacted to protect. In the opinion of the court, the evidence is sufficient to sustain the verdict, and the verdict is not contrary to law.

In view of the evidence the instruction complained of was not prejudicial to appellant's rights.

Judgment affirmed.

STANDARD OIL CO. OF INDIANA v. ALLEN. (No. 9619).*

(Appellate Court of Indiana, Division No. 1.
June 19, 1919.)

1. MASTER AND SERVANT §277—INJURIES TO SERVANT—EVIDENCE—EXISTENCE AND RELATION.

A finding that the relation of master and servant existed between defendant and decedent held warranted by the evidence.

2. APPEAL AND ERROR §996—REVIEW—SUFFICIENCY OF EVIDENCE.

The Appellate Court is bound by a finding that the relation of master and servant existed between decedent and defendant, notwithstanding a contrary inference equally reasonable might have been drawn from the evidence.

Appeal from Circuit Court, Wayne County; H. C. Fox, Judge.

On motion for rehearing. Rehearing denied.

For former opinion, see 121 N. E. 329.

S. D. Miller, F. C. Dalley, and W. H. Thompson, all of Indianapolis, Gath Freeman, of Richmond, and C. C. Shirley, of Kokomo, for appellant.

C. E. Shiveley, Ray K. Shiveley, and Joshua H. Allen, all of Richmond, for appellee.

BATMAN, C. J. Appellant, in a very able brief on its petition for a rehearing, has pointed out wherein it believes the court erred in its original opinion; but, after a careful consideration of such petition, we are forced to adhere to the conclusion already announced. However, in view of appellant's earnest contention that there is no evidence to sustain the essential finding that the relation of master and servant existed between it and the decedent, at the time he was engaged in making the repairs on its gasoline tank, we call attention to the fact that there is evidence in the record which tends to establish the following: That Jacob Kern was running a small boiler repair shop in Richmond, Ind.; that he employed a few men to assist him in his work, but did not contract; that he could not do all the work that came to him, and he would, at times, furnish men to those who wanted repairs made; that he would render bills for such work, and pay his men therefor, reserving a small portion of the amount received as his compensation; that, on the occasion in question, word was received at his shop that appellant desired some repairs made, and he sent the decedent, who had been working for him for several years, to see what was to be done; that the decedent called at appellant's place of business, and, after ascertaining the nature of the repairs desired, returned to Kern's shop for the purpose of obtaining tools with which to do the work and some one to assist him therein; that the decedent and one Graham, who was also an employé of said Kern, then took certain tools and went to appellant's place of business to make said repairs; that, after making an examination of the tank to be repaired, they reported to appellant's superintendent that it could be repaired in either one of two ways; that the said superintendent then decided how the work should be done, and directed the decedent and said Graham to perform it in that

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion 128 N. E. 674. Rehearing denied.

manner; that the decedent then went on the inside of said tank, and on coming out reported that there was still a quantity of gasoline in the same; that appellant's superintendent thereupon directed the decedent and said Graham to drill holes in the bottom of the tank in order that the gasoline might be drawn out before the work proceeded; that, prior to the time the decedent entered the tank, appellant's superintendent procured an electric light globe, attached it to the end of an extension cord, and assisted in connecting it with the electric wiring on the premises, in order that the decedent might carry the lighted globe with him into the tank; that, at the time the decedent first entered the tank, one Ball, an employé of appellant, got on top of the tank, and appellant's said superintendent handed the electric light globe up to him, and said Ball then passed it on to the decedent, after he had entered, or was about to enter, the tank; that, after the gasoline had been drained from the same, the decedent re-entered the tank, and the electric light globe was passed to him, by appellant's said superintendent and the said Ball, in the same manner; that, before the decedent entered the tank the last time, appellant's said superintendent handed a line up to said Ball, who was on the top of said tank, and who placed one end thereof around the decedent's body, and held the other end on the outside as a matter of precaution, on account of the attendant danger in entering the tank from which gasoline had been recently drawn.

Appellant cites the brevity of the conversations between its superintendent, and the men engaged in making the repairs, and the meagerness of the directions given them by its superintendent with reference thereto. It lays stress on these facts in its contention that the relation of master and servant did not exist between it and the decedent in the performance of the work in question. While it was proper for the jury to consider the extent of such conversations, and the scope of such directions, as circumstances bearing on the question under consideration, they were by no means conclusive. It will be noted that the repairs to be made were neither large nor complicated, and evidently did not require extended conversations, or elaborate directions, in order to exercise control over the men with reference to the work, while it was in progress.

[1] It should be borne in mind that the

jury, in determining the question under consideration, was not limited to a consideration of the conversations between appellant's superintendent and the men engaged in making the repairs, but was authorized to consider all the attendant circumstances among which we note that no definite arrangements were made with Jacob Kern regarding the manner in which the repairs were to be made; that he did not visit the scene of the work to ascertain what was to be done, or how it could be performed; that he did not plan the work, or give any directions as to how it should be done; that he was not present at any time during its progress, and assumed no personal control over the same; that the decision, as to how the repairs should be accomplished, was made by appellant's superintendent, and the direction to proceed with the work, in accordance with such determination, was given by him; that, in addition to this, he was present during the progress of the work, and aided in making preparations therefor. These facts are not cited as conclusive on the question under consideration, but merely as circumstances which the jury had a right to weigh, along with other evidence, in reaching its conclusion in that regard. In so doing it was not only the province of the jury to consider all the facts and circumstances in evidence attending the work, but to draw all reasonable inference therefrom.

[2] The jury, after considering such facts and circumstances, has drawn the inference that the decedent was the servant of appellant, while making said repairs, and, as we are unable to say that such an inference is an unreasonable one, it is binding on this court, although a contrary inference, equally as reasonable, might have been drawn therefrom. This rule is too well settled to require authorities, but to those cited in the original opinion we add the following: *Bright Nat. Bank v. Hartman* (1915) 61 Ind. App. 440, 109 N. E. 846; *Louisville, etc., R. Co. v. Western Union Tel. Co.* (1915) 184 Ind. 531, 11 N. E. 802, Ann. Cas. 1917C, 628.

When the rules governing appeals are applied to the facts and circumstances which the evidence in this case tends to establish, we cannot say that the verdict of the jury is not sustained by sufficient evidence or is contrary to law. Other contentions made by appellant are fully covered by the original opinion.

The petition for a rehearing is overruled.

(71 Ind. 532)

BRACKNEY et al. v. BOYD et al.*
(No. 10062.)(Appellate Court of Indiana, Division No. 2.
June 17, 1919.)**1. MORTGAGES** \S 544(3) — ASSISTANCE, WRIT OF—PETITION—SUFFICIENCY.

A petition in a summary proceeding for a writ of assistance to obtain possession of real estate wrongfully withheld by defendants after a foreclosure decree had been rendered and the property sold thereunder is not demurrable for failure to set out the sheriff's deed to plaintiff, nor a copy of the notice to defendants of the application for the writ.

2. BOUNDARIES \S 20(1) — DESCRIPTION OF PROPERTY—STREETS AND ALLEYS.

A conveyance of a lot in a town or city designated by its number or other proper designation and abutting on a street or alley carries with it the fee to the center of the street.

3. BOUNDARIES \S 20(1)—MORTGAGES—FORECLOSURE—SHERIFF'S DEED.

The rule that a conveyance of a town or city lot by number or other proper description gives the fee to the center of a street upon which the property abuts applies to a mortgage and to a sheriff's deed to a purchaser at a foreclosure sale.

4. MORTGAGES \S 544(3) — ASSISTANCE, WRIT OF—JURISDICTION—SPECIAL JUDGE.

The powers of a special judge in a foreclosure proceeding extend to the grant of a writ of assistance to place plaintiffs in possession after sale.

5. MORTGAGES \S 544(3) — ASSISTANCE, WRIT OF—CROSS-COMPLAINT—PROPERTY.

In a summary proceeding for a writ of assistance to place mortgage foreclosure purchasers in possession, it was not error to refuse to permit mortgagors to contest title by cross-complaint.

Appeal from Circuit Court, Putnam County; John H. James, Special Judge.

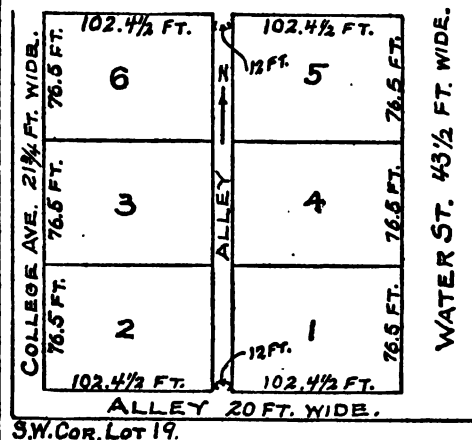
Proceeding by Ida Cullen Boyd and another against Daniel C. Brackney and another for a writ of assistance. Judgment for petitioner, and defendants appeal. Affirmed.

Thomas A. Moore and Fay S. Hamilton, both of Greencastle, for appellants.

Jackson Boyd and Lyon & Peck, all of Greencastle, for appellees.

NICHOLS, P. J. The appellants were the owners of lots Nos. 1 to 6, inclusive, Higert's subdivision in the city of Greencastle, Ind., and executed their mortgage thereon to the appellee Ida Cullen Boyd. After the making of said mortgage the said Higert's subdivision, including said lots, and streets and alleys abutting them, was duly vacated according

to the law and the easement of the public removed therefrom. The situation is better understood by reference to the following plat:



Thereafter, to wit; on August 9, 1912, the said appellee Ida Cullen Boyd commenced suit in the Putnam circuit court against the appellants to foreclose said mortgage. A change of venue was taken from the regular judge of said court, and Hon. John H. James was appointed and duly qualified to try said cause, and upon the trial thereof entered a judgment and decree in favor of said Ida Cullen Boyd and against the appellants, foreclosing said mortgage.

The sheriff sold said land by virtue of the authority of a certified copy of the foreclosure judgment and decree, and the said appellee Ida Cullen Boyd purchased the same at such sale and took a certificate of sale therefor, which the said appellee afterward sold and assigned to the appellee Jackson Boyd; after the expiration of the year for redemption, said land not having been redeemed, the said appellee Jackson Boyd received from the sheriff of Putnam county a deed therefor, said land being described in said proceeding and in said deed by the lot numbers as originally in the mortgage.

Thereafter, when said appellee Jackson Boyd went to take possession of said lots, or such part of the same as he had not sold, appellants refused, upon notice and demand, to surrender possession thereof, and said appellee then filed his petition before Hon. John H. James, special judge as aforesaid, to redocket said cause and for a writ of assistance, afterwards filing an amended petition, describing said land therein by its lot numbers, and also describing it by metes and bounds, commencing at the southwest corner of lot No. 19 in trustee's plat, which point can be located by reference to the plat above. This description included the streets and alleys upon which said lots abutted, and which are involved in this action.

The petition prays for a writ of assistance,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 125 N. E. 235.

directing the sheriff to remove the appellants from said real estate and put the appellee in possession thereof.

Appellants appeared specially and objected to Hon. John H. James sitting or acting as the judge in said cause, he being the special judge sitting at the foreclosure proceeding in said cause. This objection was overruled by the court, to which ruling appellants excepted.

Appellants filed a demurrer to the amended petition, which was overruled, to which ruling the appellants excepted. Appellants filed an answer in three paragraphs to the amended petition, the first paragraph being a general denial. Appellee petitioner (hereinafter called petitioner) filed his demurrer to the second paragraph of answer, which was sustained by the court, to which ruling appellants excepted.

Petitioner filed his motion to strike out appellants' third paragraph of answer and cross-complaint, which motion was sustained by the court, to which ruling the appellants excepted.

The petition was submitted to the court for hearing, and evidence was heard, for the purpose of identifying the said lots as the same real estate that was described by metes and bounds in said petition. To this evidence appellants objected, and excepted to the court's ruling in admitting it. There was a judgment that the petitioner was entitled to immediate possession of said real estate, describing the same, both by lot numbers and by metes and bounds, and that the appellants be ejected and dispossessed, and that a writ of assistance be issued by the clerk of the court to the sheriff, directing him to eject and dispossess appellants from said real estate, and to place the petitioner in the immediate possession thereof. After motion for a new trial, which was overruled, this appeal is prosecuted.

Appellants have assigned 14 errors upon which they rely for reversal, one of which is overruling their motion for a new trial, in which motion 10 errors are specified. Of these alleged errors we need only to discuss such as are contained under Appellants' Points and Authorities, as all others are waived. These in their order:

[1] Appellants contend that said petition is not sufficient to withstand their demurrer, for the reason that it fails to set out the sheriff's deed to appellee, or a copy of the notice to appellants that application for the writ of assistance is being made. But this is not an action based upon said deed or notice, or any other written instrument. This is a summary proceeding for a writ of assistance to obtain the possession of real estate wrongfully withheld from petitioner by appellants, after their title thereto has been divested in a foreclosure proceeding, this proceeding being supplemental to and a part of the foreclosure proceeding, and to give full effect thereto. *Emerick v. Miller*, 159 Ind. 317, 64 N. E. 28.

Under appellants' second point, they complain that the court erred in overruling appellant's motion to quash the notice and demand, and under their third point they complain of error of the court in overruling their motion to require the petitioner to make his petition more specific by setting out a copy of the decree of foreclosure, a copy of the assignment of the certificate of purchase, showing the description of the real estate therein, and the deed from the sheriff or copy thereof. By these motions appellants undertake to show that the description of the land in the petition for a writ of assistance is not the same as in the papers and record of the original proceeding. But the petition gives the description of the land both by metes and bounds and by lot numbers, identifying the two descriptions as of the same land, and, though appellants fail to discuss their motion for a new trial, we may add that the evidence which was properly admitted fully identifies the two descriptions as of the same land. Under these points appellants challenge petitioner's right to the possession of the parts of the vacated street and alleys upon which said lots abutted before said addition was vacated, appellants claiming still to own such vacated streets and alleys, and contending that a writ of assistance can only issue when the right to possession is clear, and that in such a summary proceeding there can be no trial of any bona fide question as to the right of possession.

[2] But in this case there is no bona fide question as to the right of possession. It is the settled law of this state that a conveyance of a lot in a town or city designated by its number or other proper description, and abutting on a street or alley, carries with it the fee to the center of the street. *Cox v. L. N. A. & C. Ry. Co.*, 48 Ind. 178; *City of Logansport v. Shirk*, 88 Ind. 563, 569; *T. H. & S. R. R. Co., v. Rodell*, 89 Ind. 128, 132, 46 Am. Rep. 164; *Bergan v. Co-operative Ice Co.*, 41 Ind. App. 647, 84 N. E. 833; *Western Union Telegraph Co. v. Krueger*, 36 Ind. App. 348, 74 N. E. 25; *Irvin v. Crammond*, 58 Ind. App. 540, 108 N. E. 539.

[3] Of course the same rule applies to a mortgage and to a deed by the sheriff to a purchaser at the sale upon foreclosure of such mortgage. This conclusion makes it unnecessary for us to discuss appellants' fifth and seventh points, as they each involve the same principles of law as control in disposing of appellants' second and third points.

[4] Under their fourth point, appellants complain that the court erred in assuming jurisdiction of said petition, over the objection of the appellants, for the reason that the powers of a special judge cease after final judgment has been rendered. But the case of *Emerick v. Miller*, supra, which appellants have cited more than once in their brief, and which is a well-considered case, and which gives no comfort to appellants on any prop-

osition involved in this case, is a strong authority against them on this point. The case was one in which a special judge was acting, and on its appeal the Supreme Court asks, "Can there be any reason why the same court, in the same case, should not effectuate its decree by requiring the debtor to surrender that which the court had adjudged he should surrender?" and then, after discussion, answers the question by quoting the rule announced by Chancellor Kent, "that the power to apply the remedy is coextensive with the jurisdiction over the subject-matter," then saying that the rule is unassailable in reason. Putting the purchaser in possession is only an incident in the full enforcement of the court's decree. *Gilliland v. Milligan*, 144 Ind. 154, 42 N. E. 1010.

[6] Under their sixth point, appellants complain of error in sustaining petitioner's motion to strike out appellants' cross-complaint. By this cross-complaint appellants sought to quiet the title to the real estate involved. This is a summary proceeding, and, had the court permitted the appellants to contest the title by their cross-complaint, he would have permitted a departure from the theory upon which the application rested. The court properly struck the cross-complaint out, on motion. *Roach v. Clark*, 150 Ind. 93, 48 N. E. 796, 65 Am. St. Rep. 353.

We have examined all the questions presented, and find no error in the proceeding. The judgment is affirmed.

(74 Ind. App. 178)

UNITED BRETHREN PUBLISHING ESTABLISHMENT v. SHAFFER, County Auditor, et al. (No. 9874.)*

(Appellate Court of Indiana, Division No. 2, June 20, 1919.)

1. TAXATION \S 204(2) — EXEMPTIONS — STATUTES — CONSTRUCTION.

Burns' Ann. St. 1914, \S 10144, 10145, exempting charitable organizations from taxation upon their real or personal property, are to be strictly construed.

2. TAXATION \S 241(1) — EXEMPTIONS — "CHARITABLE ORGANIZATION" — CHURCH PUBLISHING HOUSE GIVING NET PROCEEDS TO CHARITY.

Although a church publishing establishment applied all the net proceeds of its business of publishing church and Sunday school papers to the charitable purpose of aiding traveling and worn-out preachers, the establishment was not a charitable institution within the meaning of Burns' Ann. St. 1914, \S 10144, 10145, exempting charitable organizations from taxation.

Appeal from Circuit Court, Huntington County; Samuel E. Cook, Judge.

Suit by the United Brethren Publishing Establishment against Abner H. Shaffer, Auditor of Huntington County, and others, to enjoin the placing of plaintiff's real estate and personal property, endowment and interest, on the tax duplicates of the county and the collection of taxes thereon. Judgment for defendants, and plaintiff appeals. Affirmed.

S. M. Saylor, of Huntington, for appellant.
Claude Cline and Milo Feightner, both of Huntington, for appellees.

NICHOLS, P. J. The appellant filed its complaint against appellees in the Huntington circuit court, the substantial averments of which are that the appellant is a religious and charitable institution and a part of the Church of the United Brethren of Christ, and for the more complete prosecution of its purposes has been incorporated under the laws of the state of Indiana, as a corporation without stockholders, and no capital stock has been issued or provided for by the articles of incorporation thereof, but it has been solely incorporated as a part of the said Church. The appellant, through its officers and trustees, is under the direct control of the General Conference of the said church, and its officers and trustees are required to report to the General Conference of the said church. It has been clothed with powers to make by-laws, so long as the same shall not conflict with the provisions of the charter of the appellant, nor with the rules of the church.

The appellant is engaged in the publishing of a church paper, called "Christian Servitor," and numerous Sunday school papers and literature used in the Sunday schools of said church, through its publications furnishing a means of communication between the members of the said church in its religious work.

The proceeds of the appellant, over and above contingent expenses, are applied to the benefit of traveling and worn-out preachers and their widows and orphans, the distribution of any available profits of the publishing establishment for this purpose to be, in proportion to the number of regular ministers in each annual conference who are itinerants, according to the "Itinerant plan" of the Discipline. It is the duty of the secretary of the annual conference each year to report to the publishing agent the true number of such itinerants as found on the records of the several conferences; also, the name and address of the conference treasurer appointed to receive dividends awarded to his conference.

The trustees and officers of the appellant have no power to divert the proceeds from the above-mentioned purpose, and the distribution of such proceeds as provided by the articles of incorporation and the rules and discipline of said church constitute a reli-

gious and charitable institution under the laws of the state of Indiana, and, as such, all of the real estate belonging to the appellant, which is used for the above and foregoing named purposes and the personal property and endowment and interest are exempted from taxation under the laws of the state of Indiana.

The appellant is the owner of two certain tracts of real estate in the town, now city, of Huntington, Huntington county, Ind., the first tract of which is used exclusively for the purposes set forth in appellant's complaint, to wit, the publishing of a church paper and church and Sunday school literature and religious knowledge for the members of said church, and for the aforesaid charitable purposes. The last-described tract of land has been acquired for the purpose of erecting thereon a building, for the better prosecution of its aforesaid charitable purposes, and appellant is now erecting such building on said real estate, but the same has not yet been completed. The appellant has personal property and an endowment fund and interest for the above and foregoing purposes and uses.

There has been placed on the tax duplicates of the county of Huntington the above and foregoing tracts of real estate, and the personal property and endowment and interest has been placed on such tax duplicates, and the appellee treasurer of said county is threatening to collect the taxes thereon for the year 1914, and, on the refusal of the appellant to pay the same, is threatening to levy on such property and sell the same, to the great and irreparable damage of the appellant. The appellee, auditor of Huntington county, is threatening to put all the above and foregoing real estate and personal property, endowment and interest, on the tax duplicates of said county for the year 1915, and to place the same so that the treasurer of said county can enforce the collection of taxes upon the same, unless restrained by the court, to the irreparable damage of the appellant.

There is a prayer for a restraining order, a temporary, and a perpetual injunction.

The appellees filed their demurrer to this complaint with memoranda, which demurrer was sustained, to which ruling of the court the appellant excepted, and, failing and refusing to plead further, but electing to stand by its complaint, judgment was rendered against the appellant, that it take nothing by

reason of its complaint. From this judgment the appellant prosecutes this appeal, assigning as error the ruling of the court in sustaining the demurrer to its complaint.

[1] Appellant contends that under sections 10144 and 10145, Burns' R. S. 1914, it is such a charitable organization that it is exempt from taxation. This question, however, was early submitted to the Supreme Court of this state in the case of *Orr v. Baker*, 4 Ind. 86, in which case it was held that, under a statute similar to said sections 10144 and 10145, which statute exempted from taxation the lands whereupon every building erected for religious worship is situate, not exceeding 10 acres, it was not intended to include any part of the land which is diverted to secular uses or gain. It was held in that case that such exemptions are not to be favored by the courts, and that they should be confined to the specified objects, and to such as by reasonable intentment the Legislature must have had in contemplation. In short, the statute which exempts persons or property from taxation is to be strictly construed. This case is cited with approval in the case of *City of Indianapolis v. Grand Master, M. C., etc.*, of the Grand Lodge of Indiana, 25 Ind. 518, in which case, applying the rule of strict construction, the court says it cannot be held that the use of a building for * * * mercantile purposes is a use by a charitable institution within the meaning of the statute.

In *Greenbush Cemetery Ass'n v. Van-Natta*, 49 Ind. App. 192, 202, 94 N. E. 890, 903, the case of *Orr v. Baker*, supra, is cited, and, speaking with reference to that case, the court says, "Considering the statute and the facts of that case, the holding that the part of the property occupied and used exclusively for business purposes was not exempted from taxation was eminently correct," and stating that the same principle governed in the case of *City of Indianapolis v. Grand Master, etc.*, supra.

[2] Without discussing or citing other authorities, we hold that it is not enough that the proceeds of the business conducted by the appellant is used for charitable purposes; the institution itself must be used for such purposes and must, itself, be a charitable institution, and not one organized for the purpose of profit, notwithstanding the fact that the proceeds or profits of the business are devoted to a most worthy charitable purpose.

The judgment is affirmed.

(74 Ind. App. 263)

FORSYTH et al. v. BOARD OF COM'RS OF LAKE COUNTY. (No. 9845.)*

(Appellate Court of Indiana. June 20, 1919.)

1. TAXATION — 537 — IRREGULARITIES IN CORRECTION OF ASSESSMENT—RECOVERY OF TAX PAID.

In view of Burns' Ann. St. 1914, §§ 10268 and 10316, it was the duty of the county auditor to correct an error in tax duplicates, where the township assessor erroneously figured owner's land as 16.77 acres instead of 162.77, and the owners cannot avail themselves of naked irregularities in such assessment and correction as ground for recovery of the tax paid, unless they were injured thereby.

2. TAXATION — 543(7) — RECOVERY OF TAX PAID—BURDEN OF PROOF—INJURY FROM IRREGULARITY OF ASSESSMENT.

The burden is upon owners, claiming a refund of tax paid, and alleging irregularities of the county auditor in correcting and increasing claimants' assessment upon their lands, to show that an excessive tax has been levied against their property, and they are entitled to no relief until it is so shown.

Appeal from Circuit Court, Lake County; W. C. McMahan, Judge.

Oliver O. Forsyth and others made claim before the Board of County Commissioners of Lake County, Ind., for the refunding of taxes alleged to have been illegally assessed upon their certain land in that county. The claim was disallowed by the Board, and appeal was taken to circuit court, where there was a trial, and the claim was disallowed. After overruling of motion for new trial, the claimants appeal. Judgment affirmed as of date of submission.

J. Kopelke, of Crown Point, for appellants.
Newton A. Hembroff, of East Chicago, and
J. A. Gavitt, of Hammond, for appellee.

NICHOLS, P. J. This action was upon a claim filed by appellants against the appellee for the refunding of taxes which the appellants allege have been illegally assessed upon certain of their lands in Lake county and illegally collected from them by the county treasurer.

The claim was disallowed by the board, and appeal was taken to the circuit court, where there was a trial, and the claim was disallowed. After a motion for a new trial, which was overruled, the appellants prosecute this appeal. The only error assigned is the overruling of appellants' motion for a new trial.

The substance of the claim is that certain lands of the appellants had been regularly assessed by the assessor of the proper township in said county for the year 1915 at \$6,070, that such assessment was left unchanged by the board of

review sitting that year, and that appellants had paid the taxes imposed by such assessment, but that the county auditor had placed an additional assessment of \$50,630 on such lands and extended taxes thereon, and that thereby they had been required to pay by the county treasurer \$921.47 additional taxes as the first installment. The appellee answered this claim by a general denial.

It appears by the evidence that on March 1, 1915, appellants owned the land referred to in their claim, and that in the assessment thereof it was placed upon the books of such township assessor and returned to the county assessor and auditor of said county as 162.77 acres, valued at \$6,070, lands and improvements; that such assessment was not modified by the board of review; that the first installment of taxes thereon, as computed by the auditor, was \$110.47, but afterwards it was discovered by the township assessor that a mistake had been made, and thereupon he made an assessment of omitted real estate which showed 162.77 acres, valued at \$70,720, upon which statement such township assessor indorsed:

"There was a mistake in figuring the amount of acres; I figured 16.77 acres instead of 162.77 acres."

Thereupon the auditor of said Lake county placed an additional value of land upon the tax duplicate of \$64,650, the first installment of taxes upon such additional valuation being \$921.47, and the second the same.

[1] The said county treasurer called the appellants' attention to this additional assessment, which they paid, protesting at the time that such assessment was illegal and wrongful, and thereafter filed their claim for the amount of additional taxes so paid, which claim is the basis of this action. It is contended by the appellants that their lands had been regularly assessed, and that the additional assessment placed thereon by the county auditor under the circumstances aforesaid was without authority and void.

Section 10268, Burns' R. S. 1914, reads as follows:

"When the returns of the assessors are received the county auditor, if satisfied that such assessor has omitted any * * * real estate which it was his duty to return, may, if he deem it expedient, authorize and require such assessor to proceed to correct any error or omission which may have occurred, * * * and * * * such assessor, shall within ten days * * * make returns thereof to such county auditor; * * * or the auditor may himself ascertain the value and add the same to the assessment, and such county auditor shall charge such person with the additional amount, if any, returned by such assessor."

Section 10316, Burns' R. S. 1914, provides with reference to the duties of auditors:

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Transfer denied.

"He shall, from time to time, correct all errors which he may discover in such tax duplicate * * * in * * * the amount of tax charged; and he shall add from time to time, any corrections, or additional assessments, made on the assessor's books by the county assessor," etc.

This statute makes express provision for the performance of the duty by the auditor of which the appellants here complain. Appellants, having appealed to the court for redress of their grievances, cannot avail themselves of naked irregularities to shield themselves from a just liability. *Hunter Stone Co. v. Woodard, Treas.*, 152 Ind. 474, 53 N. E. 947. Such tax assessments, even if irregular, are not rendered invalid thereby. *Citizens' National Bank v. Klauss*, 47 Ind. App. 50, 93 N. E. 681.

The appellants had not been injured or unjustly dealt with, and therefore technical irregularities, even if they exist, will not avail them. *People's Gas Co. v. Harrell*, 38 Ind. App. 588, 76 N. E. 318.

[2] The burden is upon the appellants to show that an excessive tax has been levied against their property, and they are entitled to no relief until it is so shown. *Fell v. West, Treas.*, 35 Ind. App. 20, 73 N. E. 719. This burden they have failed to discharge; they have only been required to pay their just proportion of the taxes to be collected in Lake county.

There is no force in their complaint, and no merit in their appeal.

The judgment is affirmed as of the date of submission.

BATMAN, C. J., and DAUSMAN, REMY, and ENLOE, JJ., concur.

McMAHAN, J., not participating.

(70 Ind. App. 584)

WELLS FARGO & CO. EXPRESS v. FIRST NAT. BANK OF HAMMOND. (No. 9870.)

(Appellate Court of Indiana, Division No. 2. June 20, 1919.)

1. APPEAL AND ERROR ¶989 — REVIEW OF EVIDENCE — WEIGHING CONFLICTING ORAL EVIDENCE.

In determining whether findings as to notice to indorsers of nonpayment of checks are supported by sufficient evidence, the appellate court need only consider such evidence as tends to support findings.

2. BILLS AND NOTES ¶386 — NOTICE TO INDORSERS PAYABLE IN ANOTHER STATE — WHAT LAW GOVERNS.

In an action against an indorser of checks made payable in Illinois, the law of that state governs as to the time within which notice of nonpayment must be given to an indorser.

3. BILLS AND NOTES ¶526 — NOTICE TO INDORSER—EVIDENCE TO SUSTAIN FINDINGS.

In an action against an indorser of checks, evidence held sufficient to sustain the findings of the court that notice of nonpayment of two checks was given to the indorser within the time required by the laws of the state where payable.

Appeal from Circuit Court, Porter County; H. H. Loring, Judge.

Action by the First National Bank of Hammond against Wells Fargo & Co. Express. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment affirmed.

John M. Stinson, of Hammond, and Holt, Cutting & Sidley, of Chicago, Ill., for appellant.

Jesse E. Wilson, of Hammond, and Edgar D. Crumpacker, of Valparaiso, for appellee.

NICHOLS, P. J. The appellee commenced this action against the appellant in the Porter circuit court, alleging in its complaint a cause of action based upon appellant's indorsement of certain checks of the Cree Publishing Company payable to the order of appellant, and by appellant indorsed to appellee. The first of these checks is for \$906.96, dated November 19, 1912, and the second is for \$1447.30, dated November 27, 1912. There is a third check for \$3.95, upon which there is no recovery.

The complaint is in eight paragraphs, to which an answer of six paragraphs is filed. Plaintiff's reply to the answer in one paragraph put the case at issue. It was tried by the court without a jury, and a special finding made, upon which conclusions of law were stated in favor of appellee. Judgment was rendered in favor of appellee and against appellant in the sum of \$2,661.51. After appellant's motion for a new trial, which was overruled, this appeal.

Appellant presents 15 specifications of error upon which it relies for reversal, all of which that are available to appellant are embraced in appellant's statement:

That it "relies for reversal upon the insufficiency of the proof to show the receipt by it of the notice of the nonpayment of each of the checks herein set out within the time required by law, both in accordance with the statutes of Illinois, where the checks were payable, and which were introduced in evidence in the court below, and in accordance with the law of the state of Indiana, where the checks were negotiated and delivered to the plaintiff. The grounds for reversal thus presented were set forth in the motion for a new trial, and argued in the court below. They were overruled."

The substance of so much of the special findings of fact as is necessary to this opinion is as follows:

On November 19, 1912, the Cree Publishing Company, of the city of Hammond, Ind., drew, executed, and delivered a check in said city to defendant for \$906.96 upon the Colonial Trust & Savings Bank, of the city of Chicago, Ill., payable to the order of the defendant.

On November 21, 1912, the cashier of the defendant, acting for and on behalf of the defendant, sold, indorsed, and delivered said check to the plaintiff in due course of business, receiving par value therefor.

On November 21, 1912, plaintiff sent said check by mail to its correspondent, Continental & Commercial National Bank, of Chicago, Ill., for collection. On the 22d day of November, 1912, said correspondent presented said check to said Colonial Trust & Savings Bank and demanded payment thereof, which was refused, for the reason that the drawer had no funds to its credit in said bank. The check was thereupon on said date protested by a notary public, and proper notice of said protest and nonpayment was mailed on said date to the plaintiff at Hammond, with a duplicate notice of nonpayment and protest inclosed, addressed to the defendant, which notice to the plaintiff and defendant was received by the plaintiff on November 23d. On the day following, to wit: November 23, 1912, the assistant cashier of plaintiff, at its bank in said city of Hammond, during business hours, notified the agent of defendant of said nonpayment and protest, and that defendant would be liable to plaintiff for the payment of said check.

November 27, 1912, said Cree Publishing Company drew a check payable to the order of the defendant upon the said Colonial Trust & Savings Bank at Chicago, for \$1,447.80. Said check was drawn, signed, and delivered to the defendant in the city of Hammond. On the 30th day of said month, which was Saturday, the defendant, by and through its cashier, sold, assigned, and indorsed said check to the plaintiff at its said banking house in the city of Hammond, and duly indorsed the same in the course of business, during business hours, and received therefor its face value. Plaintiff on said day sent said check by mail to its correspondent the Continental & Commercial National Bank of Chicago for collection. On Monday, December 2d, following, said correspondent presented said check, during business hours, to said Colonial Trust & Savings Bank, and demanded payment, which was refused for the reason that there were no funds to the credit of the drawer of said check. Thereupon on said day said check was duly protested by a notary public, and notice of nonpayment and protest of said check was sent by mail on the day of its protest to the plaintiff. Plaintiff received said notice, together with notice directed to the defendant, as the indorser, on December 3d.

On said date, during business hours, the plaintiff, by its cashier, notified the defendant by telephone communication, through its cashier, who was then on duty, informing him of the nonpayment and protest of said check, and that the plaintiff would hold the defendant as indorser liable for the payment thereof.

Either on the day the plaintiff received the notice of nonpayment and protest of said check or on the day thereafter, at farthest, said plaintiff, by its cashier, orally notified the defendant's cashier, during business hours, of the nonpayment and protest of said check, and that the defendant would be held liable as indorser for the payment thereof.

Each of said checks was given to the defendant by the Cree Publishing Company in payment of money it owed defendant as the proceeds of sales of money orders it sold for and on behalf of said defendant as defendant's agent. Plaintiff purchased each of said checks in due course and in good faith for a valuable consideration, and exercised due and proper diligence in giving the defendant notice of the nonpayment and protest of each of said checks. The protest fees on said checks were \$5.16. The plaintiff has received on said checks \$216.12, and the balance of said checks, together with interest from date of protest and protest fees, is wholly unpaid.

[1] In determining as to whether the findings as to notice are supported by sufficient evidence, we need only to consider such evidence as tends to support the findings. *Robinson & Co. v. Hathaway*, 150 Ind. 679, 50 N. E. 883. And conflicting oral evidence will not be weighed. *Hudelson v. Hudelson*, 164 Ind. 694, 74 N. E. 504.

[2, 3] The checks involved being payable in Illinois, the law of that state governs as to the time within which notice of nonpayment must be given to an indorser. *Brown v. Jones*, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227. And such law is fixed by statute of that state, which provides that notice to an indorser must be given by the close of the day following the receipt, in this case by appellee, of the notice of the dishonor of the checks. Illinois Negotiable Instruments Law of 1917, §§ 88, 93, 102, and 106 (*Hurd's Rev. St. 1917*, c. 98, §§ 106, 111, 120, 124). Witness Morton Towle, assistant cashier of appellee's bank, testified that in a conversation with Mr. Bowls, local agent of appellant at Hammond, within a day or two after the notice of protest of the first check, he informed him of the fact that the check had gone to protest, admonishing him to look after it immediately. On cross-examination he said that it was the next day after the check was returned, and that it was on the day that the notice of protest came to the bank. While the witness was somewhat confused in his statements, his

evidence was sufficient to sustain the finding of the court as to the first check.

Witness Belman, cashier of appellee's bank, testified that the second check was brought to appellee's bank on Saturday, November 30, 1912. It was dishonored in Chicago on Monday, December 2, 1912, and immediately upon getting the certificate of protest, which was the day after the protest of the check, being on Tuesday, December 3, 1912, he called Mr. Berwanger, cashier of appellant's company, by phone, and notified him that the second check had come back, and that he wanted them both paid at once. This evidence is sufficient to sustain the finding as to the second check.

The judgment is affirmed.

(71 Ind. App. 64)

WOOD et ux. v. ISGRIGG LUMBER CO.
et al. (No. 9891.) *

(Appellate Court of Indiana, Division No. 2.
June 19, 1919.)

1. MECHANICS' LIENS \S 8—CONSTRUCTION OF
STATUTE—"PERSONS."

The word "persons" within Burns' Ann. St. 1914, § 8295, giving mechanic's lien to "all persons performing labor or furnishing materials," etc., held to include corporations, in view of section 1356.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

2. MECHANICS' LIENS \S 109—MATERIALMEN
—RIGHT TO LIEN.

A dealer or materialman who furnishes material to another materialman has no right to a mechanic's lien on the property improved.

3. MECHANICS' LIENS \S 109—MATERIALMEN
—RIGHT TO LIEN.

Where person to whom materials were furnished had the contract to construct the house in which the materials were to be used, the materialmen were entitled to liens; such person being a general contractor, and not a materialman.

Appeal from Circuit Court, Hendricks County; Geo. W. Brill, Judge.

Consolidated action by the Isgrigg Lumber Company, the Practical Cement Block Company, and the Indianapolis Mortar & Fuel Company against John J. Wood and wife and Harvey R. Cox, in which last-named defendant filed cross-complaint. Decrees for plaintiffs, and first two named defendants appeal. Affirmed.

Edward W. Little, Earl W. Little, and Frank S. Roby, all of Indianapolis, for appellants.

Edgar A. Brown, of Indianapolis, George R. Harvey, of Danville, and Groninger, Groninger & Groninger, of Indianapolis, for appellees.

McMAHAN, J. This is a consolidated action for the foreclosure of mechanics' liens by the Isgrigg Lumber Company, the Practical Cement Block Company, and the Indianapolis Mortar & Fuel Company, corporations, against certain real estate in the city of Indianapolis owned by the appellants, who are husband and wife. Appellee Cox, who was named as a defendant, filed a cross-complaint. The issues were closed by general denials. The cause was tried by the court, and on request the facts were found specially, and conclusions of law stated thereon, in favor of the appellees other than Cox. Decrees were rendered in favor of said appellees foreclosing their respective liens. Appellants excepted to the several conclusions of law. The errors assigned and relied on for reversal are that the court erred in each of its conclusions of law.

[1] Appellants first contend that the statute does not give the right of acquiring a mechanic's lien to a corporation. Section 8295, Burns 1914, provides that "all persons performing labor or furnishing materials," etc., may have a lien on the real estate belonging to the owners to the extent of any labor or materials furnished. It is appellants' contention that our statute provides for a lien in favor of any "person," and not in favor of a corporation, and that a corporation cannot acquire a lien under our statute.

In Endlich, Interpretation of Statutes, §§ 87 and 89, it is said:

"In its legal significance it is said the word 'person' is a generic term, and as such prima facie includes artificial as well as natural persons, unless the language indicates that it is used in a more restricted sense. * * * If any general rule can be drawn from the decisions, it is this: That where an act imposes a duty toward or for the protection of the public or individuals, it grants a right properly common to all, and from participation in which the limited character of corporate franchises and the absence of any natural rights incorporations do not, by any policy of the law, debar them, the term 'persons' will, in general, include them whether the act be a penal or a remedial one."

Section 1356, Burns 1914, provides, among other things, that the word "person" extends to bodies politic and corporate.

In 27 Cyc. 24, in an article on "Who May Acquire Liens," the following language is used:

"The statute generally provides that any person who furnished material or does work shall have a lien, and this is construed to mean either a natural or an artificial person. Thus the lien may be acquired by a partnership or a corporation."

Rockel on Mechanics' Liens, § 45a, in discussing the Mechanic's Lien Law of this state, says:

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied.

"The words 'all persons' * * * would seem to be broad enough to include every individual or corporation that would bring itself within the statute."

Watson on Indiana Statutory Liens, § 884, says:

"Person, as used in the statute, includes artificial as well as natural. An individual, a partnership, or a corporation otherwise entitled thereto may acquire the lien. * * * The word 'person' includes a corporation. That a corporation is entitled to a lien is shown by a number of Indiana decisions."

In *Tennis, etc., Co. v. Wetzel* (C. O.) 140 Fed. 193, it was held under the statute of West Virginia which gave a lien to every workman, laborer, or other person who shall do or perform any work or labor that the word "person" included a corporation. See, also, *Doane v. Clinton*, 2 Utah, 417; *Dallas, etc., Co. v. Wasco, etc., Co.*, 3 Or. 527; *Loudon v. Coleman*, 59 Ga. 653; *Fagan v. Boyle, etc., Co.*, 65 Tex. 324; *Gaskell v. Beard*, 58 Hun, 101, 11 N. Y. Supp. 399. As said by the court in *Gaskell v. Beard*, supra:

"A corporation is as completely within the intention of the section as a natural person would be, and is equally entitled to its protection; for, as a matter of justice, no distinction can possibly exist between the merits of a claim for materials furnished by a corporation and an individual, but each is entitled to be equally supported and each may be fairly presumed to be a person within the intention of the act."

Corporations can furnish materials the same as individuals, and we know of no reason why they are not entitled to have a lien for materials furnished the same as an individual. Every reason and argument in favor of giving a natural person such a lien applies with equal force to a corporation. We hold that under the Mechanic's Lien Law of this state a corporation may acquire a lien for materials.

[2, 3] The appellants also contend that the appellees in whose favor the liens were foreclosed were not materialmen, for the reason that the materials were furnished by them to the appellee Cox, who, appellants say, was a materialman. In other words, they say that a dealer or materialman who furnishes material to another materialman has no right to a mechanic's lien on the property improved. This is a correct statement of the law. *Rudolph Hegener v. Frost*, 60 Ind. App. 108, 108 N. E. 18. But in the case at bar the materials were furnished to the appellee Cox, who had the contract to construct the house for which the materials were furnished and in which they were used. Appellee Cox was a general contractor who had no other business than taking contracts for the erection of houses and other similar buildings, and was in no sense a materialman.

A contractor has been defined as a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons, without submitting himself to their control with respect to all the petty details of the work. *Halstead v. Dahl*, 47 Ind. App. 600, 94 N. E. 1056; *Lombard, etc., Co. v. Jones*, 187 Ill. 203, 58 N. E. 347.

Appellants also contend that the notices of intention to hold liens given by appellees were not sufficient. There is, however, no merit in this contention.

Judgment affirmed.

(70 Ind. App. 537)

LAKE MICHIGAN WATER CO. v. UNITED STATES FIDELITY & GUARANTY CO. (No. 9832.)

(Appellate Court of Indiana, Division No. 1, June 18, 1919.)

1. PLEADING ⇐310, 312—CONSTRUCTION—INCORPORATION OF CONTRACT—VARIANCE.

The bond sued on being an obligation to carry out a contract, the bond and the contract which includes the plans and specifications must, in considering the complaint, be construed together, and, if the allegations vary from provisions of the contract incorporated, the latter will control.

2. CONTRACTS ⇐284(4)—APPROVAL OR ACCEPTANCE—CONCLUSIVENESS.

Where a contract provides that work shall be done to the satisfaction, approval or acceptance of architect or engineer, such architect or engineer is constituted sole arbitrator by the parties, and they are bound by his decisions in the absence of fraud or such gross mistakes as to imply bad faith, or a failure to exercise an honest judgment.

3. CONTRACTS ⇐284(1)—DECISION OF ARBITRATOR—CONCLUSIVENESS.

A provision in a building contract by which an architect or engineer becomes the arbitrator is more binding than an ordinary submission to arbitration for the reason that it becomes a part of the consideration of the contract.

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Action by the Lake Michigan Water Company against the United States Fidelity & Guaranty Company. Judgment that plaintiff take nothing, and defendant recover costs, and plaintiff appeals. Affirmed.

See, also, 116 N. E. 744.

C. R. & J. B. Collins, of Michigan City, and Anderson, Parker, Crabill & Crumpacker, of South Bend, for appellant.

M. J. & J. P. Kenefick, of Michigan City, and McInernys, Yeagley & McVicker, of South Bend, for appellee.

REMY, J. On June 9, 1908, the Lake Michigan Water Company, appellant herein desiring to improve its water supply system at Michigan City, Ind., entered into a contract with the M. H. McGovern Company, hereinafter called the "contractor," to make such improvement. The United States Fidelity & Guaranty Company, appellee, became surety on said contractor's bond for the faithful performance of the contract. This action is by appellant on said bond. The contractor and said guaranty company were each made defendants, but process was never served upon the former. The complaint was in two paragraphs, to each of which appellee successfully demurred for want of sufficient facts. Appellant refused to plead further, and judgment was rendered that appellant take nothing, and that appellee recover costs. The appeal is from this judgment, and the only errors assigned are based on the rulings of the court on the demurrers to the two paragraphs of complaint. Appellant in its oral argument expressly waived the error, if any, as to the court's ruling on the demurrer to the second paragraph of complaint, and rested its case on the alleged error of the court in sustaining appellee's demurrer to the first paragraph.

The first paragraph of complaint, hereinafter denominated the "complaint," is, in substance, as follows: Appellant on June 9, 1908, entered into a written agreement with the M. H. McGovern Company, by the terms of which agreement said contractor was to furnish the materials and install in Lake Michigan a crib and intake pipe, in consideration of \$50,000 to be paid by appellant, for which amount the contractor was to, and did, give a bond to secure the faithful performance of said agreement, with appellee as surety, which bond is made the basis of the action. The written agreement of the contractor, and the plans and specifications for the improvement, are incorporated in the complaint, and provide that the contractor shall furnish all labor and material, and do all the work in accordance with said plans and specifications, which, as alleged, had been prepared by appellant's engineer. The plans and specifications, in substance, provide that all materials shall be furnished and labor performed to the satisfaction of said engineer who was employed by appellant to design and supervise the construction of the work; that, in the event of discrepancy between the plans and specifications, the judgment of the engineer shall be final; that any doubt as to the meaning of the specifications shall be explained by the engineer; that any materials or work may be rejected by the engineer at any time before the final acceptance of the work; that the contractor is to afford the engineer proper assistance and facilities for the proper inspection of the work and materials; and that—

"In case the rate of progress shall be in all respects satisfactory to appellant, monthly estimates will be made of the value of the work fully completed, constructed and in its proper place, and a voucher for eighty-five per cent. of the estimated value of the work so done during the previous month will be issued, the remaining fifteen per cent. to be reserved till the completion and acceptance of the whole work, at which time two thirds of the said fifteen per cent. so reserved shall be paid to the contractor, and the remaining one third retained for sixty days to insure the reconstruction by the contractor of defective work."

It is further averred that the contractor negligently failed to perform the work in certain respects in accordance with the terms of the contract, and by reason thereof the intake pipe was rendered weak, leaky, and unstable, and admitted sand and gravel into the pumps whereby said intake pipe became wholly useless to the damage of plaintiff in the sum of \$50,000. It is further averred that the defects in the work complained of were latent, and of such a character that plaintiff did not discover, and in the exercise of reasonable care could not have discovered until the time of the commencement of this action, which was approximately five years after the completion and acceptance of the work and the payment therefor. The usual clause in contracts of this character, providing for repair or maintenance for a definite period after the acceptance of the work, was omitted from the contract.

It is contended by appellee, and such was the holding of the trial court, that the complaint is demurrable for the reason that the facts pleaded show that appellant was bound at its peril so to inspect the work as it progressed that all improper material or defective work would be discovered and rejected before making final payment 60 days after the work was completed, and that, inasmuch as the work was accepted and payment therefor made, appellee was released as surety. On the other hand, appellant takes the position that under the contract it was not bound to discover the latent defects set forth in the complaint, which defects were not, and could not have been, discovered before settlement.

[1-3] The bond sued on is an obligation to carry out the contract, and, in considering the complaint, the bond and the contract, which includes the plans and specifications, must be construed together, and, if any allegations of the complaint vary from the provisions of the contract, the latter will control the pleading. *Harrison Bldg., etc., Co. v. Lackey*, 149 Ind. 10, 48 N. E. 254; *Dunlap v. Eden*, 15 Ind. App. 575, 44 N. E. 560. The contractor did not guarantee the materials furnished nor the efficiency of the work when completed. Its contract was to furnish materials and do the work according to certain plans and specifications prepared by appellant's engineer. All material was to be in-

spected, and all work to be supervised, by, and to the satisfaction of, such engineer. It is a well-settled rule of law that where a contract provides that work shall be done to the satisfaction, approval, or acceptance of an architect or engineer, such architect or engineer is thereby constituted sole arbitrator by the parties, and the parties are bound by his decisions in the absence of fraud or such gross mistakes as to imply bad faith or a failure to exercise an honest judgment. *Cook v. Foley*, 152 Fed. 41, 81 C. C. A. 237; *Barlow v. United States*, 35 Ct. Cl. 514; *Williams v. Chicago, etc.*, R. R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; *Church v. Shanklin*, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207; *Martinsburg, etc.*, R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Kennedy v. Poor*, 151 Pa. 472, 25 Atl. 119; *Sheffield, etc.*, Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164; *Moore v. Kerr*, 65 Cal. 519, 4 Pac. 542; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453. See also *Baltimore, etc.*, R. Co. v. Scholes, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. Rep. 307. A provision in a building contract by which an architect or engineer becomes the arbitrator is, if anything, more binding than an ordinary submission to arbitration, for the reason that it becomes a part of the consideration of the contract. *Williams v. Chicago, etc.*, R. Co., supra. It has been held that, where the owner and building contractor have agreed that payments shall be made upon estimates furnished by the architect, such estimates have the force of findings between the parties, and are binding on them unless impeached for fraud. *Kilgore v. North West, etc., Soc.*, 89 Tex. 465, 35 S. W. 145.

It is very clear that the parties by their contract intended to place the engineer of the water company in charge of the work, and to make it his duty to supervise the construction, to the end that the improvement when completed should be in every particular in accordance with the plans and specifications. Appellee as surety on the bond had no voice in the acceptance or rejection of materials, but had a right to assume that the engineer would do his duty. The bond did not provide that the surety should be responsible for the conduct of the engineer in the exercise of the authority vested in him by virtue of the contract. The work was to be completed in the time specified, and, within 60 days after completion, it was finally accepted, and payment was made therefor. If the work was not in all things as called for by the contract, the fault lay in the poor judgment or breach of duty on the part of the engineer selected by appellant, but who by the contract had become the arbitrator for both parties. It is not charged in the complaint that there was any fraud or mistake on the part of the engineer. The allegations

of the complaint with reference to lack of knowledge on the part of appellant company add nothing to the pleading. Under the terms of the contract, appellant's engineer was there as appellant's expert to know what was going on, and this expert of appellant was made the judge for both parties. We conclude that the trial court did not err in sustaining appellee's demurrer to the complaint.

Judgment affirmed.

(70 Ind. App. 490)

THOMPSON v. PATTEN et al. (No. 9877.)

(Appellate Court of Indiana, Division No. 2
June 17, 1919.)

WILLS §647—CONDITIONS—"RESTRAINT OF MARRIAGE"—LIMITATION OF ESTATE.

A devise to testator's wife to remain her absolute property "as long as she remains my widow" and, in the event she "should remarry, all my property shall go to my children," is not on a condition in "restraint of marriage" within *Burns' Ann. St. 1914*, § 8123, but the words used amount only to a limitation of the estate devised.

[Ed. Note.—For other definitions, see Words and Phrases, Restraint of Marriage.]

Appeal from Circuit Court, Monroe County; Robt. W. Myers, Judge.

Action by Hannah Thompson against Myrtle Patten and others. Demurrer to complaint sustained, judgment for defendants, and plaintiff appeals. Affirmed.

John F. Regester, of Bloomington, for appellant.

Edwin Corr, of Bloomington, for appellees.

McMAHAN, J. The appellant commenced this action to quiet her title to certain real estate in Monroe county which was owned by John Thompson at the time of his death. The appellant is the widow, and the appellees are the children and consorts of children, of John Thompson, who died leaving a will, reading as follows:

"Item 1. I will, devise and bequeath all of my property real and personal to my wife Hannah Thompson to be and remain her absolute property as long as she remains my widow.

"Item 2. In the event my said wife Hannah Thompson should remarry, all of my property shall go to my children, share and share alike."

The only question presented for our determination is whether the provisions in the above will amount to a condition in restraint of marriage. If they do, the appellant is the owner of the fee-simple title to the real estate in controversy, and this cause will have to be reversed.

Section 8123, Burns' R. S. 1914, provides that—

"A devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void."

It requires the citation of no authorities to uphold the statement that, where a particular estate has been devised to a wife upon condition that such wife shall not remarry, the condition is void, and the estate devised vests, and the same is held as if it had not been coupled with the condition. It is also just as well settled that a husband may devise to his wife an estate to continue during her widowhood and that he is not obliged to devise to her a larger estate.

We have no hesitancy in saying that the provisions of the will now under consideration are not conditions in restraint of marriage, but amount only to a limitation of the estate devised, and we would rest our decision upon this statement without further discussion or citation of authorities were it not for the fact that appellant's counsel, by brief and on oral argument, earnestly insist that the provision relating to the remarriage is a condition and that the appellant became the owner of the real estate in fee.

In *Hibbits v. Jack*, 97 Ind. 570, 49 Am. Rep. 478, the Supreme Court, after an exhaustive discussion of the meaning of the words "condition" and "limitation" held that a devise of lands to the testator's wife "so long as she shall remain my widow" contains no condition in restraint of marriage, but a mere limitation, and if she marry, or, not marrying, dies, the land goes to the heirs of the testator.

In *Summit v. Yount*, 109 Ind. 506, 9 N. E. 582, the court had before it a will which read as follows:

"I will and bequeath to my wife, Sarah Radcliff, all my estate, both real and personal, so long as she remains my widow. But in case of her again marrying I will to her one-third of all my effects, to hold as her own, and for her sole benefit as she may desire; and in case of said subsequent marriage of my said wife, I devise and will," etc.

The court, on page 508 of 109 Ind., on page 583 of 9 N. E., quoted from 4 Kent. Com. 126, as follows:

"Words of limitation mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event, which, if it takes place in the course of that time, will defeat the estate."

And continuing on page 509 of 109 Ind., on page 583 of 9 N. E., the court said:

"This statement of the distinction between words of limitation and words of condition, of itself, settles the point of contention under consideration adversely to the views and argument of appellant's counsel, in the case now before us. The words, 'so long as she remains my widow,' are in the strictest sense words of limitation, and not of condition. Clearly and unequivocally, these words specify the widowhood of appellant as the utmost time of continuance of the estate devised to her; and they do not mark or indicate any event, the occurrence of which, in the intermediate time, will defeat such estate."

See, also, *Wood v. Beasley*, 107 Ind. 37, 7 N. E. 331; *Levengood v. Hoople*, 124 Ind. 27, 24 N. E. 373; *Beatty v. Irwin*, 35 Ind. App. 238, 73 N. E. 926.

The court properly sustained the demurrer to the complaint.

Judgment affirmed.

DAUSMAN, J. I concur in the result because of the prior decisions. Under the rule of stare decisis, the decision herein is right; but I am of the opinion that the precedents are wrong, and that the distinction between a condition and a limitation is wholly without merit.

(70 Ind. App. 559)

EARLE et al. v. FLETCHER AMERICAN
NAT. BANK OF INDIANAPOLIS.
(No. 9889.)

(Appellate Court of Indiana. June 20, 1918.)

1. **BILLS AND NOTES** \S 371 — **ACCOMMODATION PAPER—HOLDERS WITHOUT NOTICE.**

Where a note and mortgage in fact constituting accommodation paper were pledged as collateral for a debt of the payee therein, recovery by the creditor might be had thereon, notwithstanding a claim by the accommodation maker that the collateral did not extend to renewals of the original note secured, and that, being merely a surety, the renewal discharged the liability; the creditor having no notice of the accommodation character of the paper.

2. **BILLS AND NOTES** \S 330—**PRINCIPAL AND SURETY—NOTICE OF RELATION — NONCOMMERCIAL PAPER.**

That a note deposited as collateral for a loan constituted noncommercial paper, and is unindorsed, does not charge the creditor with knowledge that the maker is a surety merely.

3. **ESTOPPEL** \S 72—**INNOCENT PARTIES—ACCOMMODATION PAPER—RIGHT OF RECOVERY.**

Where a mother invested her son with apparent ownership of a note and mortgage, in fact constituting accommodation paper, and the son by depositing such paper as collateral obtained a loan, the lender, on the son's failure to make repayment, could recover on the collateral, since, where one of two innocent persons must suffer by the act of a third, he who put it in the power of the third to act must suffer.

Appeal from Circuit Court, Porter County; H. H. Loring, Judge.

Action by the Fletcher American National Bank of Indianapolis against Effie S. Earle and another. Judgment for plaintiff, motions to modify the judgment and for a new trial were overruled, and defendants appeal. Affirmed.

A. D. Bartholomew, of Valparaiso, and John H. Gillett and Gerald A. Gillett, both of Hammond, for appellants.

R. R. Peddicord, of Hobart, and E. D. Crumpacker, Grant Crumpacker, and Owen L. Crumpacker, all of Valparaiso, for appellee.

NICHOLS, P. J. This suit was upon a note executed by appellant John H. Earle, and upon a note and mortgage executed by appellant Effie S. Earle, to her coappellant, and claimed by the appellee to be collateral security for the payment of the first-mentioned note. Hereinafter, appellant Effie S. Earle will be mentioned as appellant.

Appellee's amended complaint was in one paragraph, with appellant and said John H. Earle as defendants therein. In substance, it was as follows:

On the — day of —, 1914, said John H. Earle borrowed of appellee \$2,000, executing his note therefor, payable three months after date. At that time he held and owned a note for \$2,000, secured by a mortgage on certain real estate, which note and mortgage were executed by appellant, and which he assigned as collateral security to appellee to secure said loan, which said note so assigned is due and wholly unpaid.

When the note executed by said John H. Earle became due on January 23, 1915, he renewed it to April 15, 1915, by executing a new note due at said last-named date, which note was not given in payment. To secure its payment he left with appellee the said note and mortgage of appellant. Said renewal note is due and wholly unpaid. Said collateral note and mortgage were assigned by said John H. Earle to appellee by written assignment. A reasonable attorney's fee for the collection of the note of said John H. Earle is \$250.

The said collateral note is noncommercial paper. The assignment thereof is in writing, in which it is provided that the same is as collateral security, and that it is "to include any and all renewals of promissory notes or new promissory notes or other obligations accepted in payment of former obligations." John H. Earle suffered default.

Appellant filed an answer to the amended complaint in five paragraphs. The first was a general denial. The second admitted the execution of the note and mortgage, but averred that they were executed to secure the payment of a note executed by said John

H. Earle to appellant, dated September 25, 1914, for a loan to him of \$2,000, and due 90 days after date and for no other or different purpose, which appellee well knew, and that said note was taken up at maturity. The third paragraph was a plea of no consideration. The fourth paragraph admitted the execution of said note and mortgage, but avers: They were executed for the sole purpose and upon the sole condition that the payee might use the same as collateral for a loan to him from appellee of \$2,000, to be evidenced by a note therefor, payable in 90 days after its execution. That pursuant thereto the said John H. Earle borrowed said \$2,000 from appellee, executing his note therefor, payable in 90 days after its execution, drawing 8 per cent. interest from maturity, said note being the first-mentioned note in plaintiff's complaint, and with which he deposited appellant's note and mortgage as collateral security, but without any indorsement, and that the same are not transferred or in any manner assigned by said John H. Earle to appellee, and that they were held by appellee as a bare deposit of papers in the original form without any writing, collateral or otherwise, transferring either of them to appellee. When said first-mentioned note fell due, to wit, December 24, 1914, said John H. and appellee entered into an agreement surrendering said note, and, in consideration of such surrender, said John H. executed a new note, in lieu of the former, to January 23, 1915, and appellee extended the time of payment to said January 23, 1915, and accepted interest to said date from said John H. On January 23, 1915, by agreement, said note then maturing was surrendered, and in consideration of such surrender said John H. executed a new note in lieu thereof due April 15, 1915, and paid the interest thereon to said date; said last-mentioned note against said John H. is the note sued on in appellee's complaint. Appellant executed to said John H. the said note and mortgage as surety only for the first of said notes, and that said note and mortgage were wholly without a consideration, saving only as they were given as an accommodation to enable said John H. to obtain the first of said loans, as evidenced by said ninety-day note. Appellant had no notice or knowledge of either of said agreements between appellee and said John H. for the extension of the time of payment or anything pertaining thereto, and has never given her consent to anything that was so agreed to be done between appellee and said John H., and did not know or consent that her said note or mortgage should be held as security for other than the said first note, if so they were, and that said extensions were wholly without appellant's consent, and appellee at all times knew she was the surety only. This paragraph of answer was verified.

The fifth paragraph was the same as the fourth, except that it charged that each of the notes of December 24, 1914, and January 23, 1915, were executed in payment of the note immediately preceding. Appellee replied in two paragraphs: the first being general denial, and the second being addressed to the fourth paragraph of answer and averring that said John H. applied to appellee for a loan of \$2,000 September 25, 1914, and stated that he expected to have a note for \$2,000 secured by mortgage on real estate described in the complaint given him by appellant, and that if appellee would loan him \$2,000 he would deposit, assign, and turn over to appellee said note and mortgage. Appellee agreed to make such loan if such note and mortgage were so turned over. Thereupon said John H. executed said note, which was held until the note and mortgage involved were assigned and delivered to the appellee as collateral security for the payment of said notes; and that it made said loan depending on said security. Said John H. represented to appellee that he was the owner of said note and mortgage, and that appellee had no notice or knowledge that they were accommodation paper. That, at the maturity of the first note, said renewal notes were executed with the understanding that said note and mortgage should remain as collateral security therefor. Appellee had no notice or knowledge that said note and mortgage were not the property of said John H., and acted in good faith, and in the honest belief that they were his property in making said original loan, and the said extension, and appellee never heard of the claim that said collateral note and mortgage were accommodation paper until after the commencement of this suit.

There was a trial by the court which resulted in a general finding and judgment for the appellee against said John H. on his note for \$2,499.98, and costs, and the finding and decree in appellee's favor against appellant on her note and mortgage in the sum of \$2,410.50 and for the foreclosure of said mortgage and for costs.

It was further found and adjudged that said note and mortgage were collateral for said note of the said John H. Appellant filed her motion to modify the judgment which was overruled. She then filed her motion for new trial, which was overruled, and she now prosecutes this appeal.

Appellant assigns as error the action of the court in overruling her motion to modify the judgment and in overruling her motion for a new trial.

In her motion for new trial the appellant has specified:

(1) That the decision of the court is not sustained by sufficient evidence.

(2) That the decision of the court is contrary to law.

It appears by the evidence in this case that

John H. Earle, who was the son of the appellant, applied to the appellee on September 25, 1914, for a 90-day loan of \$2,000, representing at said time that he owned an interest in an unsettled estate, and which he expected to sell to his mother, the appellant; that he expected to obtain therefor a note secured by mortgage on appellant's real estate in lieu of the money for the purchase of such interest. Appellee agreed to furnish him the loan applied for upon condition that he procure and pledge, as collateral security for the loan, the note and mortgage to be obtained from his mother as his own property. Thereupon he executed the note first mentioned in the complaint, and a written pledge, which were left in the custody of the appellee, and the money for the loan was to be placed to his order when he delivered the said note and mortgage to the appellee as collateral security for the payment of the loan.

In a few days, said John H. returned with the note and mortgage involved, duly executed, which he delivered as collateral security to the appellee, stating that the note and mortgage were his absolute individual property. Thereupon the amount of the loan, less interest discounted, was placed to said John H.'s credit, and soon thereafter withdrawn from the bank. There was no restriction of any kind or nature in the collateral paper, and nothing to indicate that it was executed as accommodation paper, and on its face appeared to be the result of a business transaction for a valuable consideration. The evidence shows that the appellee in good faith believed the collateral paper to be said John H.'s individual property and, acting on such belief, made the loan aforesaid. The evidence shows that appellee had no knowledge or intimation from any source that such collateral was accommodation paper until after the institution of the suit thereon. Said John H. being unable to pay his loan at maturity, the same was twice extended, renewal notes being executed at each extension. At the time of said extensions, the said collateral note and mortgage had not reached their maturity.

Appellant contends that she occupied the relation of a surety to the said John H., and that, as her note and mortgage were executed for the purpose only of obtaining the loan evidenced by the first note mentioned in the complaint, the taking of the renewal notes without her knowledge and consent discharged her; that, it having been understood between herself and the said John H. that her note and mortgage were only pledged for the payment of the first note, therefore they were not pledged for the payment of either of the renewal notes; that the appellant upon no consideration, except as the maker of accommodation paper, became a surety as to her note and mortgage, and secured the payment of only the first note

mentioned in the complaint; and that, such note being nonnegotiable by the law merchant, the appellee was charged with implied knowledge of her relationship, and, with such implied knowledge having twice definitely extended the time of the payment of the principal owed, she was thereby discharged.

She cites in support of her position the following Indiana cases: *Matchett v. Winona*, etc., Ass'n, 185 Ind. 128, 113 N. E. 1; *Buck v. Smiley*, 64 Ind. 431; *White v. Whitney*, 51 Ind. 124; *Jarvis v. Hyatt*, 43 Ind. 163; *Dickerson v. Board*, 6 Ind. 128, 63 Am. Dec. 373; *Altoona*, etc., *Bank v. Dunn*, 151 Pa. 228, 25 Atl. 80, 31 Am. St. Rep. 742.

In each of these cases, however, except one, it appears that the payee at the time of the extension complained of had knowledge of the relation of suretyship. The case of *Jarvis v. Hyatt*, supra, is the exception, in which the matter of knowledge, or want of knowledge, is not mentioned.

[1] Appellant cites 1 Am. & Eng. Enc. of Law, pp. 382, 383, from page 383 of which volume we quote:

"One who has received accommodation paper even after it has been diverted from its contemplated purpose, without notice of the diversion, in good faith, and for value, is entitled to recover thereon."

She also cites 32 Cyc., from page 158 of which volume we quote:

"In order that a surety, as such, may be discharged by acts of the creditor or obligee, the latter must have knowledge of the existence of the relation."

She also cites 8 Corpus Juris, from page 274 of which volume we quote:

"There is no question that, as to persons who take accommodation paper without knowledge of its true character, the accommodation party is bound by his apparent standing on the face of the instrument and cannot claim the privileges of a surety of the real debtor."

With these statements of the rule of law before us, quoted from volumes cited by appellant, we do not deem it necessary further to review the long list of authorities cited by her.

[2] Appellant contends that because of the fact that the note involved is noncommercial paper, and because it was unindorsed, appellee was charged with knowledge of appellant's suretyship. This does not seem to be the rule of law with notes under circumstances similar to the one in this suit. In the case of *Tharp v. Parker et al.*, 86 Ind. 102, the note in suit was noncommercial paper, and it was held in that case that, the suretyship not being apparent on the face of the note, the surety was not released by an extension of the time of payment, unless the payee had knowledge of the suretyship.

In *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155, the note involved was noncommercial, and it was held that an agreement between the payee and one of the joint makers, without the knowledge or consent of the other, a surety in fact but not known as such to the payee, does not release the nonconsenting maker. In *Gipson v. Ogden*, 100 Ind. 20, on page 25, which involved the collection of a judgment, it was held that a surety is not released by the extension of time, unless the creditor had notice of the relationship, and that this rule applies where the assignee of the payee takes without notice that one of the makers is surety. Other authorities to the same effect are: *Williams v. Scott*, 83 Ind. 405-407; *Lamson v. First National Bank*, 82 Ind. 21, 23; *Weaver v. Prebster*, 37 Ind. App. 582, 77 N. E. 674.

[3] Other questions are discussed in the briefs filed, both of which are ably prepared; but we do not deem it necessary to discuss them for the purposes of this opinion. A loss must be sustained, and the appellant having invested her son with apparent ownership of business paper, and thereby having enabled him to obtain the money from appellee, she must bear the loss. It is a familiar principle of law that, where one of two innocent persons must suffer by the act of a third, he who put it in the power of the third to do the act must suffer. *Hirsch v. Norton*, 115 Ind. 341, 17 N. E. 612.

The judgment is affirmed.

McMAHAN, J., not participating.

WATTS v. EVANSVILLE, MT. C. & N. RY.
CO. et al. (No. 9494.)*

(Appellate Court of Indiana, Division No. 2.
June 20, 1919.)*

1. COURTS \S 489(1)—JURISDICTION OF STATE COURTS—ASSUMPTION OF JURISDICTION BY CONGRESS—STATUTES.

By the passage of River and Harbor Appropriation Act, §§ 9, 10 (U. S. Comp. St. §§ 9971, 9910), and Act Aug. 11, 1888, § 2 (U. S. Comp. St. § 9975), Congress merely intended to prevent obstructions and nuisances in navigable streams which would interfere with interstate commerce, but did not intend to assume control of the bottom lands extending back from the low-water line of such rivers so as to deprive the state courts of jurisdiction thereof.

2. STATES \S 12(1) — BOUNDARIES—POWER TO FIX.

The boundaries of the state of Indiana were not fixed by the adoption of the state Constitution, but by Congress, and their recital in the Indiana Constitution (*Burns' Ann. St. 1914, § 221*) is merely a memorandum thereof.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion 129 N. E. 315.

3. STATES — 12(3) — BOUNDARIES — NAVIGABLE WATERS.

The federal government has not retained the Wabash river, forming a boundary between Indiana and Illinois, or any part of it, as federal territory, and is concerned only with the relation of interstate commerce thereon.

Appeal from Circuit Court, Gibson County; F. M. Hostetter, Special Judge.

On motion for rehearing. Rehearing denied.

For former opinion, see 120 N. E. 611.

Arthur P. Twineham and Chas. E. Sumner, both of Princeton, for appellant.

P. J. Kolb, of Mt. Carmel, Ill., Morton C. Embree and Lucius C. Embree, both of Princeton, L. J. Hackney, of Cincinnati, Ohio, and Frank L. Littleton and W. F. Elliott, both of Indianapolis, for appellees.

DAUSMAN, J. The appellees ask a rehearing on several grounds, but we do not deem it necessary to consider more than the question of jurisdiction.

[1] Counsel assert that the courts of Indiana are without jurisdiction in the case at bar for the reason that the federal government has entered the field and taken control of the entire subject-matter involved. To sustain their contention they point to sections 9 and 10 of the River and Harbor Appropriation Act of March 3, 1899 (30 Stat. 1151, c. 425), and to section 2 of the similar act of August 11, 1888 (25 Stat. 423, c. 860 [6 Fed. Stat. Ann. pp. 802, 805, 813; U. S. Comp. St. §§ 9971, 9910, 9975]). Counsel have not directed us to any decision by any federal court in which any provision of these statutes has been discussed or applied. They have presented to us nothing but the bare statement that by the enactment of said sections the Congress deprived the state of Indiana of all jurisdiction in the premises. Under these circumstances, we can only say that in our opinion by these sections the Congress did not intend to concern itself further than to prevent obstructions and nuisances in navigable streams which would interfere with interstate commerce. It seems unreasonable to say that the Congress intended thereby to assume control of the bottom lands which extend far back from the low-water line. See the following cases: *Stinson v. Butler*, 4 Blackf. 285; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644; *Martin v. City of Evansville*, 32 Ind. 84; *Escanaba, etc., v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; *Willamette, etc., v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; *U. S. v. Bellingham*, 81 Fed. 658, 26 C. C. A. 547; *U. S. v. Rio Grande Dam*, 174 U. S. 707, 19 Sup. Ct. 770, 43 L. Ed. 1136; *Northorn Pacific v. U. S.*, 104 Fed. 691, 44 C. C. A.

135, 59 L. R. A. 80; *Cummings v. Chicago*, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525; *Montgomery v. Portland*, 190 U. S. 89, 23 Sup. Ct. 735, 47 L. Ed. 965.

Counsel insist that we erred in stating that the railway company derived its right to construct its road across the water course from the Indiana statute. They assert that—

"The Constitution of Indiana makes the middle of the river the western boundary line of the state, and the bridge over the stream lies in Indiana and Illinois as does also that part of the river with which the court has to deal."

[2, 3] The statement just quoted is not quite correct. The Constitution of Indiana did not fix the boundary line now under consideration. Indeed, the people of Indiana, by adopting a Constitution, could not fix the boundaries of the state. Our impression is that the Congress fixed that boundary and that the recital in the Indiana Constitution is merely a memorandum of it. Section 221, Burns 1914. By way of comparison, we observe that the southern boundary of Indiana is low-water mark on the north side of the Ohio river; that the northern boundary of Kentucky is low-water mark on the south side of the Ohio river; and that the space between these boundaries remains federal territory. But our impression is that no such condition exists between Indiana and Illinois with respect to the Wabash river. It seems that the federal government has not retained the Wabash river or any part of it as federal territory, and that it is concerned only with the regulation of interstate commerce thereon. See *Welsh v. State*, 128 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; *Memphis Packet Co. v. Pickey*, 142 Ind. 304, 40 N. E. 527; *Indiana v. Kentucky*, 136 U. S. 479, 10 Sup. Ct. 1051; 34 L. Ed. 329. We are of the opinion that our statute applies to the bottom lands on the Indiana side—where the damage was done. See *U. S. v. Rider* (D. C.) 50 Fed. 406; *U. S. v. Moline* (D. C.) 82 Fed. 592; *Lake Shore, etc., v. Ohio*, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. Ed. 747. This is an interesting subject, and it would be a pleasure to investigate the history of the western line of our state and to explore the decisions for the purpose of determining the question of exclusive and concurrent jurisdictions as between the two states and as between them and the federal government. But we would not be justified in consuming public time to do what counsel have failed to do.

Perhaps it would have been better if we had said that the railway company derived its right from the Indiana statutes to construct its railroad "upon or across" the high-water channel on the Indiana side of the Wabash river. But if it constructed its road therein and thereon without legislative au-

thority, then its liability is the same as it would be under the statute. So that upon the facts the decision is correct under either theory of the law.

We make these observations merely for the purpose of indicating that we did not overlook the question of jurisdiction, but refrained from discussing it because of appellees' failure to develop the subject.

Petition for rehearing overruled.

(70 Ind. App. 493)

KINGAN & CO. v. ALBIN. (No. 9800.)

(Appellate Court of Indiana, Division No. 2.
June 18, 1919.)

1. APPEAL AND ERROR ¶359(1)—REVIEW—GENERAL VERDICT AND SPECIAL FINDINGS.

A general verdict necessarily determines all the material issues in favor of appellee, and, unless the answers to special interrogatories disclose facts so inconsistent with the general verdict that they cannot be reconciled with it under any conceivable state of facts provable under the issues, there is no error in overruling motion for judgment on the answers to the interrogatories; no presumptions being indulged in favor of such answers.

2. MASTER AND SERVANT ¶297(4)—GENERAL VERDICT AND SPECIAL FINDINGS.

In an action for the death of a foreman caught in a hog-scraping machine, where the general verdict was for plaintiff, special findings not disclosing how the accident happened could not be construed as showing that a voluntary act of deceased was the proximate cause of his death.

3. MASTER AND SERVANT ¶121(2)—FAILURE TO GUARD MACHINERY — NEGLIGENCE PER SE.

Failure to guard a dangerous machine when practicable to do so without practically destroying its usefulness generally constitutes negligence per se.

4. MASTER AND SERVANT ¶297(2)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—SPECIAL FINDINGS.

In an action for the death of a foreman caught in a hog-scraping machine, special findings that he was struck by an iron bar, but not showing what he was doing, held not to show that he was guilty of contributory negligence, so as to be inconsistent with the general verdict for plaintiff.

5. TRIAL ¶316—SPECIAL INTERROGATORIES—DISCHARGE FOR FAILURE TO AGREE.

If the jury are unable to agree on answers to interrogatories, they may be discharged.

6. TRIAL ¶362—SPECIAL INTERROGATORIES—REFUSAL TO RESUBMIT.

While a party submitting proper interrogatories is entitled to a full and fair answer thereto, it is not error for the court to refuse to require the jury to retire and make more

definite answers, where the answers demanded would not, if given, change the results of the judgment rendered.

7. TRIAL ¶362—SPECIAL INTERROGATORIES—OBJECTIONS TO ANSWERS.

If the answers to special interrogatories are not sustained by sufficient evidence, the remedy is by motion for a new trial, and not by motion to require the jury to make further answers.

8. MASTER AND SERVANT ¶286(22)—INJURIES TO SERVANT—DIRECTION OF VERDICT—GUARDING MACHINERY.

In an action for the death of a foreman caught in a hog-scraping machine, direction of verdict for defendant was properly refused, where it appeared that the machine was not guarded, but could have been guarded without interfering with its usefulness.

9. MASTER AND SERVANT ¶265(14)—INJURIES TO SERVANT—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

In an action for death of a servant, the burden of proving his contributory negligence is on defendant.

10. MASTER AND SERVANT ¶121(1)—INJURIES TO SERVANT—GUARDING MACHINERY.

An owner of dangerous machinery is under no obligation to guard it while repairs are being made thereon.

11. APPEAL AND ERROR ¶1064(1)—REVIEW—HARMLESS ERROR.

In an action for the death of plaintiff's intestate by being caught in unguarded machinery, an incorrect definition of the burden of proof held harmless error.

12. NEGLIGENCE ¶56(1) — "PROXIMATE CAUSE."

"Proximate cause" is an act which immediately causes or fails to prevent an injury which might reasonably have been anticipated would result from such negligent act or omission.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

13. MASTER AND SERVANT ¶278(13)—INJURIES TO SERVANT—UNGUARDED MACHINERY—EVIDENCE—SUFFICIENCY.

In an action for the death of a foreman caught in an unguarded hog-scraping machine, evidence held to justify a finding that he slipped and fell into the machine while stooping over to rake something out from under it, and that, if it had been guarded, the accident would not have happened.

Appeal from Superior Court, Marion County; James A. Ross, Special Judge.

Action by Matilda Albin, administratrix of the estate of Anthony Albin, deceased, against Kingan & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

Samuel D. Miller, Frank O. Dalley, and Will H. Thompson, all of Indianapolis, for appellant.

Louis H. Flinn and J. R. Cauble, both of Indianapolis, for appellee.

McMAHAN, J. This is an action for damages commenced by the appellee, as administratrix of the estate of Anthony Albin, to recover damages sustained by reason of the death of said Anthony Albin, alleged to have been caused by the negligence of appellant in failing to guard a certain hog-scraping machine. The case was tried by a jury, and resulted in a verdict and judgment in favor of appellee. The jury, in connection with their general verdict, answered certain interrogatories. The appellant's motion for judgment on the interrogatories notwithstanding the general verdict was overruled. Appellant filed a motion for a new trial setting out 37 specifications or reasons why a new trial should have been granted. This motion was overruled, and the errors assigned are that the court erred: (1) In overruling the motion for judgment on the interrogatories and answers thereto; and (2) in overruling the motion for a new trial.

In determining the correctness of the action of the court in overruling appellant's said motion for judgment, we can only consider the complaint, answer, general verdict, and answers of the jury to the interrogatories. *City of Jeffersonville v. Gray*, 165 Ind. 26, 74 N. E. 611.

The complaint, after alleging that appellant is a corporation doing business in this state and that appellee is the duly appointed and qualified administratrix of the estate of Anthony Albin, reads as follows:

"Plaintiff further avers that on the 11th day of February, 1913, and for some time prior thereto, said defendant company was and is still engaged in the manufacture of meat products, pork packing, and the general meat business in the city of Indianapolis, Ind.; that on the 11th day of February, 1913, and for some time prior thereto, said defendant company had in its employ the said Anthony Albin, deceased, and more than five other employes.

"Plaintiff further avers that said decedent, Anthony Albin, was employed by said defendant company as a machinist, and as such machinist had charge of a certain machine and conveyor known as a 'hog-scraping machine' and 'hog conveyor'; that it was his duty as such machinist to repair, adjust, clean, and keep in order said hog-scraping machine and hog conveyor, and to run and operate said machine and conveyor; that said hog-scraping machine and hog conveyor was composed of a series of sharp knives, sprockets, chains, gears, shafting, and belting, and was and is a dangerous machine and dangerous conveyor; that said machine and conveyor was unguarded, and that there was no guard of any kind, character, or description upon said machine and conveyor; that said machine and conveyor was operated by said defendant company in viola-

tion of the laws of the state of Indiana pertaining to unguarded machinery; that it was practicable to guard said machine and hog conveyor without rendering it practically useless for its intended purpose.

"This plaintiff further alleges and says that on the 11th day of February, 1913, said decedent was attending said machine and conveyor in conformity with the orders of said defendant company, and that said machine and conveyor was being operated by said defendant company on said date; that while said decedent was so engaged about said machine and conveyor, and while in the line of his duties, said decedent fell into, upon, against, and came in contact with said dangerous, unguarded machine and conveyor, thereby crushing and lacerating his head, cutting off his skull, lacerating and tearing his right arm near the shoulder joint, killing him instantly; that said injuries and death resulted from the negligence and carelessness of the said defendant company in operating, and permitting and suffering to be operated, said dangerous, unguarded machine, contrary to law as aforesaid.

"Plaintiff further avers that said decedent received the above-described injuries which resulted in his death by the negligence and carelessness of the said defendant company in permitting, suffering, and allowing and ordering said decedent to work upon or about said dangerous, unguarded machine and conveyor; that said injuries and death resulted wholly through the negligence and carelessness of the said defendant company as above described."

It is also alleged that said decedent left surviving him his widow, Matilda Albin, and eight children; that said widow and two of the children were dependent upon him for their support, and demanding damages.

The answer was a general denial.

[1] It is well settled that the general verdict necessarily determined all the material issues in favor of the appellee, and, unless the answers to the interrogatories disclose facts so inconsistent with the general verdict that they cannot be reconciled with it under any conceivable state of facts provable under the issues, the court did not err in overruling the motion for judgment on the answers to the interrogatories. No presumptions are to be indulged in favor of the answers to the interrogatories, but all reasonable presumptions will be indulged to sustain the general verdict. *City of Jeffersonville v. Gray*, supra. The reason for this rule is well stated in *City of South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200, as follows:

"The jury is required to pronounce upon all the issuable facts proved in the case, while the court in testing the force of isolated facts disclosed by answers to interrogatories does not know, and cannot know, what other facts touching the same matters were rightfully before the jury to justify their verdict. Therefore, in conceding to the jury the presumption of right judgment, to overthrow its general verdict, the special facts returned must be of such a nature as to exclude the possible exist-

ence of other controlling facts, provable under the issues, relating to the same subject."

The jury, by their answers to the interrogatories, found the facts to be substantially as follows: Decedent was the foreman in charge of the machinery in question, and had been in charge of such machinery for many years. It was a part of his duty to make repairs to such machine, and just prior to his injury he and his assistant had finished doing so. He then told his assistant to start the machine. To do so it was necessary for decedent's assistant to pass out of his sight. Said assistant, when starting the machine, was not at a place where decedent could see him. When he directed his assistant to start the machine, decedent was standing several feet from the place where he met his death. It was necessary for decedent, in order to put himself in a position where he could come in contact with said machine, to walk several feet from the place where he was last seen alive. The portion of the machine in which the accident occurred was upon a raised platform above which were two iron or steel shafts, one about 9½ inches above the other; the platform below these shafts was about 1 foot 5½ inches above the floor at the south end and was about 11 inches above it at the north end. There was a wooden bar known as the shifter bar about 11½ inches south of the lower of these shafts. The accident was caused by decedent being struck on the head by an iron bar attached between two descending chains. Decedent and his assistant had been inside said machine on said platform a short time before the accident to adjust said machine, which was not in motion at the time they were in the same prior to the accident. Had there been a gate or door north of the machine, it would have been necessary to have opened or removed said gate or door in order to enter the machine to make repairs. Decedent was familiar with the mechanism of the machine. The machine was 5 feet 10 inches wide. The platform on which the shafting stood was about 4 feet 11 inches deep from north to south. The distance between the two sprocket chains was about 2 feet 8 inches, and from the sprocket chains to the outside of the north edge of the platform was 1 foot 7 inches. The bars on the sprocket chains were about 9 feet 6 inches apart. The chains when in motion moved about 142½ feet a minute. The machine was started and stopped by a shifter lever which was on the platform 9 feet above the floor, said platform being reached by a stairway. From the top of such stairway to the shifter lever was about 12 feet 3 inches. The repair decedent and his assistant had made consisted in replacing the sprocket chains on the sprocket wheel. Decedent had often made this repair. Decedent had full authority to order this machine stopped or started at any time he deemed it desirable or necessary. Decedent could not

have been in the position he was when injured had there been a door, gate, or other guard at the north end of said machine without opening or removing said door or other guard. Decedent did not have the authority if he thought it necessary or desirable that the north end of said machine be guarded to see that a guard was placed thereon; nor did he at any time cause a guard to be placed thereon or suggest to defendant's construction department that the same be done. On several occasions prior to the accident in question decedent had attempted to adjust said machine while same was in motion. When the chains were in operation, they moved at a rate of speed such that 15 bars would pass a given point per minute. These bars were about 9 feet apart. The lower of the two shafts moved from south to north.

[2] The appellant first contends that the "answers to the interrogatories show that the failure to guard the machine was not the proximate cause of the accident because they show that, if the machine had been guarded, the decedent could not have placed himself in the position he was in when the accident occurred without removing the guard." Arguing from this premise, appellant says that a guard would not have afforded any protection against the accident, as the voluntary act of the deceased must have been the proximate cause of his death. The objection to this contention is that appellant's logic is at fault. Not only is appellant's logic at fault, but the facts as found do not support its contention. The answers of the jury do not show what the deceased was doing when killed. There are no facts found to justify the conclusion that the accident was the result of any voluntary act of the deceased. In view of the general verdict, it would be more reasonable to say that the injury was the result of some involuntary act on the part of decedent, such as accidentally falling or slipping on a wet floor in passing alongside the unguarded machine.

The answers of the jury to the interrogatories do not disclose any facts or state of facts that throw any light on how the accident happened. Whether the deceased went back to the machine after his assistant went upstairs and started it for the purpose of watching it so as to see that it was in working order and slipped and accidentally fell into it or whether he attempted to make some adjustment on the machine, is not disclosed.

[3] It will not do to say what might or might not have happened or how it might have happened if the machine had been guarded. The answer to appellant's contention is that the jury by their general verdict found that the machine was not guarded, and that it was practicable to have guarded it without practically destroying its usefulness for the purpose for which it was intend-

ed. Such a failure is a plain breach of the duty owing to the employé and generally constitutes negligence per se. *Monteith v. Kokomo, etc., Co.*, 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; *Davis v. Mercer Lumber Co.*, 164 Ind. 413, 73 N. E. 899. The purpose of the Legislature in enacting the statute requiring dangerous machinery to be guarded was to prevent accidents. The jury by their general verdict found that the absence of a proper guard was the proximate cause of the accident. Such a conclusion and finding is not unwarranted. To hold that the absence of such a guard cannot be the proximate cause of an injury would be to destroy the statute. A proper guard might not have prevented the accident, but it would have relieved appellant from all liability on account of a failure to comply with the statute. As said by this court in *Tucker, etc., Co. v. Staley*, 40 Ind. App. 63, 80 N. E. 975:

"So far as the question of proximate cause is concerned, it is not necessary that appellant should have anticipated the particular injury which resulted. *Davis v. Mercer Lumber Co.*, 164 Ind. 413, 73 N. E. 899. It is quite sufficient that the performance of the statutory duty might and, as the jury found, would have prevented it. The question, as before stated, was one of fact, and no amount of logic authorizes us to disregard the verdict."

[4] The appellant also contends that the answers of the jury to the interrogatories show that the deceased was guilty of negligence which contributed to his death. This contention is based upon the theory that the deceased was working with the machine while it was in motion, and that he ought to have stopped the machine before undertaking such work. We cannot agree with appellant in this contention. The facts as found do not show that deceased was working with the machine or attempting to do anything with it at the time of the accident. They only show that the deceased and his assistant had been making some repairs or adjustments a short time before the accident; that they had the repairs completed; that the assistant had gone upstairs and started the machine, at which time the decedent was standing several feet from the machine; that the accident was caused by deceased being struck on the head by an iron bar attached between two descending chains on the machine. There are no facts showing what the deceased was doing or that he did or failed to do anything that could be construed as showing that he was guilty of contributory negligence.

Several interrogatories were submitted to the jury, the purpose of which was to elicit facts showing that the deceased was guilty of contributory negligence, and which, if answered in favor of appellant, would have shown deceased guilty of negligence which was the proximate cause of the accident; but the jury answered each of these interro-

gatories, "No evidence." In determining whether the interrogatories and the answers thereto are sufficient to overthrow the general verdict, we are not concerned about the truthfulness of the answers. We must accept them as being true. There are no facts found by the jury showing that deceased was guilty of contributory negligence. There was therefore no error in overruling appellant's motion for judgment on the interrogatories.

Did the court err in overruling appellant's motion for a new trial?

When the jury returned into court with their general verdict and answers to the interrogatories, appellant filed a motion asking the court to require the jury to retire and make further answers to interrogatories Nos. 11, 13, 15, 18, 19, 20, 23, 27, 41, 48, 53, and 54. This motion was sustained as to 18, 19, 20, 27, 48, 53, and 54, and overruled as to 11, 13, 15, 23, and 41. The jury, having retired, again returned into court with their general verdict and answers to interrogatories, and appellant filed another motion asking the court to require the jury to retire and make further answer to interrogatory No. 54, which motion was overruled. The action of the court in refusing to require the jury to make further answer to interrogatories Nos. 11, 13, 15, 23, 41, and 54 is set out as ground for a new trial. These interrogatories and the answers thereto are:

(11) Did the decedent, immediately before the accident in question, voluntarily step upon the platform? A. No evidence.

(13) Did decedent put his head between these two shafts while the machine was in motion? A. No evidence.

(15) Did the decedent step upon said platform at the north end? A. No evidence.

(23) Would the accident have occurred if decedent had caused the machine to be stopped before going into it at the time of his accident? A. No evidence that he went in at time of accident.

(41) Upon each occasion when this repair or adjustment was made did the decedent or his assistant, or both of them, go into the machine from the same direction that decedent entered it immediately prior to the accident in question? A. No evidence.

(54) When said machine was in motion, was such fact perfectly obvious, to one looking at it when within eight feet from the north end thereof? A. No evidence. (This is the first answer returned to said interrogatory No. 54.)

The jury reconsidered No. 54 and made the answer thereto read as follows: "No evidence as to eight feet"—and, after being so answered, the court refused to require the jury to retire again and make further answer to such interrogatory.

Appellant's motion was that the jury be required to retire and make further answer to each of said interrogatories for the reason that "there was evidence introduced in the course of the trial from which each of

said interrogatories could and should have been answered otherwise than as they were answered. Appellant insists that each of these interrogatories was proper, and that there was evidence on the subject inquired about in each interrogatory; that Edward McCloud, who was one of appellant's witnesses, testified as to the facts asked about.

[5] If there is any evidence on the subject embraced in an interrogatory, it is the duty of the jury to answer such interrogatory in accordance with the preponderance of the evidence. If the jury are unable to agree upon the answers to interrogatories, the court should discharge the jury on account of such disagreement, the same as in a case where the jury fails to agree on a general verdict. If there is no evidence on the subject embraced in the interrogatory, the jury then has the right to answer, "No evidence." *Perry, etc., Co. v. Wilson*, 160 Ind. 435, 67 N. E. 183.

[6] A party submitting proper interrogatories has the right to have them answered fairly and fully (*Indiana, etc., Co. v. Swafford*, 179 Ind. 279, 100 N. E. 840), but it is not available error for the court to refuse to require the jury to retire and make more definite answers if the answers demanded would not, if given, change the results of the judgment rendered (*Cleveland, etc., Ry. Co. v. Asbury*, 120 Ind. 289, 22 N. E. 140).

[7] Appellant's real contention is, not that the answers are defective or indefinite, but that they are not sustained by the evidence. If the answers of the jury to interrogatories are not sustained by sufficient evidence, the remedy is by motion for a new trial, and not by motion to require the jury to make further answers. There was therefore no error in overruling the motion to require the jury to make further answer to said interrogatories. *Bird, etc., Co. v. Krug*, 30 Ind. App. 602, 65 N. E. 309.

The appellant next contends that the answers to interrogatories 46, 53, and 54 are not sustained by sufficient evidence. These interrogatories and answers are as follows:

(46) Did the decedent have the authority, if in his opinion it was necessary or desirable that the north end of said hog-scraping machine should be guarded, to see that a guard was placed thereon? A. No.

(53) Did the accident occur while the decedent was attempting to make some adjustment of said machine while the same was in motion? A. No.

(54) When said machine was in motion was such fact perfectly obvious to one looking at it when within eight feet from the north end thereof? A. No evidence.

It is clear that, even though the jury had answered Nos. 46 and 54 in the affirmative, such answers would not have controlled the judgment. A different judgment would not have been rendered as a result of such affirmative answers.

Interrogatory No. 53 is double. The evidence showed without conflict that the machine was in motion at the time of the accident, but there was no evidence that the deceased was making any adjustment of the machine at the time of the accident. The evidence without conflict showed that the chains which operated the machine had been thrown off the sprocket wheel; that the machine had been stopped; that the deceased and his assistant had loosened the take-ups, put the chain back on the sprocket wheel, and tightened the take-ups; that all adjustments and repairs had been made before the accident. No witness testified that the deceased was making any adjustments of the machine at the time of the accident. The only witness who claimed to have seen the accident did not testify that the deceased made any adjustment or attempted to make any adjustment after the machine was started. The statement of the witness was that the deceased stepped on the platform and stooped over as if he was going to rake something out, and that the witness supposed he was raking hog hair. The jury might truthfully have answered this question by saying there was no evidence that the deceased was attempting to make any adjustment of the machine at the time of the accident.

Complaint is next made of the refusal of the court to give certain instructions tendered by appellant.

[8, 9] Instruction No. 1 tendered by appellant asked the court to instruct the jury to return a verdict for appellant. This was properly refused. The evidence conclusively showed that the machine which caused the death of deceased was not guarded, and that it could have been guarded without in any manner interfering with its usefulness. One witness testified to a state of facts that would have justified the jury in finding that the deceased was guilty of contributory negligence, but there were circumstances surrounding this testimony that might have warranted the jury in not believing the witness. The burden of proving contributory negligence was on appellant.

[10] Instructions 3, 4, 7, and 9 tendered by appellant were fully covered by the instructions given by the court. No. 8 was properly refused, as there was no evidence to which it was applicable. By this instruction the court was asked to instruct the jury that there was no obligation on the owner of dangerous machinery to guard it while repairs were being made. This is correct as an abstract proposition of law, but the evidence was uncontradicted that the repairs or adjustment of the machine were completed before the accident, and that the deceased and his assistant had left the machine. There is no evidence that the deceased afterwards undertook to make any repairs or that he was making any repair or adjustment when he was killed.

Instruction No. 8 given by the court on its own motion was in part as follows:

"By burden of the proof is meant a preponderance of the evidence. Such preponderance is not necessarily the greater number of witnesses testifying to any one fact, but the evidence applying to that particular fact which is greater in weight and credibility. If, after considering all the evidence in the cause, you should find that the evidence on any given question is evenly balanced, you should find on that question against the party having the burden on such issue; for in such case there would be no preponderance in favor of such proposition."

[11] The definition of the "burden of proof" is not correct, but there is no claim that the giving of this instruction misled the jury to the disadvantage of appellant. Its giving was not reversible error.

[12] No. 6 was as follows:

"'Proximate cause' may be defined as an act which immediately causes or fails to prevent an injury which might reasonably have been anticipated would result from such negligent act or omission."

This is a correct statement of the law. *Evansville Hoop, etc., Co. v. Bailey*, 43 Ind. App. 153, 157, 84 N. E. 549.

We have examined all the instructions given of which complaint is made, and find no reversible error.

The next contention of appellant is that the verdict is not sustained by sufficient evidence. That the appellant was negligent in failing to guard the machine that caused the deceased's death is not seriously questioned. The evidence without conflict is that it was not guarded, and that it could have been guarded without interfering with its usefulness; that the machine was stopped while the deceased and his assistant made some adjustments. When the adjustments were made the assistant stepped to his place about 12 feet from the machine and out of sight of the deceased and started the machine. After the machine had been running about two or three minutes, the assistant heard a noise as if something was wrong with the machine. He stopped the machine and went to investigate, finding the deceased headforemost in the machine dead. The only question remaining in the case for further consideration is whether the deceased was guilty of negligence which proximately contributed to his death. The burden of proving contributory negligence was on the appellant.

Edward McCloud was a witness for appellant, and was the only witness who claimed to have been present and to have seen the accident. At the time of the trial he was a prisoner in the Marion county workhouse, and his testimony was given in a deposition which was read to the jury. He testified

that he was 37 years of age; that he was working for appellant at the time the deceased was killed; that he saw the accident; that, when he first saw the deceased, he (deceased) was standing right down in front of the hog scraper and was off the platform and about three feet from the machine; that he had just come out from under there and told his helper, Arnold Cornelius, to start the machine. The helper went upstairs and started the machine. The reason witness was down on the floor where the accident happened was that machine was stopped, and that he just walked around down stairs looking around. After the helper went upstairs, the deceased stooped there a few moments looking, and then he went ahead and went under the machine like he was going to rake something out. This was after he told the assistant to start it. He had been under there once and had come out and told his assistant to start it. That is when he went back the second time. There was the machine and the iron rods that go across and a little platform that he could step on. The platform was about 2 feet wide and not over 1½ feet high. He just stepped on the platform and stuck his head right down under there when his foot slipped. The machine was going then; had been going about five minutes. He stuck his head under there like he was raking something out; supposed he was raking hog hair; saw the thing catch him; saw his foot slip and he fell in the machine; he was taken out dead; his head was cut off; stood there and watched him five minutes; saw him two or three minutes before the machine started; he walked up there to work in the machine; he was through working on the machine; was raking something out from under there when his foot slipped; he stuck his head in between two rods there; is all he saw. Witness says he "hollered there is a man in the machine."

[13] Appellant contends that the deceased was attempting to make some repairs or adjustments on the machine while it was in motion, and that, even if the same had been guarded, that would not have prevented the accident. The objection to this argument is that it is simply a conjecture. It is a sufficient answer to say that there is no evidence that deceased was attempting to make any repairs or adjustments at the time of his death. The jury were justified in finding that he stooped over to rake something out from under the machine, and that in so doing he slipped and fell into the machine being instantly killed, and that, if there had been a gate or guard in front of the machine as explained by the witnesses, the accident would not have happened.

We find no reversible error in the record. Judgment affirmed.

(70 Ind. App. 637)

MARYLAND CASUALTY CO. OF BALTIMORE, MD., v. KNIGHT & JILLSON CO.
(No. 9917.)(Appellate Court of Indiana, Division No. 1.
June 25, 1919.)**INSURANCE — 606(1) — SUBROGATION — ACTION — COMPLAINT.**

Where casualty company, which had paid claim, against insured employer, of an employé injured by explosion of a boiler tube claimed to be defective, sued the corporation which sold the tube to the employer, on theory of subrogation of plaintiff to the employer's claim against defendant for breach of implied warranty, the complaint, in failing to allege that the explosion of the tube was the result of the alleged defective construction, *held* demurrable.

Appeal from Superior Court, Marion County; B. G. Clifford, Judge.

Action by the Maryland Casualty Company of Baltimore, Maryland, against the Knight & Jillson Company. From judgment for defendant, plaintiff appeals. Affirmed.

James E. Rocap, of Indianapolis, for appellant.

Gavin & Gavin, of Indianapolis, for appellee.

ENLOE, J. This was an action by appellant and against appellee to recover damages for breach of an alleged implied contract of warranty.

The complaint, omitting formal parts, was, in so far as is material to the decision of the question involved in the appeal, as follows:

"Plaintiff complains of the defendants and each of them, and for a cause of action says that plaintiff is a corporation duly organized and existing under and by virtue of the laws of the state of Maryland, and as such corporation is engaged in the state of Indiana in employers' liability insurance, and has been so engaged for 10 years continuously last past; that defendant Knight & Jillson Company is a corporation duly organized and existing under and by virtue of the laws of the state of Indiana, and was during the year of 1907 and 1908, and is now, engaged in the business of vending, jobbing, and selling hardware and boiler tubes and flues; that defendant Crane Company is a corporation of the state of Illinois, and such corporation now has in its possession large amounts of the assets of said Knight & Jillson Company owned by the latter company in the years 1906, 1907, 1908, 1909, 1910, 1911, 1912, and 1913; that on or about June 27, 1905, plaintiff entered into a certain written contract of employers' liability insurance with Kingan & Co., Limited, a corporation organized and existing under and by virtue of the laws of Great Britain and Ireland, which was then, and continuously since then is, engaged in carrying on a manufacturing business in Indianapolis, Marion county, Ind., by which con-

tract plaintiff agreed to insure the said Kingan & Co., Limited, against loss from liability by reason of injuries to employes of said Kingan & Co. and by reason of judgments in court by reason of such injuries; that on or about February 29, 1908, one William E. King, who was then and there an employé of said Kingan & Co., Limited, received personal injuries by reason of being scalded and burned by the explosion of one certain boiler tube installed in the plant of said Kingan & Co., Limited, as a part of the boiler system thereof, and thereafter the said Kingan filed suit in said county and state against said Kingan & Co. on the ground that he received said injuries by reason of the negligence of the latter company, and thereafter, on or about July 2, 1910, the said court entered judgment against said Kingan & Co. for the sum of \$7,500, and costs upon the verdict in the same cause of action in favor of said William E. King against the said Kingan & Co., Limited, that thereafter the defendant in such cause of action alleged such cause to the Supreme Court of said state of Indiana, and on February 20, 1913, said judgment was in all things affirmed by the Supreme Court of Indiana (179 Ind. 285, 100 N. E. 1044); that thereafter, by reason of said contract of insurance, this plaintiff paid to and for the use of said Kingan & Co., Limited, the sum of \$5,149.45, such sum being the total amount due said Kingan & Co. under the provisions of said policy and contract on account of the said Kingan & Co., Limited, loss by reason of liability on account of said personal injuries to said William E. King, and plaintiff alleges that it was compelled to and obligated to make such payment of last-named sum to said Kingan & Co., Limited, under the provisions of the said contract, and plaintiff alleges that by reason of such payment of the last-named sum that it is subrogated by operation of law to all the rights and choses in action of said Kingan & Co., Limited, against defendants, and each of them, on account of said loss from liability, to the extent of \$5,149.45; that on or about December, 1907, defendant Knight & Jillson Company sold and delivered said tube, which exploded as aforesaid, to Kingan & Co., Limited, for the specific purpose of being used in the boiler of the latter company's plant, and plaintiff avers that then and there such tube was defective, in this, that said tube was improperly welded, weak, and infirm, and had a weld of only one thirty-sixth, more or less, of an inch of a weld, and plaintiff avers that the proper and safe dimensions of such weld should have been one-fourth of an inch, more or less; that said defective condition of said tube was concealed from view and from sight by reason of the fact that such defective condition was on the inside of said tube, and inside of such weld, and completely covered and concealed from the view of said Kingan & Co., and the latter company could not have discovered such defective condition without tearing open such tube, breaking and destroying the same; that said Kingan & Co. relied upon defendant Knight & Jillson Company to furnish safe and fit tubes for the use of such boiler, and relied upon the name and reputation of said Knight & Jillson Company for the furnishing of said safe and fit tubes for said boiler, and defendant Knight &

Jillson Company was then and there, and at all times mentioned herein, fully aware of such reliance, and the said Knight & Jillson Company at the time of the sale of said tubes and said defective tube impliedly warranted to the said Kingan & Co., Limited, that said boiler tubes and said defective tube was and were free from defects, and fit for the purpose intended for the same, namely, to serve as a part of the boiler system of said Kingan & Co., Limited, in heating and furnishing power for its said plant; that defendant Knight & Jillson Company sold said defective tube to said Kingan & Co., and delivered the same to the latter for the specific purpose of its use in such boiler, and then and there well knew of such intended purpose and use; that said defective tube was installed in said boiler by said Kingan & Co., and was used and operated therein as a part of said boiler for a period of time of one week, more or less, and at the end of such period said defective tube burst and exploded, and injured the said William E. King as aforesaid; that by reason of the sale to said Kingan & Co., Limited, by said defendant Knight & Jillson Company of said defective tube, and by reason of its explosion as aforesaid, plaintiff alleges that defendant Knight & Jillson Company breached said implied warranty, by which plaintiff avers that defendant Knight & Jillson Company impliedly warranted to said Kingan & Co. that said tube which exploded was sound, and fit for the purpose intended as hereinbefore described, and by reason of such breach plaintiff avers that said Kingan & Co. was rendered liable for said loss from liability, and plaintiff lost and was compelled to pay the said sum of \$5,149.25. * * *

To this complaint appellee demurred for want of facts, with which demurrer it duly filed its memorandum of deficiencies.

The demurrer was sustained, and, appellant refusing to further plead, judgment was rendered against it, that it take nothing by its complaint, and that appellee recover its costs. From this judgment this appeal is prosecuted, and the only question involved is the one as to the sufficiency of the complaint.

It will be noted that while the complaint in question alleges a defect in construction of said "tube," it does not seek to recover the usual damages therefor. The damage sought to be recovered is special damage only.

Conceding, without deciding the same—for such decision is not necessary to the decision in this case, and we therefore do not decide the question—that upon proper complaint the present action will lie, yet it is so clear that appellant did not, and under the circumstances alleged it could not, have any greater right in the premises than the purchaser of said "tube," Kingan & Co., had as to need no citation of authority. Appellant is seeking to be subrogated to the alleged rights of Kingan & Co., and to recover thereon against appellee. If Kingan & Co. could not maintain this action, appellant cannot.

In the case at bar, what caused the explosion? For aught that is alleged in this complaint, it may have been the negligence of the engineer, in allowing the water in the boiler to get too low, excessive steam pressure, failure of pump to work, etc.

It is not alleged that said "tube" exploded as a result of defective construction. The special damages claimed grow out of the said alleged explosion, and the complaint by its allegations not connecting said alleged defect and said explosion, by proper averments, was not good as against the demurrer interposed. Other insufficiencies of said complaint are urged, but they need not be noticed.

The judgment is affirmed.

(71 Ind. App. 266)

FT. WAYNE MERCANTILE ACC. ASS'N v. SCOTT. (No. 10467.)

(Appellate Court of Indiana, Division No. 2. June 25, 1919.)

APPEAL AND ERROR §—766 — DISMISSAL—
FAILURE TO PRESENT QUESTION.

Where appellant was given notice of filing of appellee's motion to dismiss the appeal, for defects in appellant's brief which exist in fact, but has taken no steps to correct or amend the brief, and has filed no brief in opposition, the appeal will be dismissed.

Appeal from Superior Court, Allen County; Carl Yaple, Judge.

Action by John E. Scott against the Ft. Wayne Mercantile Accident Association. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

O. E. Fuelber, of Ft. Wayne, for appellant.

Leonard, Rose & Zollars, of Ft. Wayne, and Shirts & Fertig, of Noblesville, for appellee.

McMAHAN, J. The appellee commenced this action to recover upon a certificate of membership in appellant association insuring him against accidents. Appellant filed a plea in abatement, to which a demurrer was sustained. The issues being closed by the filing of an answer and reply, the cause was tried by a jury, and resulted in a verdict and judgment for appellee.

Appellant filed a motion for a new trial for the reasons: (1) That the court erred in sustaining the demurrer to the plea in abatement; (2, 3, 4, 5, and 6) that the court erred in giving certain instructions; (7) that the court erred in refusing to give a certain instruction; (8) that the verdict of the jury is not sustained by sufficient evidence; (9) that the verdict of the jury is

contrary to law; (10) that the verdict of the jury is contrary to the law and the evidence; (11) that the amount of recovery is erroneous, being too large; and (12) that the court erred on admitting certain evidence. The errors assigned are the sustaining of the demurrer to the plea in abatement and the overruling of the motion for a new trial.

The appellee, in April of this year, filed his motion, supported by brief, asking that the appeal be dismissed. The reasons set out in the motion are: That appellant has failed to show that it reserved any exception to any ruling or action of the trial court; that the complaint is not set out in the brief; that no showing is made as to when the judgment was rendered, or when the motion for a new trial was filed; that it does not appear that the motion for a new trial was ever ruled on; that the instructions are not in the record; that the evidence is not in the record; and that there is no condensed statement of the evidence in narrative form in appellant's brief, as required by rule 22 of this court (55 N. E. v).

Although appellant was given notice in April of the filing of this motion to dismiss, it has taken no steps to correct or amend its brief, and has filed no brief in opposition to such motion. Appellant's brief is subject to each and all of the objections pointed out by appellee. No exception appears to have been taken to the action of the trial court in sustaining the demurrer to the plea in abatement, or to the overruling of the motion for a new trial; in fact, it does not appear that the court ever ruled on the motion. No exception appears to have been reserved to the giving or refusing to give any instructions, and an examination of the record shows that neither the instructions nor the bill of exceptions containing the evidence are in the record.

There being no question presented for our consideration, the appeal is dismissed.

(72 Ind. App. 189)

HARTER v. MORRIS. (No. 9730.)

(Appellate Court of Indiana, Division No. 2.
June 27, 1919.)

1. APPEAL AND ERROR ⇐757(3) — BRIEFS—STATEMENT—RECITALS.

Where the record consisted of over 1,000 pages, it was the duty of appellant, under Court Rule 22 (55 N. E. v), to give a condensed recital of the evidence in narrative form.

2. APPEAL AND ERROR ⇐768 — BRIEFS—STATEMENT OF EVIDENCE.

Statement of evidence in appellant's brief not challenged by appellee is to be accepted as true.

3. SPECIFIC PERFORMANCE ⇐121(4)—ACCEPTANCE—DELIVERY.

In an action for specific performance of an agreement to exchange lands, evidence held insufficient to show that defendant delivered the acceptance of the proposal.

Appeal from Circuit Court, Marion County; Louis B. Ewbank, Judge.

On petition for rehearing. Petition overruled, and former opinion affirmed.

For former opinion, see 123 N. E. 23.

Wm. A. Hughes, of Greenfield, and Jas. L. Murray and U. C. Stover, both of Indianapolis, for appellant.

John F. Robbins and Weyl & Jewett, all of Indianapolis, for appellee.

NICHOLS, P. J. [1, 2] Counsel for appellee state in their brief on petition for rehearing that the court's statement in its opinion that there was a delivery of the acceptance by the appellee to the appellant is somewhat remarkable, in view of the fact that appellant himself testified on the trial of the cause to the delivery of the acceptance to him by the appellee. Counsel then quote from the record to the effect that the appellant stated that he got possession of this contract August 18, 1911, which was the next day after appellant had signed it in the office of appellee. There is no statement of this evidence in appellant's brief. The record in this case consists of over 1,000 pages, and under rule 22 of the Supreme and Appellate Courts (55 N. E. v), it was the duty of the appellant to give a condensed recital of the evidence in narrative form in his brief, so as to present the substance clearly and concisely, and this statement is taken to be correct unless challenged by the appellee.

[3] Appellee states in his brief that the contract was delivered to appellant on the 18th day of August, and that he gave the same to Mr. Hughes, his attorney. The papers that were delivered to Mr. Hughes were delivered under the following written agreement:

"These papers left with Wm. A. Hughes, and not to be returned except upon mutual agreement of Richard R. Harter and J. Edward Morris. This 18th day of August, 1911.

"Richard R. Harter.
"J. Edward Morris."

If this contract had been with the papers delivered to Mr. Hughes, such a delivery could not have been construed as a delivery to the appellant. It appears by appellant's brief, as well as by the record, that the appellant on cross-examination, upon having his recollection refreshed, corrected his testimony as to such delivery, and said that he had never had a contract in his possession after he left it with the appellee on the night of August 17, 1911, except to examine it;

that he thought he saw it the next day; that he thought it was left with the papers with Mr. Hughes but of this he was not certain. Afterward he saw it in the office of his attorney, Campbell, in Rush county, after suit had been brought, and that it had been produced in court thereafter suit was brought, and that he and his attorney had an inspection of it. Mr. Hughes, who was the attorney in whose office the business was transacted August 18, 1911, testified that the contract was not to his knowledge in his office at the time, and that he never saw it until it was produced by the appellee in the office of Hall & Campbell at Rushville. Upon that occasion he and the appellant went to Rushville and examined the contract.

This evidence is in harmony with the statement of the appellee, who claimed that on August 18th he exhibited the contract to the appellant without saying that he delivered it, and it shows, without contradiction, that the instrument remained in the hands of the appellee, except as he delivered it to the appellant after suit, for inspection and for use in the trial.

The question quoted in appellant's brief, to wit: "Have you any contract in your possession between you and Mr. Morris for the exchange of your farm for that of Mr. Morris in Starke county?" It was answered, "I have a written proposition that I made him and which I signed"—has to refer to the possession of the contract under the order of the court aforesaid, and for the inspection and use at the trial.

The petition for rehearing is overruled.

(71 Ind. App. 263)

**FT. WAYNE & NORTHERN INDIANA
TRACTION CO. v. RIDENOUR.***
(No. 9884.)

(Appellate Court of Indiana, Division No. 2.
June 26, 1919.)

**1. ASSAULT AND BATTERY §3, 35—WILLFUL-
NESS OF ASSAULT—EVIDENCE.**

In assault case there was no merit in the contention that the evidence did not show that the assault and battery were willfully committed, and therefore was not sufficient to sustain verdict for plaintiff; and there could not be an assault and battery without its being willfully committed.

2. CARRIERS §319(1)—INJURIES TO PASSENGER—EXCESSIVE DAMAGES.

A verdict of \$500 for plaintiff physician against defendant traction company for assault by defendant's conductor, not resulting in serious personal injury, held not excessive; plaintiff being entitled to damages for humiliation and wounded feelings, and the evidence showing other passengers were on the car at the time.

**3. APPEAL AND ERROR §773(5) — BRIEFS—
FAILURE TO FILE—REVERSAL.**

Where appellant has not shown prima facie error, the cause will be affirmed, though otherwise the cause would have been reversed for conduct of appellee in keeping record from files and his failure to file briefs.

Appeal from Circuit Court, Wabash County; John R. Brown, Special Judge.

Action by David O. Ridenour against the Ft. Wayne & Northern Indiana Traction Company. From judgment for plaintiff, defendant appeals. Affirmed.

Sayre & Hipskind and Barrett, Morris & Hoffman, of Ft. Wayne, for appellant.

McMAHAN, J. This is an action by appellee against appellant for damages on account of an assault and battery alleged to have been made by one of appellant's servants upon appellee while he was a passenger on one of appellant's cars.

The cause was tried by a jury, and resulted in a verdict and judgment for appellee. The only question presented for our determination relates to the action of the court in overruling appellant's motion for a new trial.

Appellant contends that the verdict of the jury is not sustained by sufficient evidence, that the assessment of damages is excessive, and that the court erred in giving and refusing to give certain instructions.

The evidence shows without conflict that the appellee was a physician residing at Peru; that he, in company with his wife and daughter, boarded one of appellant's cars in the city of Peru with the intention of getting off at another point in the city. A dispute arose between the conductor on the car and appellee relative to the car stopping at the point where appellee wished to alight. The conductor said he would not stop the car at that place. Appellee told the conductor that if he did not stop the car he (appellee) would, and with this statement appellee pulled the bell cord to stop the car, whereupon the conductor struck the appellee with his fist, knocking appellee into the vestibule of the car. The conversation between appellee and the conductor was loud and sufficient to attract the attention of the other passengers on the car.

[1] Appellant contends that the evidence does not show that the assault and battery was willfully committed, and that therefore the verdict is not sustained by sufficient evidence. There is no merit in this contention. We are unable to understand how there can be an assault and battery, and it not be willfully committed.

[2] Appellant next contends that the damages assessed are excessive. The jury assess-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied.

ed appellee's damages at \$500. While the evidence does not show that appellee was seriously injured in his person, he was also entitled to damages for humiliation and wounded feelings. The evidence as set out in appellant's brief does not show how many passengers were on the car at the time of the assault and battery, although it does disclose that there were others, some of whom testified as witnesses on the trial. The appellee was a doctor, residing and practicing his profession in the city of Peru, and the damages assessed are not such that we are justified in saying they are excessive.

Appellant also complains of the giving and the refusing to give certain instructions to the jury, but neither the instructions given nor those refused appear to have been made a part of the record. Appellant has failed to show that the court overruled its motion for a new trial, that there was any exception taken to the overruling of such motion, or that any exception was reserved to the giving or refusing to give any of the instructions. Appellant has failed to present any reversible error.

[3] The conduct of appellee in failing to file a brief in this cause, and in keeping the record from the files for a year or more, and in not returning it until the court called for it, is such that we would not hesitate to reverse the case for failure of appellee to file a brief, if appellant had shown any *prima facie* error.

There being no *prima facie* error shown, the judgment is affirmed.

(70 Ind. App. 674)

HOME BREWING CO. v. CITY OF INDIANAPOLIS. (No. 9957.)

(Appellate Court of Indiana, Division No. 2.
June 25, 1919.)

1. APPEAL AND ERROR ⇐837(7)—REVIEW—MOTION FOR JUDGMENT ON INTERROGATORIES.

In determining whether trial court erred in overruling motion for judgment on interrogatories and answers, appellate court considers only the complaint, the general verdict, and the interrogatories with the answers thereto.

2. TRIAL ⇐359(1)—GENERAL VERDICT—INTERROGATORIES—PRESUMPTIONS.

All reasonable presumptions should be indulged in favor of the general verdict over answers to special interrogatories.

3. INDEMNITY ⇐13(1)—INJURIES FROM DEFECTIVE SIDEWALK — RECOVERY OVER BY CITY.

A city, compelled to respond in damages for injuries to pedestrian from defective sidewalk, has right of action against party wrongfully causing defect for amount city was compelled to pay.

4. INDEMNITY ⇐14—PERSONAL INJURIES—CONCLUSIVENESS AS AGAINST INDEMNITOR OF FORMER ADJUDICATION AGAINST INDEMNITEE.

Where city, primarily liable for injuries to pedestrian from defective sidewalk, notifies person causing defect of action against it, such party will be bound by the judgment against the city, but will not be estopped to show that he was under no obligation to keep sidewalk in repair, or that it was not defective through his fault.

5. INDEMNITY ⇐13(3)—PERSONAL INJURY—DEFECTIVE SIDEWALK — LIABILITY OVER WRONGFUL USE OF SIDEWALK.

Where sidewalk was used by saloon keeper to roll beer kegs from wagon to elevator in walk, and after four years' wear, combined with travel of pedestrians, a depression was caused which resulted in injury to pedestrian for which city was compelled to respond in damages, held that use of sidewalk was not wrongful so as to render saloon keeper liable over to city.

Appeal from Circuit Court, Shelby County; Alonzo Blair, Judge.

Action by the City of Indianapolis against the Home Brewing Company. Judgment for plaintiff, and defendant appeals. Reversed, with instructions to sustain motion for judgment for defendant on answers to interrogatories.

J. W. Fessler, Harvey J. Elam, and Howard S. Young, all of Indianapolis, and Melks & Hack, of Shelbyville, for appellant.

Wm. A. Pickens, Walter Myers, Russell J. Ryan, and Edward W. Hohlt, all of Indianapolis, Adams & Jones, of Shelbyville, and Paul G. Davis, of Indianapolis, for appellee.

NICHOLS, P. J. This was an action by the appellee, city of Indianapolis, against the appellant, Home Brewing Company, commenced in the Marion circuit court, and finally tried on change of venue in the Shelby circuit court. It was to recover \$2,000 with interest and costs, which the city of Indianapolis had paid upon a judgment for that amount which one Mattie Crawford had obtained against the city as damages for injuries received when she stepped into a depression in the sidewalk in front of lands in Indianapolis owned by the appellant.

The complaint in substance is as follows: The appellant was a corporation engaged in the manufacture and sale of various kinds of beer, and as a part of its operations owned land in the city of Indianapolis, described as 39 South Delaware street, which it occupied with a saloon. On September 5, 1913, Mattie Crawford was injured by means of a defect in the sidewalk immediately in front of said lands by stepping into such defective place, which was about two feet long, a foot and a half wide, and two or three inches deep, and was located about

three inches west of an offset in the sidewalk and an opening in the surface thereof, which was for an elevator running from the surface of the sidewalk to the basement of such premises, which was used, owned, and controlled by the appellant for the purpose of conveying kegs of beer delivered by the appellant in front of the building on said lands, such beer being transferred from delivery wagons by a chute, and carried of its own motion to the edge of the raised place in the sidewalk, and from there placed on such elevator; and all kegs of beer taken from the premises were raised from the basement to the sidewalk at this point and taken away by the appellant. Said defective place was about seven feet northwest of the entrance to said saloon. By reason of the use which appellant made of said sidewalk said hole was caused to exist, with full knowledge of the appellant at all times of its existence, and appellant allowed the same to remain open and dangerous to persons using the sidewalk for ordinary travel, without attempting to warn them of the dangerous condition, and appellant continued on and prior to said date to use such sidewalk in the manner aforesaid. Mattie Crawford was walking along such sidewalk, and stepped into such hole or defect, and was seriously injured. She gave notice to the appellee of her intention to hold the city responsible for damages for such injuries, and on December 19, 1913, filed her suit against the appellee in the Marion circuit court, which cause was assigned to the Marion superior court, room 1, and there set for trial, notice of which was given to the appellant by the appellee to appear and defend such action, which appellant refused and neglected to do. Appellee defended such action, and on January 14, 1915, said Mattie Crawford recovered judgment against the appellee, by reason of the negligence of the appellant aforesaid, in the sum of \$2,000, which appellee was compelled to pay, and did pay, on April 23, 1915, together with 6 per cent. interest and costs, all of which was without the fault or negligence of the appellee. There was a demand for judgment in the instant case for the amount appellee was compelled to pay as aforesaid.

The cause was first submitted to a jury for trial, which disagreed and was discharged, and thereafter on change of venue the cause was sent to the Shelby circuit court, where there was a trial by jury, which returned a verdict in favor of the appellee and against the appellant for \$2,245.23. The jury also answered interrogatories submitted to it, which, in narrative form, found the following facts:

On September 5, 1913, there was a hole in the east sidewalk of South Delaware street in the city of Indianapolis, Ind., in front of the premises known as 39 South Delaware

street, which was two feet long, one foot and a half wide, and three inches deep at its deepest point, which was in the middle. It sloped up from the deepest point to the edge. This hole started to wear in the sidewalk about four years before September 5, 1913, and gradually grew larger from wear until said date. It was about six inches west of an elevator used for lowering beer and other articles to the basement of said premises. The level of the elevator when raised was about six inches above the sidewalk level. The premises were occupied by Christian Reis, and had been so occupied by him for eight years prior thereto, for saloon purposes. Said Reis bought his beer of the appellant, who delivered the same in kegs by wagon, and unloaded it for said Reis at the Delaware street curb. In unloading the kegs they were unloaded from the wagon to a mat or cushion on the sidewalk near the curb, and then rolled six or eight feet across the sidewalk to the elevator opening, and then raised and placed on the elevator. The empty beer kegs were raised from the basement on the elevator, and were then lowered from the elevator to the sidewalk, and rolled across the sidewalk and lifted into the appellant's wagon. The deliveries of beer made by appellant were not by means of a slide or chute from the delivery wagon to a point in front of the sidewalk to the elevator where the hole was. Soft soap in barrels, pickles in barrels, sauerkraut in barrels, whiskey in barrels, bottled wines and liquors, and ice in 100 and 200 pound pieces were delivered to said Reis at the Delaware street curb, and lowered to the sidewalk, rolled across the same, and placed on the elevator. None of these deliveries were made by the appellant. The effect of all these deliveries, removals, and uses was to gradually wear the hole complained of in the sidewalk in front of the elevator. The point where the hole complained of was located is in the business portion of the city of Indianapolis, where a large number of people were walking every day on and over said sidewalk on said east side of Delaware street.

In loading and unloading said elevator it was necessary to use the sidewalk of said Delaware street at the spot where the hole complained of was worn. The appellee was sued February 14, 1914, having been notified of the accident in November, 1913. The appellee undertook to defend such suit, first notifying the appellant that it expected the appellant to pay any judgment that might be rendered against it. This notice was when the appellant participated in the preparation for the trial. The trial began January 8, 1915, and said Mattie Crawford was injured September 5, 1913. It was provided in the lease that the tenant was to make the repairs, such repairs being on the building

only. When the hole first appeared it was very small, and gradually wore bigger as the sidewalk was used. The kegs of beer delivered by appellant were so delivered in the regular course of business, and the hole in question was about six feet from the curb.

The appellant filed its motion for judgment in its favor on the interrogatories and answers thereto, notwithstanding the general verdict, and thereafter within 30 days filed its motion for a new trial. The court overruled appellant's motion for judgment on answers to interrogatories, and also overruled its motion for a new trial, and thereupon entered judgment in favor of the appellee, and appellant now prosecutes this appeal from said judgment.

[1,2] In determining whether the trial court erred in overruling appellant's motion for judgment in favor of appellant on the interrogatories and answers thereto, this court considers only the complaint, the general verdict, and the interrogatories, together with the answers thereto. All reasonable presumptions should be indulged in favor of the general verdict, and nothing will be presumed in favor of the answers to interrogatories.

[3-5] If a city sidewalk is rendered unsafe by the wrongful act of negligence of a third party, and the city, by reason of its primary liability, is compelled to respond in damages for injuries caused by such unsafe condition, it has a right of action over against the party so rendering the sidewalk unsafe for the amount which it has been compelled to pay, and if the party so causing the unsafe condition is properly notified of such action against the city, the injuring party will be bound by the judgment against the city (*City of Anderson v. Fleming*, 160 Ind. 597, 602, 67 N. E. 443, 66 L. R. A. 119; *City of Bloomington v. O., I. & L. Co.*, 52 Ind. App. 510, 98 N. E. 188; *Town of Centerville v. Woods*, 57 Ind. 192), but in order that the city may recover it must appear that the unsafe condition of the sidewalk has been brought about by the wrongful act or omission of such alleged injuring party (*Town of Centerville v. Woods*, supra); and such alleged injuring party will not be estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident occurred (*Catterlin v. City of Frankfort*, 79 Ind. 547, 41 Am. Rep.

627). There is no charge in the complaint in this action that the appellant had made any wrongful use of the sidewalk. It was engaged in a business that at the time was lawful, and it had a right under the law to deliver to its customers its merchandise over and upon the sidewalks of the city. There is no violent or improper act charged in the complaint as to its method of delivery, unless it may be said that the charge of transferring its kegs of beer from its delivery wagon to chutes and then allowing it to reach the sidewalk by its own motion was an improper and violent use of its privilege, and this method of delivery is denied by the jury's answers to interrogatories. The use of the sidewalk for the purpose of delivering its merchandise was in common with a similar use of the sidewalk made by a number of other persons. The defect in the sidewalk was not a result of any affirmative wrongful act on the part of appellant, but was the result of the continuous use thereof for four years or more by this appellant and others, including the general public walking over such sidewalk, which continuous use for four years resulted in the defect complained of. All of these uses made of the sidewalk were proper and legitimate, and such uses produced the gradual wear which resulted in the defect complained of.

The duty of repairing streets and sidewalks is upon the city, and not upon the abutting property owners, or upon the persons using such streets or sidewalks in a legitimate way and such abutting property owners and such persons so using the street are not liable to a person injured by reason of the defect produced by such uses, unless such uses were wrongful and unlawful. *City of Elkhart v. Wickwire*, 87 Ind. 77; *Centerville v. Wood*, supra; *City of Bloomington v. O., I. & L. Co.*, supra.

It appears by the answers to interrogatories that the appellant had not made an improper or wrongful use of the sidewalk, and, it not being appellant's duty to repair the same, appellant's motion for judgment in its favor upon the answers to interrogatories should have been sustained.

The judgment is reversed, with instructions to the trial court to sustain appellant's motion for judgment on the answers to interrogatories.

(70 Ind. App. 550)

CASSIDY v. WARD et al. (No. 9902.)(Appellate Court of Indiana, Division No. 1.
June 20, 1919.)**1. APPEAL AND ERROR §757(1)—SPECIFICATIONS OF ERROR—SUFFICIENCY.**

Any question with reference to action of court in overruling motion to modify judgment has been waived by appellant by failing to set out said motion or the substance thereof in her brief, and by failing to state any specific point thereon, as required by the rules governing the preparation of briefs.

2. APPEAL AND ERROR §1010(1)—REVIEW—DECISIONS SUSTAINED BY COMPETENT EVIDENCE.

Decision of trial court as to priority of liens must be sustained if supported in its material aspects by any competent evidence, although there may be other evidence from which a different conclusion might have been reached.

3. EVIDENCE §414—MISTAKE IN DATE OF INSTRUMENT—PAROL EVIDENCE.

The date of a deed or mortgage furnishes only prima facie evidence of the date of execution, which may be rebutted.

4. DEEDS §108—MORTGAGES §108—TIME OF TAKING EFFECT—EXECUTION.

Deeds and mortgages become effective from the time of their execution, which includes their delivery to and acceptance by the grantee or mortgagee.

5. VENDOR AND PURCHASER §266(8)—VENDOR'S LIEN—WAIVER.

Generally, where vendor takes a mortgage for the unpaid purchase price, he waives the implied equitable lien which he would otherwise have as security.

6. APPEAL AND ERROR §179(1)—REVIEW—ISSUES NOT RAISED BY PLEADINGS.

Where plaintiff appellant does not allege that she has a vendor's lien, and cross-complainant does not allege such issue, but alleges that his mortgage is senior to the mortgage of plaintiff, no issue as to priority of vendor's lien is presented, and appellant's contention with reference thereto will be overruled.

7. APPEAL AND ERROR §843(2)—REVIEW—QUESTIONS NOT NECESSARY TO DECISION.

The rule involving the question of presumption of payment arising from the acceptance of a note and the rule involving merger of legal and equitable liens can have no controlling influence on the sole question presented, namely, the priority of liens of plaintiff appellant and cross-complainant by virtue of their respective mortgages, and a consideration of the rules is unnecessary.

Appeal from Circuit Court, Perry County; Wm. Ridley, Judge.

Action by Leona M. Cassidy against John F. Ward and wife, in which Adolph Graves filed a cross-complaint against plaintiff and the Wards. There was a judgment for plain-

tiff and Graves against the Wards, the mortgage of Graves being decreed superior to that of plaintiff. Plaintiff's motions to modify judgment and for new trial were overruled, and she appeals. Affirmed.

Leo H. Fisher, of Huntingburg, John W. Ewing, of New Albany, and Edmund S. Lincoln, of Marion, for appellant.

Oscar C. Minor, of Cannelton, for appellees.

BATMAN, C. J. Appellant brought this action against appellees John F. Ward and Marguerite Ward, husband and wife, on two promissory notes of \$750 each, executed by said John F. Ward, and secured by a mortgage on certain real estate in Perry county, Ind. The complaint is in a single paragraph of the usual form, with the following additional averment: That said mortgage "was represented to be a first mortgage, and was to be dated the same day hereof as said notes, but the date was made on the 30th day of August, 1910, when said date should have been the 27th day of August, 1910, and said date was changed by mistake." Appellees Ward and Ward answered said complaint by a general denial. Appellee Adolph Graves was admitted as a party defendant on his own application, and answered appellant's complaint by a general denial. He also filed a cross-complaint against appellant and his coappellees, by which he sought to recover a judgment against his coappellees, Ward and Ward, on a promissory note for \$1,500, and to foreclose a mortgage on the same real estate described in plaintiff's complaint, alleged to have been given to secure said note. Said cross-complaint alleges that the mortgage described therein was senior to appellant's said mortgage, and asked that it be so decreed. Appellant answered said cross-complaint by a general denial. Trial was had by the court, resulting in judgments against appellees Ward and Ward, in favor of appellant and appellee Graves, on their respective notes, the foreclosure of their respective mortgages, and an order for the sale of the real estate in satisfaction of said judgments; the mortgage of appellee Graves being decreed to be superior to the mortgage of appellant. Appellant filed a motion to modify the judgment, and also filed a motion for a new trial, both of which were overruled, and has assigned the action of the court in overruling her said motions as the errors on which she relies for reversal.

[1] Any question with reference to the action of the court in overruling the motion to modify the judgment has been waived by appellant, by failing to set out said motion, or the substance thereof, in her brief, and by failing to state any specific point thereon, as required by the rules governing

the preparation of briefs. *M. Rumley Co. v. Major* (1917) 115 N. E. 337; *Robbins v. Bank, etc.* (Sup. 1917) 117 N. E. 562; *Clifton v. McMains* (1915) 184 Ind. 539, 111 N. E. 801.

[2] The sole question presented by this appeal relates to the priority of the liens held by appellant and appellee Graves on the real estate described by virtue of their respective mortgages. In considering this question, it should be borne in mind that, under the rules governing appeals, the decision of the trial court must be sustained, if it is supported in its material aspects by any competent evidence, although there may be other evidence from which a different conclusion might have been reached. *Public Utilities Co. v. Handorf* (1916) 185 Ind. 254, 112 N. E. 775; *Elliot v. Elliot* (1915) 61 Ind. App. 209, 111 N. E. 813; *Toledo, etc., R. Co. v. Milner* (1916) 62 Ind. App. 208, 110 N. E. 756; *Caldwell v. Ulsh* (1915) 184 Ind. 725, 112 N. E. 518, *Ann. Cas.* 1918E, 68; *Trout v. Woodward* (1916) 114 N. E. 467.

The evidence is contradictory in some particulars, and in others not entirely clear; but there is some material evidence which reasonably tends to establish the following facts: That appellant sold the real estate in question to appellee John F. Ward in August, 1910, for \$3,000, one-half of which was to be paid in cash, and the remainder to be evidenced by notes, secured by a mortgage thereon; that, for the purpose of securing the money with which to make said cash payment, said Ward called on appellee Graves and arranged for a loan of \$1,500 and agreed to give him a mortgage on the land in question to secure the same; that on August 27, 1910, in pursuance of said arrangement, Graves gave Ward a check for said sum, and later on said day Ward, in company with a notary public, called upon appellant at her home for the purpose of consummating the purchase of said real estate; that, while there, appellant, who was a widow, signed, acknowledged, and delivered to Ward a deed therefor, and Ward gave to her, as the cash payment agreed upon, the check for \$1,500, which he had obtained from Graves for that purpose, and also delivered to her the two notes in suit of \$750 each, bearing date of August 27, 1910, to evidence the balance due her for said real estate; that, on the same occasion, the notary public prepared, and Ward signed, a mortgage on the real estate in question to secure said two notes, being the mortgage described in appellant's complaint; that, as the wife of said Ward was not present to sign and acknowledge the mortgage, it was not delivered to appellant at that time, but was taken away for the purpose of obtaining the signature of Ward's wife thereto; that later, on the same day, Ward and the notary public went to the place of business of appellee Graves with the note and mortgage de-

scribed in the cross-complaint duly prepared, where Ward completed their execution by delivering the same to Graves by whom they were then accepted; that said note and mortgage each bore the date of August 27, 1910, and, at the time Graves accepted the same, he knew that one-half of the purchase money for said real estate had not been paid; that subsequently on August 30, 1910, the mortgage described in appellant's complaint having been given the date last named, and having been duly signed and acknowledged by Ward and his wife, was delivered to appellant, who accepted the same as security for the two \$750 notes, which Ward had theretofore delivered to her on August 27, 1910, to evidence the balance of the purchase price of said land; that the said mortgage of appellee Graves was duly recorded in the office of the recorder of Perry county, Ind., on August 30, 1910, and the said mortgage of appellant was so recorded on September 2, 1910.

[3, 4] It will be observed that appellant has alleged in her complaint that her mortgage should have been dated August 27, 1910, and that it bore the date of August 30, 1910 by mistake. The fact that such a mistake was made, if it be a fact, did not affect appellant's rights, as the date of a deed or mortgage only furnishes prima facie evidence of the date of its execution, which may be rebutted. *Guyer v. Union Trust Co.* (1913) 55 Ind. App. 472, 104 N. E. 82. In this case the evidence, outside of the dates which the mortgages in question bear, tends strongly to show that the mortgage of appellee Graves was delivered to, and accepted by, him, prior to the day on which appellant's mortgage was delivered to her. It is well settled that instruments, such as deeds and mortgages, become effective from the time of their execution, which includes their delivery to, and acceptance by, the grantee or mortgagee. *Hoadley v. Hadley* (1874) 48 Ind. 452; *Krutsinger v. Brown* (1880) 72 Ind. 466; *Sims v. Smith* (1885) 99 Ind. 469, 50 Am. Rep. 90; *John Shillito Co. v. McConnell* (1891) 130 Ind. 41, 26 N. E. 832; *McColley v. Binkley* (1919) 121 N. E. 847. Applying this well-settled rule to the facts which the evidence in this case tends to establish, as stated above, it is clear that the mortgage of appellee Graves was executed and became effective prior to that of appellant. But appellant contends that, although the mortgage of appellee Graves may have been executed and become effective prior to her mortgage, nevertheless it should not have been decreed to be senior thereto. In support of this, she calls our attention to the fact that all of the notes in suit are dated August 27, 1910; that her notes mature five years after date, while the note of appellee Graves does not mature until six years after date, and cites certain decisions of this state which hold that a mortgage given to

secure the payment of several notes, payable at different times, must be considered as if there were as many different successive mortgages as there are notes, and the holder of the note first maturing will be considered as having priority, and the holder or holders of the remaining notes will come in in the same order in which said notes mature. It must be apparent, however, that this rule can have no application to a case like the one at bar, where the several notes involved are secured by different mortgages, executed on different dates.

Appellant also cites the doctrine of instantaneous seisin, which has been applied for the purpose of preserving the priority of a purchase-money mortgage, executed at the time the vendor parts with his title to the real estate covered thereby, as against a mortgage thereon executed by the vendee prior thereto. Again it must be apparent that this doctrine can have no application under the facts of this case, as the uncontradicted evidence shows that appellant's mortgage on the real estate in question was not executed at the time she delivered her deed to said real estate to appellee John F. Ward.

[5] It is further contended by appellant that she had a vendor's lien on the real estate in question, as security for her two notes of \$750 each; that her acceptance of a mortgage on the real estate to secure the same did not constitute a waiver of her said vendor's lien; and that, by reason of that fact, the court erred in its decree with reference to the priority of the mortgages in suit. As pertinent to this question, it should be noted that, as a general rule, where the vendor of land takes a mortgage thereon to secure the unpaid purchase price therefor, or a part thereof, he thereby waives the implied equitable lien, which he would otherwise have as security for its payment. *Harris v. Harland* (1860) 14 Ind. 439; *Mattix v. Weand* (1862) 19 Ind. 151; *Wilson v. Hunter* (1868) 30 Ind. 466; *Fouch v. Wilson* (1877) 60 Ind. 64, 28 Am. Rep. 651; *Anderson v. Donnell* (1879) 66 Ind. 150; *Richards v. McPherson* (1881) 74 Ind. 158; *Robbins v. Masteller* (1896) 147 Ind. 122, 46 N. E. 330. As said by the court in the case first above cited, on page 440 of 14 Ind.:

"By taking a mortgage to secure the unpaid purchase money, the vendor waived the implied equitable lien which he otherwise might have had for the payment thereof, and created an express lien. Although the implied and express liens are both intended to effect the same purpose, and both on the same property, yet they are in their nature so different that they cannot both exist as to the same object, at the same time, and for the same purpose, because

they are inconsistent. One is a mere equity, based upon the idea that the vendee holds the legal estate in trust for the payment of the vendor. The other puts the legal title in the vendor and makes him the trustee—destroys, or at least merges, the implied lien, by creating the express lien, and throwing the trust on the vendor, the mortgagee."

It has also been held that when a vendor's lien has once been waived it cannot be revived. *Mattix v. Weand*, supra; *Richards v. McPherson*, supra; *Nutter v. Fouch* (1882) 86 Ind. 451; *Buffalo, etc., Quarries Co. v. Davis* (1909) 45 Ind. App. 116, 90 N. E. 327.

[6] Appellant has cited a number of cases in this state which she insists conflict with the rule first above stated on the question of waiver; but an examination of these cases discloses that any apparent conflict may be readily explained from the particular facts and circumstances involved. But it is unnecessary to resort to this rule in order to sustain the decision of the trial court, as, under the issues in this case, no question can properly arise as to the priority between the mortgage of appellee Graves and an implied equitable lien for the unpaid purchase money in favor of appellant. An examination of the complaint discloses that she does not allege that she has a vendor's lien on the real estate, and ask that it be enforced. Appellee Graves by his cross-complaint does not present any such issue, but alleges that his mortgage is senior to the mortgage of appellant, which is met with an answer of general denial. Thus an issue of priority between the two mortgages was clearly made, and, as no other issue of priority was tendered, the correctness of the court's ruling must be determined in the light of such issue, and not in the light of an issue that might have been tendered. Under this state of the record, we are forced to conclude that appellant's contention with reference to the existence of a vendor's lien in her favor is outside of the issues presented and determined in the trial court. *Hull v. Mechanic's Building, etc., Ass'n* (1914) 56 Ind. App. 449, 105 N. E. 573.

[7] Appellant has also discussed the rule involving the question of presumption of payment arising from the acceptance of a note governed by the law merchant, and also a rule involving the merger of legal and equitable liens; but, as these rules can have no controlling influence on the sole question presented for our determination on this appeal, their consideration is unnecessary. For the reasons stated, we conclude that the court did not err in overruling appellant's motion for a new trial.

Judgment affirmed.

(70 Ind. App. 643)

KING PIANO CO. v. BRANT. (No. 9925.)

(Appellate Court of Indiana, Division No. 2.
June 25, 1919.)**1. APPEAL AND ERROR ⇨386(1)—TERM TIME APPEAL.**

Appeal will not be dismissed on appellee's motion on the ground that, on overruling of appellant's motion for new trial, no time was fixed by the trial court in which to file an appeal bond, and that no surety was named or indicated by the court at that time, where the record shows that, when motion for new trial was overruled, appellant reserved an exception, and prayed and was granted an appeal, and that, on a later day in the same term, the court approved and filed an appeal bond tendered by appellant.

2. APPEAL AND ERROR ⇨766—BRIEF.

Where there has been a good-faith effort made by appellant in his brief to comply with the appellate court's rules, and to group the points and authorities bearing on the trial court's action in overruling his motion for new trial, the appeal will be determined on its merits.

3. APPEAL AND ERROR ⇨1002—JURY VERDICT—CONFLICTING EVIDENCE.

Where the evidence, although conflicting, supports the verdict of the jury, the verdict will not be disturbed on appeal.

Appeal from Superior Court, Marion County; W. W. Thornton, Judge.

Action by the King Piano Company against Carrie Brant. From a judgment for defendant, plaintiff appeals. Affirmed.

James E. White, of Richmond, and Lloyd D. Claycombe, of Indianapolis, for appellant.

Wilson S. Doan and James C. Mathews, both of Indianapolis, for appellee.

McMAHAN, J. This was an action in replevin, brought by appellant to recover the possession of a piano, alleged to be the property of appellant and unlawfully detained by appellee. There was an answer of general denial, a trial by jury, and a verdict for appellee. Appellant filed a motion for a new trial; the only specifications not waived being that the verdict of the jury is (1) not sustained by sufficient evidence, and (2) contrary to law. The only assignment of error presenting any question for our consideration is the fourth, which is that the court erred in overruling appellant's motion for a new trial. This is a term time appeal.

[1] Appellee has filed a motion to dismiss the appeal, and says that, on the overruling of the motion for a new trial, no time was fixed by the trial court in which to file an

appeal bond, and that no surety was named or indicated by the court at that time. The record shows that, when the motion for a new trial was overruled, the appellant reserved an exception and prayed an appeal to this court, which was granted, and that on a later day in the same term the court approved and filed an appeal bond tendered by appellant. The bond, having been approved by the court and filed at the same term at which the motion for a new trial was overruled, is sufficient.

[2] It is claimed by appellee that the first three assignments of error are not proper assignments and present no question for our determination, but the fourth assignment, that the court erred in overruling the motion for a new trial, is properly assigned. Appellee, however, insists that appellant, in the preparation of its brief, has failed to apply specifically the points and propositions of law to any of the alleged errors, and that the action of the court in overruling the motion for a new trial is therefore waived. While appellant's brief may not be a model to follow, there has been a good-faith effort made to comply with the rules of this court, and to group the points and authorities bearing on the action of the court in overruling the motion for a new trial. Where this has been done, we will determine an appeal on its merits. The motion to dismiss is overruled.

[3] The appellant contends that the verdict of the jury is not sustained by sufficient evidence and is contrary to law, and that the court erred in refusing to direct a verdict for appellant. There was a sharp conflict in the evidence. Appellee purchased the piano in controversy from appellant on a contract which provided that the title should remain in appellant until the full purchase price was paid. Appellant contended that appellee still owed a considerable part of the purchase price, while appellee contended that the purchase price had been paid in full, and that nothing was due and owing appellant. This was the only question in dispute between the parties. The evidence was conflicting on this question, and it was the province of the jury to weigh the evidence, and to render such a verdict as in their judgment was proper under the evidence. There was evidence to support the verdict of the jury, and, such being the case, we cannot disturb their verdict. There is no ground for the contention that the verdict is contrary to law. The only objection which appellant actually makes is that the verdict is not supported by the evidence.

There was no error in the action of the court in refusing to direct a verdict for appellant. It would have been reversible error for the court to have done so.

Judgment affirmed.

(71 Ind. App. 1)

KING v. HARTLEY. (No. 9880.)(Appellate Court of Indiana, Division No. 2.
June 26, 1919.)**1. APPEAL AND ERROR §1011(1)—REVIEW—FINDINGS.**

In an action for partition, findings of fact by the trial court will not be disturbed on appeal, where the evidence is conflicting, unless the decision is contrary to law.

2. FRAUDS, STATUTE OF §129(12) — AGREEMENTS TO PURCHASE LAND—POSSESSION.

Possession of land by a tenant in common, who orally agreed to purchase the interest of a cotenant, is not such possession as will take the case out of the statute of frauds, for there was no change in possession under the contract.

3. TENANCY IN COMMON §13—POSSESSION.

The possession of one tenant in common is the possession of all.

4. FRAUDS, STATUTE OF §129(5) — AGREEMENTS TO LAND — PAYMENT OF PURCHASE PRICE.

Payment of the purchase price is not sufficient part performance to take out of the statute of frauds a parol contract for the conveyance of land.

5. FRAUDS, STATUTE OF §141—AGREEMENT—PARTITION.

An action by a tenant in common for partition of the property cannot be defeated by proof that such tenant orally agreed to sell her interest to a cotenant in possession and received compensation; the parol contract which could not be specifically enforced because of the statute of frauds not being available as a defense.

Appeal from Ripley Circuit Court, Ripley County; Robert A. Creigsmile, Judge.

Action by Grace M. King against Theophilus R. Hartley, who filed a cross-complaint. From a judgment for defendant on his cross-complaint, plaintiff appeals. Reversed, with instructions to sustain plaintiff's motion for new trial.

Francis M. Thompson, of Versailles, Thomas E. Willson, of Osgood, and Romney L. Willson and Russell Willson, both of Indianapolis, for appellant.

James H. Connelley, of Milan, and Korbly & New, of Indianapolis, for appellee.

McMAHAN, J. Appellant commenced this action for partition of certain real estate. According to the allegations of the complaint, Sarah E. Hartley died intestate in 1885, the owner of the real estate in controversy, and left as her sole and only heirs the appellee, Theophilus R. Hartley and certain named children, including appellant. Some of the children had conveyed their interest in the real estate to their father, Theophilus, and all who had not so conveyed were made

defendants. The appellee filed an answer in four paragraphs; the first was a general denial, demurrers were sustained to the second and fourth, and the third alleged that appellant had agreed to sell her interest in said real estate to appellee by an agreement entered into in 1904; that thereafter appellee fully paid appellant the agreed price, and that appellee since said agreement was entered into has had exclusive possession of appellant's interest in said real estate, and, relying on said agreement, appellee had made valuable improvements upon said real estate.

The appellee also filed a cross-complaint to quiet his title to the whole of the real estate described in appellant's complaint against the appellant, alleging that Sarah E. Hartley died the owner of the said real estate, and that appellee, appellant, and the other children as set out in the complaint were her only heirs.

It is then alleged that appellant agreed to sell her interest in said real estate to appellee, that he paid her in full, and entered into possession and improved the same substantially as set out in the third paragraph of answer. Appellant filed demurrers to the third paragraph of answer and to the cross-complaint, which were overruled and exception saved. Appellant filed a general denial to the third paragraph of answer, and also to the cross-complaint. The cause was tried by the court. There was a finding against appellant on her complaint and in favor of appellee on his cross-complaint; that his title to the whole of said real estate should be quieted in him, and a decree was rendered accordingly.

Appellant filed a motion for a new trial, which was overruled and exception saved. The motion for a new trial challenges that decision of the court on the grounds that it is not sustained by sufficient evidence and is contrary to law.

The evidence shows without conflict that Sarah E. Hartley died intestate in 1885, the owner of a 56-acre farm in Ripley county, and left as her sole heirs the appellee, who was her husband, and five children, of whom appellant was one. All of said children except appellant conveyed all their interest in said real estate to appellee before the commencement of this action. Appellant was between 2 and 3 years old when her mother died. The appellee and his five children lived together on the farm after the death of his wife. Appellant left home in 1900 and went to Cincinnati, and never thereafter made her home with her father on the farm, although she returned there for short visits, during which she stayed with her brothers and sisters. After the death of his wife appellee took the active charge and control of the farm, which, when this action was begun, was worth about \$6,000.

The evidence relative to the alleged agreement of appellant to convey her interest in the real estate to appellee is conflicting. Appellant denies that she ever made such an agreement, while appellee testified that on December 31, 1903, he talked to appellant concerning the purchase of her interest in the farm; that she was 21 years old that day; that she said she would let him have her share of the place, and thought she should have \$200 for it, which was what the other children were getting for their interests. He then gave her \$10, sent her \$40 when she was in a hospital in Cincinnati and wrote, asking him for money, and sent her \$20 in August, 1904, when she got married, telling her he would send more when she made the deed, but she did not do so. He sent her \$50 in September, 1904, and paid her \$15 when her husband got hurt, and sent her \$5 in December, 1904, saying this was the last payment he would make until he got the deed. She afterwards moved to Osgood, and said she would make the deed but never did so, although he paid her the rest in a range and other utensils. He has put \$200 worth of improvements on the land, and has paid off a \$400 mortgage on the farm. Appellant has lived near the farm, and has never said anything to him about having an interest in the land, although he has been in possession of the land ever since, and has paid each of the other children \$200 for their interests. The day she was 21 she said:

"Papa, you give me the money, and I will make you the deed when I come out some time."

[1] Where the evidence is conflicting, this court will not disturb the decision of the trial court, unless the decision is contrary to law. Assuming, then, that the facts are as testified to by appellee, we will proceed to ascertain whether the decision of the court is contrary to law.

[2, 3] Appellant contends that one who seeks to hold another to an oral agreement for the sale of real estate, in the face of the statute of frauds, must show possession under the contract; that where the parties to such an agreement are tenants in common there can be no taking possession under the contract so as to take it out of the statute, as the possession by one tenant in common is the possession of all.

In the case of *Waymire v. Waymire*, 141 Ind. 164, 40 N. E. 523, the court said:

"The contract being by parol, and for the purchase of real estate, it is clearly within the statute of frauds. In order to take it out of the statute it must be alleged that the possession was taken under the contract. It is not enough that possession was taken; it must be taken under the verbal contract, and pursuant to its conditions. * * * The averment on that point in the first paragraph is, 'and went into possession of the same,' and in the third paragraph is, 'that he immediately moved upon,

and cleared up, put buildings upon, and other valuable and lasting improvements upon said land.' These averments fall very far short of alleging that appellant took possession of the land under or pursuant to the terms of the contract. * * * It is true, further on in the first paragraph, it is averred that he 'has remained in possession of said real estate under said purchase ever since 1878.' But a mere remaining in possession under the terms of a parol contract of purchase of land is not sufficient to take the contract out of the statute of frauds. The possession must be taken or delivered under or pursuant to the terms of the verbal contract or purchase to take the case out of the operation of the statute of frauds."

In *Carlisle v. Brennan*, 67 Ind. 12, the defendant sought by cross-complaint to enforce specific performance of a parol contract for the conveyance of land. The cross-complainant was in possession of the land at the time the alleged contract was made. She paid the contract price relying on a parol contract. But the court says:

"There was no change in the possession of the real estate, no giving or taking possession thereof, under or pursuant to the alleged agreement or contract of sale. No change of possession was alleged; and, indeed, we think that the allegations of the cross-complaint affirmatively show that there was, in fact, no change of possession consequent upon, or pursuant to, such alleged agreement or contract of sale. For, as we have seen, it was alleged in her cross-complaint that the appellee Ellen Brennan was in the possession of the real estate, when the appellant agreed to and contracted to sell her the property.

"It follows, therefore, that the only part performance, if such it can be called, of the alleged agreement or contract of sale by the appellee Ellen Brennan was the naked payment of the sums of money, which were to be paid by her, as she alleged, as the purchase money of the real estate in controversy. Says Mr. Browne, in his treatise on the Construction of the Statute of Frauds, on the point now under consideration: 'And now, by an unbroken current of authorities running through many years, it is settled too firmly for question that payment, even to the whole amount of the purchase money, is not to be deemed part performance so as to justify a court of equity in enforcing the contract.' Section 461.

"This is the law in this state on the question we are now considering, as settled and declared by a number of the decisions of this court."

See, also, *Johns v. Johns*, 67 Ind. 440.

In *Pearson v. East*, 36 Ind. 27, it was said:

"While it is well settled that the taking of possession under a contract of purchase of real estate is sufficient to take the case out of the operation of the statute of frauds, it is equally well settled that simply to remain in possession is not sufficient, even though the purchase money may have been paid and improvements made."

In *Green v. Groves*, 109 Ind. 519, 10 N. E. 401, it was averred in the complaint that at

the time the contract was made and ever since until the institution of the suit the plaintiff was and had been in possession of the lots. The court said:

"It thus appears that the possession was not given or taken, in pursuance or by reason of the contract. The possession, therefore, was not a part performance of the contract, so as to take it without the statute of frauds, because it preceded the contract. * * * It is said by a standard author: 'The general principle is that the act of part performance must have reference to the contract, be in execution of it, and be an act which would be prejudicial to the party seeking performance, if the agreement were not enforced. The act performed should tend to show, not only that there has been an agreement, but also to throw light on the nature of that agreement, so that neither the fact of an agreement, nor even the nature of that agreement, rests solely upon parol evidence; the parol evidence being auxiliary to the proof afforded by the circumstances of the case itself.' Waterman, *Specific Performance of Contracts*, § 261. Neither the simple payment of a sum of money, nor, what is equivalent, payment in something else, or in some other way, nor the continuation of possession, existing prior to the alleged contract, tends to throw any light on the nature of the contract, or to show that there was such a contract."

In 30 Ind. App. 377, 64 N. E. 928, *Riley v. Haworth*, the court said:

"The payment of a part or all of the purchase money is not such a part performance as will take a parol contract for the sale of land out of the statute. * * * It is said that the important acts which constitute part performance are actual, open possession of the land, or permanent and valuable improvements made on the land, or these two combined. * * * But in order that possession may remove the case from the effects of the statute, there must be an open and absolute possession taken under the contract, and with a view to its performance. The possession must be yielded by one party, and accepted by the other, as done in performance of the contract. If possession precedes the contract, or if the contract be with a tenant already in possession, and who continues in possession afterwards, the contract is within the statute, as in neither case was there a change of possession in execution of the contract."

[4] Payment of the purchase price is not sufficient part performance to take the cause out of the operation of the statute of frauds. *Johnson v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45; *Mather v. Scoles*, 35 Ind. 5; *Suman v. Springate*, 67 Ind. 123; *Green v. Groves*, *supra*; *Riley v. Haworth*, *supra*.

[5] Appellee practically concedes the law to be as hereinbefore stated, and that its application would defeat an effort on appellee's part to enforce the specific performance of the contract, but he claims the contract can be used as a matter of defense, even though it cannot be used as a basis of affirmative action.

In *Johnson v. Pontious*, 118 Ind. 270, 20 N. E. 792, the appellee defended the action, which was for partition upon the theory that he was the equitable owner of the land through a parol contract of purchase from his cotenants. He claimed to have made a parol contract for the land, to have entered into possession under the contract, and to have made valuable and lasting improvements thereon. The court held that the appellee could not defeat appellant's right to a partition, by showing an equitable title, saying:

"Unless there was a contract, possession taken under it, and a payment of the purchase money, the appellee held no equitable title, and could not successfully defend the action on the ground of equitable ownership."

It is clear that the appellee could not, under the facts, set up the alleged parol contract for the purchase of appellant's interest in the real estate as a defense.

The court also erred in entering the decree quieting appellee's title to the real estate in controversy.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

BOTTORFF v. BOTTORFF. (No. 9933.)

(Appellate Court of Indiana. June 25, 1919.)

Appeal from Circuit Court, Clark County; James W. Fortune, Judge.

Action between Birdcell Bottorff and Leona Bottorff. From the judgment rendered, the former appeals. Transferred to Supreme Court in accordance with Burns' Ann. St. 1914, § 1399.

H. Willard Phipps and James L. Bottorff, both of Jeffersonville, for appellant.

George C. Kopp, of Jeffersonville, and James D. Ermston, of Indianapolis, for appellee.

PER CURIAM. This cause was submitted to the entire court; and for the failure of four judges to concur in a result the cause is now hereby transferred to the Supreme Court in accordance with section 1399, Burns 1914.

(233 Ill. 541)

ALLOTT v. WILMINGTON LIGHT & POWER CO. (No. 12803.)

(Supreme Court of Illinois. June 18, 1919.)

1. WATERS AND WATER COURSES ¶89—RIVER AS BOUNDARY.

Grants of land bordering upon a river give exclusive right and title to the grantee to the center of the stream, unless by the terms of the grant an intention is clearly shown to stop at the stream's edge.

2. BOUNDARIES ¶3(4)—RIVER AS BOUNDARY—CONTROL AS AGAINST PLATS.

Where lots were described as water lots and public plats and conveyances having reference to them indicated an intent of the proprietors to make use of them as water lots, held the width of the lots would not be the distances marked on the plat, but would be limited only by the channel of the river to which the lots were adjacent at the time of the plat.

3. WATERS AND WATER COURSES ¶98—MEANDERING BY GOVERNMENT SURVEYORS—EFFECT AS EVIDENCE.

The fact that the channel of a river was meandered tends strongly to show that the government surveyors considered it was a river channel at the time the survey was made.

4. EJECTMENT ¶9(3)—TITLE.

Plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's.

5. EJECTMENT ¶85—PLEADING—VARIANCE.

In view of Hurd's Rev. St. 1917, c. 45, §§ 10, 22, in ejectment the proof must correspond to the declaration.

Appeal from Circuit Court, Will County; Arthur W. De Selm, Judge.

Action by William Allott against the Wilmington Light & Power Company. From judgment for defendant, plaintiff appeals. Affirmed.

Robert E. Haley, of Joliet (P. C. Haley, of Joliet, of counsel), for appellant.

O'Donnell, Donovan & Bray and Corlett & Clare, all of Joliet, for appellee.

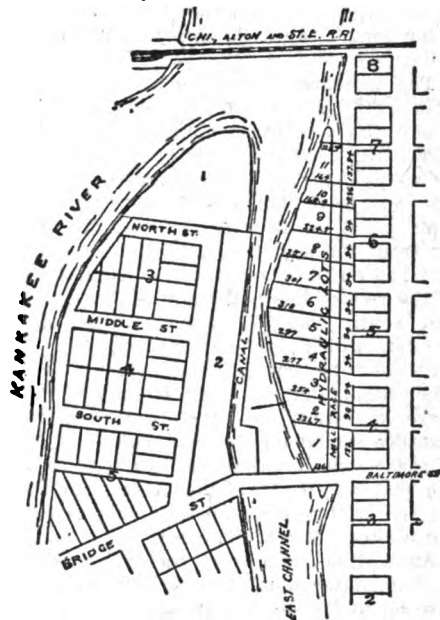
CARTER, J. This was an action in ejectment brought by appellant, William Allott, in the circuit court of Will county, against appellee, the Wilmington Light & Power Company, to recover possession of a certain strip of land in said county. The declaration was the usual form, and appellee filed a plea of general issue and a special plea. The case has been twice tried in the circuit court. On the first trial, at the close of the case, the court directed a verdict for appellee. Appellant thereupon obtained a new trial under the statute, at which a jury was waived and the case submitted to a different circuit judge from the one who originally

tried the case, and the court found the issues for the appellee and entered judgment accordingly. This appeal followed.

The land involved in this litigation lies along the Kankakee river, in the city of Wilmington. The river at this point runs slightly west of north, but for convenience we shall speak of it as if it ran north through said city. The premises in controversy were described in the declaration as follows:

"The strip of land lying between block 2 of Alden's Island addition to Wilmington on the west, and the west line of water lots 1 and 2 of Cox & Bowen's Water Lot addition to the city of Wilmington, in said county."

A plat showing approximately the situation and surroundings of this strip of land is given herewith, not for the purpose of mapping accurately the disputed property, but to aid in obtaining a clear understanding of the matters in dispute:



Litigation involving certain rights connected with this locality has heretofore been before this court in Allott v. American Strawboard Co., 267 Ill. 272, 108 N. E. 284, and a plat of the locality embracing a larger territory than the one here given will be found (267 Ill. on page 276, 108 N. E. 286) in that opinion.

In 1838 the land in Water Lot addition to said city was owned by Cox & Bowen. They platted lots 1 and 2, along with nine other lots extending north from said lot 2 and ending with lot 11, the plat being made by the then county surveyor of said county, Addison Collins. A copy of the original plat was introduced in evidence, and the certifi-

cate of the surveyor thereto reads as follows:

"I hereby certify that I have surveyed and actually laid out eleven water lots added to Wilmington for Thos. & Joseph Cox & A. W. Bowen adjoining their town plat and that this plat is the original and correct plat of said addition; that the lots are the dimensions in feet, respectively, as marked in figures on this plat; that the east side of said addition extends from the southwest corner of lot 1 in block 4 to the southwest corner of lot 2 in block 7, at each end of said line are stones sunk as monuments, and that a millrace about 55 feet wide extends over said lots from the south to the north end of said addition."

On the western border of all of these lots on the plat are the words "Kankakee river." The side lines of the various lots are parallel to each other, and not far from perpendicular to the line marked as the Kankakee river, and the lengths of the respective lots apparently conform to the course of the river; the middle lots of the subdivision being longer, and the lots toward each end being shorter.

The principal contention between counsel with reference to this litigation is as to where the western boundary line of lots 1 and 2 was located by this plat. It is argued by counsel for appellant that the boundary line was to be found by measuring the distance given on the plat as the length of each lot from the east boundary line of such lot as given on the plat; the east boundary line of the row of lots being marked at the north and south ends by stones placed in the ground, which can still be located. It is contended by counsel for appellee, on the other hand, that the west boundary lines of these lots were not fixed by means of the distance stated on the plat as to the length of these lots, but that the line was fixed by the plat as the Kankakee river, and hence the center thread of the Kankakee river was the western line of said lots.

As will be seen from an examination of all the plats submitted on the trial of this case as to the locality in question, the Kankakee river a short distance south of this point is divided into two branches by what has long been known as Alden's island, that on the west having been known as the west or main channel of the Kankakee river, while that on the east, immediately adjoining these lots, has been known as the east channel. As we understand the argument of counsel for appellant, they contend that the evidence in this record shows that there was never, in reality, any east channel of the river; that east of Alden's island was simply a depression, through which in times of high water the water flowed; that no water flowed continually through there. Whether this be true or not, we do not consider it decisive of the question as to where the west boundary line of lots 1 and 2 is located.

That must be decided, largely, on the basis of what was understood with reference to whether there was a river directly west of the property as platted in Water Lot addition, made in 1838. The evidence in the record, in our judgment, tends strongly to show that from the earliest times since this section was settled it was understood that there were two channels to the Kankakee river—one on either side of said island—and that all the plats have so indicated. There is merit in the argument of counsel for appellee that the question whether the west boundary of these lots was the east branch of the Kankakee river was settled by this court in *Allott v. American Strawboard Co.*, supra, where we said (267 Ill. 276, 108 N. E. 286):

"In 1838 Thomas Cox, Joseph Cox, and Albert W. Bowen, while owning, as tenants in common, Alden's island and all other lands riparian to the east channel of the river, laid out into lots and platted a tract of land lying along the east side of the east channel of the river opposite the north part of Alden's island, calling the same 'water lots added to Wilmington.' These lots were 11 in number, the most southerly being numbered 1, and the remaining lots, extending in a northerly direction from lot 1, being numbered consecutively to and including lot 11. Certain figures indicating the dimensions of each lot appeared on the plat, but the western boundary of each lot as shown on such plat is the east branch of the Kankakee river."

Counsel for appellant contend that the questions here involved were not raised or considered in the case quoted from, and that the statement in the opinion that the "western boundary of each lot as shown on such plat is the east branch of the Kankakee river" was unnecessary to the decision of the case. With this we cannot agree. It is clear from the last paragraph of the opinion, beginning at the bottom of page 300 of 267 Ill., on page 294 of 108 N. E., that the question whether these lots were riparian to the river was necessary for the decision of some of the questions involved therein. The court stated in that paragraph:

"As against water lot owners appellees have no right to interfere with the maintenance of dam No. 8 nor to obstruct the flow of water diverted by that dam into the east channel, and water lot owners have the right to peaceably remove obstructions placed in the east channel by appellees. *Schmidt v. Brown*, 226 Ill. 590 [80 N. E. 1071, 11 L. R. A. (N. S.) 457, 117 Am. St. Rep. 261]. Appellees contend, however, that the water wheels of the American Strawboard Company are not located on any of the water lots, and that company, therefore, cannot justify its action in removing the obstructions on the ground that it was exercising its rights as a water lot owner. The American Strawboard Company is the owner of water lots 3, 4, 5, 6, 7, 10, and 11 and a part of water lot 9, and as such owner has a clear right to the unobstructed flow of water into and through the east channel. Whether it is wrongfully using water from the

millrace is a question which does not concern appellees, but can only be raised by another water lot owner."

Manifestly, if these water lots ended on the western boundary at a distance measured on said plat and not at the Kankakee river, what is here said as to the rights of the water lot owners would not have been correctly stated. The same attorneys appeared for appellant, Allott, in the former litigation between appellant and others and the American Strawboard Company, decided in the opinion just referred to, and the briefs of Allott in that case and his petition for rehearing clearly raised the question that certain of the water lots in Cox & Bowen's Water Lot addition to Wilmington were not riparian to the east channel of the Kankakee river. In the petition for rehearing his counsel urged that the opinion was wrong because of this fact. There can be no question that a vital part of the decision in that case depended upon whether the owners of these water lots had any rights in the water flowing through the east channel at this point, and that, in its turn, depended on whether their lots extended to the east channel and were bordered thereby. If the western boundary of said lots was the east channel of the river, then the western boundary of said lots, under the settled authorities in this and other jurisdictions, was the center thread of the east channel. We see no reason to depart from our holding in that case as to the western boundary of the lots being the east channel of the Kankakee river. That it has always been the understanding that the east channel was really a river is corroborated by the reasoning in *People v. Kankakee River Improvement Co.*, 103 Ill. 491, where this court said (page 511):

"We do not understand that this provision would apply. It does not respect rivers, and we do not consider that a river becomes a canal from having its navigation improved by artificial means."

A reading of the entire opinion in that case shows, without question, that the court was discussing the artificial channel that was constructed in the so-called east channel of the Kankakee river from Baltimore to Bridge street north along the eastern boundary of block 2 on Alden's island, marked on the plat herein "Canal." Counsel for appellant, however, have argued so strenuously with reference to the western boundary of the water lots that we have decided to consider that question at some length as if it had not been considered and decided in the former decisions of this court.

Cox & Bowen's Water Lot addition to Wilmington (which we will so term for convenience regardless of its technical name, as to which the briefs differ) was the first platted land immediately adjoining the prop-

erty in dispute. Later the owners of the island platted the Island addition to Wilmington, including block 2 in said addition, shown in a general way on the plat accompanying this opinion. The witnesses who testified as to the location of the early buildings on lots 1 and 2 and the surrounding property did not agree fully in all particulars as to the time when such buildings were erected or the way in which the business was operated. This is not remarkable as memory, every one knows, is faulty, and we have little doubt that the witnesses were stating, as best they remembered, the exact situation on all these matters. A flourmill was evidently the first building constructed on lot 1 in said Water Lot addition, built, apparently, some time before 1860. This mill seems to have been destroyed by a flood in the east channel, and later a new gristmill, called the White Cloud mill, was erected practically on the same foundation as the old mill between 1870 and 1880. At about the same time appellee or its predecessor erected an electric light plant on water lot 2. A dam had theretofore been constructed across the east channel of the Kankakee river immediately south of the south line of water lot 1, extending west, being at the place designated on the plat as Baltimore street, which on Alden's island is called Bridge street, and serving both as a dam and a highway. Some years before the beginning of this litigation appellee purchased a part, if not all, of lot 1, upon which the White Cloud gristmill was located, and prior to 1907 started to construct a new electric light plant on the foundations of the old White Cloud mill. These old gristmills on lot 1 were operated by water power, receiving the water from the east branch of the Kankakee river through an opening under Baltimore (or Bridge) street and discharging it out of the west side of the mill. In 1861 the Kankakee Company, for the purpose of improving for navigation the east branch of the Kankakee river, deepened that portion of the east channel north of Baltimore street (marked as "Canal" in the plat) and adjoining block 2 on Alden's island, and this part of the channel was again deepened in 1870. The dirt and rock then excavated were mostly thrown on the east side of the deepened portion, but apparently some of it was thrown on the east side of block 2 of the Island addition, which lies just west of the deepened portion. At the time this channel was deepened the testimony tends to show that the east channel was wider just north of Baltimore street than it was farther north, and apparently an expansion was made in the deepened portion immediately north of Baltimore street, which was known as the "basin" and was used for the turning of boats, as navigation apparently did not extend south of Baltimore street until after the lock was constructed there, about 1870.

On the east side of this portion of the east channel or canal, some time about the early 70's, there was a stone wall constructed, as some of the witnesses testified, to prevent the water discharged from the mill located on water lot 1 from driving against the boats in the basin, and after that the water coming out of the mill on water lot 1 ran west to the wall and then north along the wall, ultimately emptying into the east channel of the Kankakee river. There is testimony, however, on behalf of appellant which tends to show that some of the water, at least, used in the gristmills on water lot 1 ran northwesterly from the mills across lot 1, and did not reach the east branch of the Kankakee river until it had run about as far north as water lot 8. The deepened portion of the east channel was thereafter called the "canal," and is so noted on some of the plats introduced in evidence and on the plat accompanying this opinion. There is also testimony from a former owner of water lot 2, who operated a gristmill thereon, that the water discharged from his mill ran south from lot 2 to a tailrace leading from the gristmill on water lot 1, and then ran west in the tailrace to the river. There is testimony in the record on behalf of appellee which tends strongly to show that during all the time the gristmills were being operated on water lot 1 the water used by said mills ran directly into the east channel of the Kankakee river, both before and after the deepening of said channel. The evidence before us also tends to show that many of the deeds transferring the property, or portions of it as located on the Water Lot addition to Wilmington, intended to convey said property because it was being used for water power purposes and along with the property intended to convey such water power rights.

[1] There can be no question that grants of land bordering upon a river give exclusive right and title to the grantee to the center of the stream unless by the terms of the grant an intention is clearly shown to stop at the stream's edge. This rule has been laid down by this court in *Houck v. Yates*, 82 Ill. 179, *Davenport & Rock Island Bridge Railway & Terminal Co. v. Johnson*, 188 Ill. 472, 59 N. E. 497, *Village of Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90, *Chicago, Rock Island & Pacific Railway Co. v. People*, 222 Ill. 427, 78 N. E. 790, and *Peoria Gas & Electric Co. v. Dunbar*, 234 Ill. 502, 85 N. E. 229. This has been held to be true even though plats or descriptions attempting to describe the property stated that it was a certain width or length. In *Chicago, Rock Island & Pacific Railway Co. v. People*, supra, the court said (222 Ill. 434, 78 N. E. 792):

"It is true, the certificate states that Water street is 110 feet in width, but the decisions in this state hold that when a street is bounded

on one side by a river, even though the plat gives its width in actual figures, it extends to the center of the river."

In *Peoria Gas & Electric Co. v. Dunbar*, supra, the plat in evidence showed that the length of a certain lot was 110 feet, and it was argued that if the ownership extended to the center thread of the stream it would give a lot 240 feet in length, which would be most unreasonable. In disposing of that contention the court said (234 Ill. 503, 85 N. E. 230):

"It is also well settled by numerous decisions of this court that where natural monuments or boundaries are mentioned in conveyances, such monuments or boundaries control over distances. In this case lot 4 in block 51 is conveyed by a plat showing that this lot extends to the Illinois river. The distance, 110 feet, mentioned on the plat must give way to the natural monuments. This would be true even if the conditions when the plat was made were the same as they are now. The reasonable inference is that in 1836, when the plat was made, the distance from Water street to the river was approximately 110 feet, and that the natural accumulations have extended the lot to its present length."

[2] Counsel for appellant concede that this is the law generally, but insist that the law cannot be applied to the facts in this case for the reason that the western lines of lots 1 and 2 do not extend to the east bank of the east branch; that the evidence introduced on the trial, both written and oral, tends to show that the intention and purpose of the proprietors of the Water Lot addition was to limit the size of the lots to the dimensions noted on Cox & Bowen's plat of the Water Lot addition. Said plat, which was introduced in evidence, shows that the length of the 11 water lots varied, according to the turnings or sinuosities of the east branch of the Kankakee river. There is nothing in the record to disclose that there was any intention to limit the length of these lots, except as they were limited by the course of the river. Then, too, the east line was marked by monuments at its north and south ends, and no such fixed marks or monuments were located at the western boundaries of any of these lots. In view of the situation and surroundings we think it is clear that if the original owners had intended to limit the western boundaries to the distances marked upon the plat they would have located fixed monuments there. There can be no question that at that time the eastern channel of the Kankakee river was immediately adjacent to the west boundary lines of these lots as marked on said plat. The certificate described these lots as water lots, and all the public plats introduced in this record, as well as all the conveyances which have reference to this property, indicate an intent on the part of the proprietors to make use of them as water lots and to claim and exercise for

themselves the water rights connected with the water lots. In our judgment the great weight of the evidence in this record shows clearly that the western boundary of these lots was intended to be the east branch of the Kankakee river, and therefore these lots extended to the center thread of said east branch. Nothing is said by this court in *Kinsella v. Stephenson*, 285 Ill. 369, 106 N. E. 950, cited and relied on by counsel for appellant, in view of the facts in that case, which in any way conflicts with this conclusion.

[3] The evidence in this record shows that the east channel was meandered when it was originally surveyed by the government, and meander lines are used usually only in surveying lands adjacent to a stream, whether navigable or not. 4 R. O. L. 97; 9 Corpus Juris, 189. The fact that this channel was meandered tends strongly to show that the government surveyors considered that it was a river channel at the time the survey was made. There was also introduced in evidence a memorandum from a book in the recorder's office in Will county, apparently made at the time of one of these original surveys, which gives the width of the Kankakee river and the width of the "smaller channel which lies on the east, as two chains and fifty links, September 11, 1821." While it is true there is evidence in the record tending to show that large trees were growing west of the west boundary lines of lots 1 and 2 on the east bank of the channel, if the measurements on Cox & Bowen's Water Lot addition be considered as giving the correct lengths, still, in our judgment the evidence is conclusive that this east channel was meandered as a flowing stream by the government originally, and this has always been considered as the east branch of the Kankakee river by all people who have platted this locality, and it has been so understood in practically all deeds conveying any property adjacent to or bordering on said east channel.

[4, 5] The evidence tends to show, as argued by counsel for the appellant, that the plant of the appellee company as now constructed on water lot 1 extends west of the western boundary of said lot according to the distance marked on the original plat as to the length of lot 1. It is also true, as argued by counsel for appellant, that the record does not show from the government down a complete chain of title in appellee to the land in dispute. But it has been repeatedly held by this court that the plaintiff in an ejectment proceeding must recover on the strength of his own title and not on the weakness of his adversary's title. *Hammond v. Shepard*, 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274; *Phelps v. Nazworthy*, 226 Ill. 254, 80 N. E. 756; *Terhune v. Porter*, 212 Ill. 595, 72 N. E. 820. In the case last cited the court said, at the bottom of page 595 of 212 Ill., at page 820 of 72 N. E., after citing authorities:

"Unless the plaintiff proved title in herself the defendants could not be disturbed in the possession of the land, whether they had any title or not."

Therefore in this proceeding, unless appellant proved title to the disputed strip in himself he could not take any advantage of the failure of appellee to prove valid title in itself. Obviously, under the facts and authorities already stated and cited, when the original owners of the disputed strip platted, in 1838, the Water Lot addition to Wilmington, including lots 1 and 2, the western boundary of said lots extended to the center thread of the east branch of the Kankakee river, and therefore, when appellant attempted to obtain title in 1908 from Edward Alden to this strip between the center thread and west boundary lines of lots 1 and 2, he received no title to said strip, as Alden had no title to convey; and this is conceded to be true, as we understand the arguments of counsel for appellant, if in making the original plat, in 1838, Cox & Bowen intended that the lots should extend to the east branch of the Kankakee river. Appellant is not entitled to recover any part of water lots 1 and 2 under this declaration, for the declaration distinctly states that he only asks to recover property west of the west lines of water lots 1 and 2. The proof must correspond to the declaration. *Hurd's Stat.* 1917, §§ 10, 22, pp. 1235, 1236; 5 Ency. of Evidence, 28, and cases cited in note 85; *Schoonmaker v. Doolittle*, 118 Ill. 605, 8 N. E. 839.

It is argued most earnestly by counsel for appellee that it is properly entitled to judgment in this case as to the disputed strip east of the center thread of the east channel, because the proof shows that it has had hostile and adverse possession of the strip for more than 20 years before the commencement of this litigation. In view of the conclusion that we have reached as to the failure of appellant to prove any right to the property in dispute between the center thread of the east branch and the west boundary lines of lots 1 and 2, it is not necessary for us to discuss or decide the question of title by adverse possession. Neither is it necessary for us to decide the questions raised by appellant on the law of adverse possession, as stated by the propositions of law held or refused by the trial court.

Counsel for appellant argue that the judgment of the court in effect gave title to appellee to property west of the east channel of the Kankakee river. We do not so understand the record. In the special plea filed by appellee it disclaimed any right to possession of any land lying west of the east branch of the Kankakee river as it existed at the commencement of this suit, except an easement to discharge water into that branch of the river. There can be no question that the owners of water lots 1 and

2, if their western boundary extended to the center thread of the east channel of the river, would have a right to have water flow from the tailrace on their property into the east branch and thereafter into the main channel of the river at the north end of Alden's island. Under the judgment rendered by the trial court appellee would have no rights additional to those claimed by it in its special plea.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

(226 N. Y. 347)

WALKER v. MARCELLUS & O. L. RY. CO.

(Court of Appeals of New York. May 20, 1919.)

1. DEEDS §9—FUTURE EXECUTORY ESTATE IN FEE.

A future executory estate in fee, which vests in possession in case the contingency on which it is limited occurs, may now be created by ordinary grant, although at common law this could not be done.

2. PERPETUITIES §6(10) — SUSPENSION OF ABSOLUTE POWER OF ALIENATION — VESTED ESTATES.

The rule against suspending the absolute power of alienation beyond a time measured by lives is not infringed by creating a future contingent estate, where the contingency is due only to the uncertainty of the event, since in such case the right to the estate is vested, and there are always persons in being who might convey an absolute fee in possession.

3. PERPETUITIES §4(1) — FUTURE EXECUTORY ESTATE IN FEE.

Since the exception in a deed to a railway company of a 100-foot right of way, save that the grantor "reserves and excepts * * * the lime kiln and the land that the same now occupies so long as said lime kiln is occupied and used for burning lime," although verbally excepting a determinable fee subject to a collateral limitation, in fact amounts to an attempted grant of a future executory estate in fee, to vest in possession in case of the happening of the contingency upon which it is limited, the conveyance attempted by the exception is invalid, and no future estate passes to the grantee; the conveyance so attempted falling within the legislative intention that, when future estates depend upon a contingency, they shall vest in possession within a reasonable period, which intention is indicated by the statutory requirement that, although a freehold estate may be created to commence on a future day and a fee may be limited on a fee on a contingency, such contingency must occur, if ever, within a time measured by lives.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Laura E. Walker against the Marcellus & Otisco Lake Railway Company.

Judgment of the Trial Term for plaintiff entered upon a directed verdict was affirmed by the Appellate Division (179 App. Div. 313, 166 N. Y. Supp. 354), and defendant appeals. Affirmed.

See, also, 180 App. Div. 916, 166 N. Y. Supp. 1118.

Howard R. Bayne, of New York City, for appellant.

Harry Barber, of Syracuse, for respondent.

ANDREWS, J. The plaintiff conveyed by metes and bounds to the defendant's predecessor in title a strip of land 100 feet wide running through her farm. The grantor, however, "reserves and excepts out of the aforesaid premises for herself, her heirs, grantees, lessees, and assigns, the lime kiln and the land that the same now occupies so long as said lime kiln is occupied and used for the purpose of burning lime." This parcel was about 20 feet square, and is the land which the plaintiff seeks to recover in ejectment.

[1-3] By the words used there was excepted from the grant as to the 20 feet in question a determinable fee subject to a collateral limitation. It follows that what was attempted to be passed to the grantee was a future executory estate in fee which should vest in possession in case the contingency upon which it was limited should ever occur. Originally at common law this could not be done. In equity it was permissible through the device of a use. After the statute of uses the equitable was converted into a legal estate. These rules and the forms of conveyances adapted to them have now been swept away by our Revised Statutes. Such interests defined as future estates may be created by ordinary grant. Certain restrictions, however, are imposed as to the creation of such future estates by our views of public policy. They shall not suspend the absolute power of alienation beyond a time measured by lives. Obviously this is not done by the estate we are here considering. There is a vested right to a future contingent estate where the contingency is due only to the uncertainty of the event, and, if so, there are always persons in being who might convey an absolute fee in possession. The revisers, however, had something more in mind at least with regard to certain future estates than merely the prohibition of restrictions on alienation. As an illustration a remainder might not be limited on more than two successive life estates. They well knew that every executory device or springing use was then required to be so limited that the contingency upon which they depended must happen within a time measured by lives. They were aware of the definition of a springing use; that it depended on no prior estate. Yet they intended to cover the entire ground as to the creation and divi-

sion of estates. Their design was to simplify, not to complicate, the transfer of real estate—to restrict, not to extend, the limitations which a grantor might impose upon it. With all this in mind they provided that a freehold estate might be created to commence at a future day, and that a fee may be limited on a fee on a contingency which must occur, if ever, within a time measured by lives. Technically a springing use, or what is now its equivalent, does not come within this definition. It does come within its object and purpose. Had the determinable fee been granted, not excepted, no question would arise. It is inconceivable that the revisers intended to make a distinction between two classes of cases the effect of which is substantially identical. It must be that in speaking of a fee limited on a fee they had not in mind the technical distinction of the early conveyancers. They were considering future estates, and their desire was that when such estates depended upon a contingency, they should vest in possession within a reasonable period. Their language should, therefore, be so construed as to carry out their intention. When they speak of a fee limited on a fee in this connection they refer to the grant of any future fee which may arise on a contingency which limits a prior fee, however such result is brought about.

If this is so, the attempted conveyance by the plaintiff was void. No valid future estate passed to the grantee. The absolute fee remains in the grantor. It is still in her, and she may maintain an action in ejectment against one wrongfully in possession of the land.

The judgment of the Appellate Division should be affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, and CRANE, JJ., concur.

Judgment affirmed.

(226 N. Y. 444)

FALLON v. SWACKHAMER et al.

(Court of Appeals of New York. June 3, 1919.)

1. MASTER AND SERVANT §330(3)—INJURY TO THIRD PERSON—AUTOMOBILE COLLISION—EVIDENCE.

Evidence held not to sustain finding that defendant's brother-in-law, who operated defendant's automobile when it collided with another machine, was driving for defendant while engaged in defendant's business.

2. MASTER AND SERVANT §330(1)—INJURY TO THIRD PERSON—EVIDENCE—PRESUMPTIONS.

The presumption of responsibility for the manner in which an automobile is driven arising

from ownership continues only so long as there is no substantial evidence to the contrary.

3. MASTER AND SERVANT §302(6)—AUTOMOBILE COLLISION—LIABILITY OF OWNER.

An owner who gratuitously loans his automobile to a servant or to a member of the family for such person's own pleasure or business is not liable for an accident happening; it being essential that the person driving be at the time engaged in the owner's business or purpose.

Hiscock, C. J., and Cardozo and Pound, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by May Fallon against Clinton G. Swackhamer, impleaded with another. Judgment for plaintiff entered upon verdict of a jury was affirmed by the Appellate Division by divided court (179 App. Div. 909, 165 N. Y. Supp. 1085), and the named defendant appeals. Reversed, and new trial granted.

Charles A. Dryer, of White Plains, for appellant.

Jerome A. Peck and Harry Greenberg, both of New York City, for respondent.

CRANE, J. [1] The plaintiff has recovered a verdict against the defendants for injuries received in an automobile collision at the intersection of Fisher avenue and Orawaupum street in the city of White Plains, N. Y., on Sunday, the 7th day of July, 1912. The judgment has been affirmed by the Appellate Division of the Second Department, two justices dissenting. The defendant Clinton G. Swackhamer, who is the only appellant, was the owner of the car which, at the time of the accident, was being driven by his brother-in-law, Oscar Haight, the other defendant. The only question presented is whether there is any evidence to sustain the finding that Haight was driving the automobile for and on behalf of the defendant Swackhamer, and while engaged in his business. In our opinion the evidence warrants no such conclusion.

On the day in question guests had come to Swackhamer's house in White Plains for dinner, which had been prepared by his wife and Mrs. Mary Haight, his mother-in-law. After dinner Mrs. Haight asked Swackhamer to take her home in his car, which at that time was standing in the street in front of the house. She lived some blocks away. Swackhamer replied that he could not do so as he was obliged to go at once to Rye Beach, and then proceeded upstairs to wash and dress himself. In his absence, Mrs. Haight turned to her son, the defendant, Oscar Haight, and asked him if he would drive her home. Haight worked for Swackhamer in the coal business in White Plains, and had at times run the defendant's car from the shed in the

ovalyard to the office, and at other times had taken the wheel while the defendant was giving him operating instructions. He was not the defendant's chauffeur, but an assistant yard foreman with no work or employment whatever in his occupation on Sundays. Haight was present at the Sunday gathering in his brother-in-law's house as a guest, and not as an employé engaged in the business of his employer.

Responding to this personal request of his mother, Haight proceeded to take her to the car in order to drive her home. He was asked by another guest, Henry B. Jones, where he was going, and if he, Jones, could go along too. Jones thereupon invited two young ladies, Miss Gerrard and Miss Murray, who were sitting upon the porch with him, and were also guests at the house, to take a ride. Haight left his mother at her house, and then, at the suggestion of Jones, ran down to Hartsdale through Greenacres, a distance of a mile and a half or more, and when returning collided with the car in which the plaintiff was riding at the intersection of the streets above mentioned. The defendant Swackhamer testified that he knew nothing about his car being taken by Haight until after the accident, that he did not authorize him to take these people out for a ride, and in this he is supported by Oscar Haight, and likewise by Mrs. Mary Haight, his mother-in-law.

Should we consider Swackhamer and these relatives interested witnesses, yet we have the testimony of Henry B. Jones, a passenger conductor on the New York Central Railroad, and of the young ladies, Violet Gerrard and Dorothy Murray, to corroborate them.

By positive, unshaken testimony from six witnesses, not in the least improbable, suspicious, or inconsistent with any uncontradicted fact in the case, it is shown that Haight drove the car on this Sunday afternoon for purposes of his own, and not at the request of the owner or upon the owner's business. Under such circumstances Swackhamer is not liable.

[2] The only evidence in behalf of the plaintiff is the presumption which arises from the ownership of the car, but, as has been stated by this court, such presumption continues only so long as there is no substantial evidence to the contrary. *Potts v. Pardee*,

220 N. Y. 431, 116 N. E. 78; *Rose v. Balfe*, 223 N. Y. 481, 119 N. E. 842, Ann. Cas. 1918D, 238; *Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853, L. R. A. 1916A, 954, Ann. Cas. 1916A, 656; *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, 88 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883. *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161, is in accordance with this principle, as in that case the evidence offered by the defendant was unsatisfactory, contradictory, and, in view of conceded facts, decidedly suspicious. The presumption in the plaintiff's behalf was not there overcome by substantial evidence, but rather it was supported by the nature of the defendant's business, the circumstances and relationship.

[3] Even if it could be fairly presumed from the evidence that Haight had Swackhamer's consent to take his car for the purpose of taking his mother home, this would not be sufficient to make the latter liable. An owner who gratuitously loans his car to a servant, or even to a member of his family for such person's own particular pleasure or business, is not liable for an accident thereafter happening. The person driving, whether the servant or agent as a member of the family, must at the time be engaged in the owner's business or purpose to render him liable. The son certainly was as much interested in his mother's welfare as the son-in-law, and the inference should not be drawn that the son-in-law was more anxious to have her leave his house than the son was to comply with her request to take her home. When, therefore, Haight, at the request of his mother, took her in Swackhamer's car to her house, he was doing his duty as a son and enjoying the pleasures of that relationship. The mere ownership of the car is not evidence that Haight under such conditions was driving for or on behalf of his brother-in-law.

We therefore are of the opinion that this judgment must be reversed, and a new trial granted, with costs to abide the event.

COLLIN, CUDDEBACK, CRANE, and ANDREWS, JJ., concur.

HISCOCK, C. J., and CARDOZO and POUND, JJ., dissent.

Judgment reversed, etc.

(226 N. Y. 463)

FLAUM v. PICARRETO et al.

(Court of Appeals of New York. June 6, 1919.)

1. MECHANICS' LIENS ⇨147—NOTICE—VALUE OF LABOR.

Under Lien Law, § 9, subd. 4, prior to amendment of 1916, providing that notice of lien must state labor performed and agreed price or value thereof, a notice of carpenter's lien, not stating value of work already performed or total amount of contract price, but merely balance due, is insufficient to sustain lien.

2. APPEAL AND ERROR ⇨179(1)—ISSUES IN LOWER COURT—PRIORITY OF LIENS.

In action to foreclose mortgage, a defendant lienor, demanding that validity and priority of the lien of other defendant be determined and adjudged, *held* not to have waived, by failure to raise issue, his right to question validity of other lien.

3. MECHANICS' LIENS ⇨195—PRIORITY—DETERMINATION—WAIVER.

Under Lien Law, § 45, authorizing court to adjust priority of different liens, a mechanic's lien defendant, seeking to enforce his lien in mortgage foreclosure proceedings, cannot prevent the court from determining validity of another defendant's mechanic's lien by failure to raise issue.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Suit by Bluma Flaum to foreclose a mortgage, in which Wooster & Mott, a firm, and Vito Picarreto, answered, setting forth mechanic's liens and assailing validity of the mortgage. From a judgment that the mortgage was fraudulent and declaring the firm's lien prior, plaintiff and Picarreto appealed to the Appellate Division (178 App. Div. 952, 165 N. Y. Supp. 1086), which reversed as to priority of lien, and plaintiff and Fred Wooster, surviving member of the firm, and Elizabeth Mott, as executrix, appeal. Plaintiff's appeal dismissed, and judgment of Appellate Division in favor of Picarreto reversed.

The plaintiff brought this action to foreclose a mortgage upon property situate in the town of Webster, county of Monroe, state of New York. The firm of Wooster & Mott and Vito Picarreto answered, setting forth their respective mechanics' liens upon the property and asking for a foreclosure thereof. The defendant Wooster attacked the plaintiff's mortgage as being fraudulent and void, and the trial court so found. Picarreto's lien, which was prior in point of time, was also held to be void and of no effect, while judgment was given for the full amount of the lien filed in behalf of the firm of Wooster & Mott.

The plaintiff and Piccarreto appealed to the Appellate Division. That court unanimously affirmed the judgment against the plaintiff, but held that Picarreto's lien substantially

complied with the law, reversed the trial court in this particular, and by appropriate findings established the lien. The Picarreto lien thus taking precedence over the Wooster lien, the latter defendant has appealed to this court.

The only question presented by the appeal is whether the Picarreto lien complies with the statute. The plaintiff also has appealed to this court by serving a notice of appeal; but the judgment against him having been unanimously affirmed, and no permission to appeal having been granted, he did not appear upon the argument. His appeal must be dismissed. The further facts appear below.

Andrew L. Gilman, of Rochester, for appellants.

James L. Brewer, of Rochester, for defendant, respondent.

CRANE, J. (after stating the facts as above). On the 3d day of February, 1916, the defendants Vito Picarreto, Christoforo Tarricono, and Guiseppe Gammorrello caused to be filed in the office of the clerk of Monroe county in the state of New York a notice of claim and lien for the sum of \$500, the unpaid price of work and labor performed upon the real property in question. These men were carpenters.

The defendant Fred M. Wooster and Charles A. Mott were copartners in the hardware business in the town of Webster, doing business under the firm name and style of Wooster & Mott, and which business, since the death of Charles A. Mott, has been continued by the said Wooster and the defendant Elizabeth Mott, as executrix. On the 24th day of February, 1916, Wooster & Mott caused to be filed in the office of the clerk of Monroe county a notice of claim and lien on and against the property here in question for the sum of \$2,377.58, the unpaid price for lumber, hardware, and mason supplies furnished to the owner for the building being erected.

It was determined by the trial court that the Wooster & Mott lien took precedence over the Picarreto lien, because the notice filed by the carpenters was not in the form prescribed by law, in that the said notice of lien did not state the total amount of the contract price and did not state the value of the work already performed under such contract. Tarricono and Gammorrello assigned all their rights under the lien to the defendant Picarreto. The Appellate Division reversed this finding of the trial court, finding that the Picarreto lien "complied in form and substance with the requirements of the Lien Law."

[1] This opinion need only touch upon the sufficiency of the notice and the requirements of the statute. Section 9, subd. 4, of the Lien Law (Consol. Laws, c. 33) as it existed at the

time of this lien and prior to the amendment by Laws 1916, c. 507, provided that the notice of lien should state "the labor performed or to be performed, or materials furnished or to be furnished and the agreed price or value thereof." In this case the notice should have stated what carpenter work had been performed by Picarreto and his associates and the agreed price or value thereof. The notice failed to state the latter requisite, the price of the labor performed or the value thereof. At this part of the notice it read:

"That the labor performed is all carpenter work upon said houses as per said contract; two of said houses ready for plastering and third house completed for plastering except five partitions. That the labor to be performed is completion of said houses as per contract. That the amount unpaid to said lienor for such labor is five hundred dollars (\$500)."

Is it fatal to this lien that the notice failed to state the agreed price of the labor performed or the value thereof? The statute says that this must be stated, and *Finn v. Smith*, 186 N. Y. 466, 79 N. E. 714, holds that a failure to state, either explicitly or by plain inference, the value or the agreed price of the labor performed at the time of the filing of the notice, makes it void and of no effect. This rule has been followed in *Levin v. Hessberg*, 135 App. Div. 155, 119 N. Y. Supp. 1021, and *Bachmann v. Spinghel*, 164 App. Div. 725, 149 N. Y. Supp. 610. The Picarreto lien was therefore void, as found by the trial court; the notice not being in the form described by law.

[2, 3] It is said, however, that the defendants Wooster & Mott are not in a position to contest the validity of this prior lien, in that the issue was not raised upon the trial or by pleading. The complaint referred to the respective liens and asked that the plaintiff's mortgage be foreclosed and these liens forever barred from any right in the mortgaged premises. Wooster & Mott by their answer alleged that the plaintiff's mortgage was void for fraud, set forth their lien, and also that of Picarreto, and in the demand for judgment asked "that the validity and priority of the liens of the other defendants herein be determined and adjudged." The allegation regarding the Picarreto lien was simply a statement of the fact that the three carpenters filed a mechanic's lien against the said real property on the 3d day of February, 1916, a copy of which was annexed to the answer as Exhibit A. Nowhere did Wooster & Mott in their answer admit that the lien was a valid lien, or acknowledge its priority; on the contrary, they asked the court to pass upon its validity and priority.

The respondent Picarreto, in his brief, says

that cross-answers were properly served among the defendants, but that in no part of said answer of Wooster & Mott is the validity of the respondent's lien controverted. When Picarreto's attorney received the Wooster & Mott answer, he must have read what I have here stated, that the court was asked to determine the validity of his lien and whether it took precedence over that of Wooster & Mott. On the trial the respective parties gave evidence as to the nature of their liens, work performed, and materials furnished, and offered in evidence as exhibits the notice of the liens as filed. We think that within section 521 of the Code of Civil Procedure there was thus an issue raised between Wooster & Mott and Picarreto regarding the validity of the liens, and that the court was justified in thus treating the matter. In fact, no point was raised upon the trial that under the pleadings the Picarreto lien was admitted by Wooster & Mott and that its priority could not be contested.

Even if this were not so, we think that in this case the court was called upon to determine the validity of all liens and their priority. Section 45 of the Lien Law says:

"The court may adjust and determine the equities of all the parties to the action and the order of priority of different liens, and determine all issues raised by any defense or counterclaim in the action."

The court is not obliged to hold that a mechanic's lien is valid, when upon its face it clearly is invalid and no lien, simply because no issue has been raised regarding it. Where a complaint, as in this case, seeks to foreclose a mortgage, and makes a mechanic's lienor a party under an allegation that he claims to have some interest in the property, and the defendant answers, setting forth his lien, which upon its face is void, the court in giving judgment must so find, irrespective of the answers of other defendants. A mechanic's lien never comes into existence unless the notice upon which it is founded substantially complies with the statute which authorizes the creation of such liens. *Toop v. Smith*, 181 N. Y. 283, 73 N. E. 1113.

The plaintiff's appeal should be dismissed, with costs, and the judgment of the Appellate Division in favor of respondent Picarreto should be reversed, and that of the Special Term affirmed, with costs in this court and the Appellate Division to the appellant.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, and McLAUGHLIN, JJ., concur.

Judgment accordingly.

(226 N. Y. 758)

BOWNE v. COLT et al.

(Court of Appeals of New York. May 20, 1919.)

COURTS ⇐237(1)—APPEAL FROM FINAL JUDGMENT—JURISDICTION OF COURT OF APPEALS.

Where, in action to partition realty, interlocutory judgment of Special Term that widow did not have estate for life in an undivided one-third of all realty was modified or reversed by the Appellate Division, and there has been no appeal to Appellate Division from final judgment subsequently entered, *held*, Court of Appeals has no jurisdiction of appeal from final judgment, "as well as from each and every part of interlocutory judgment," there being no authority to appeal directly to the Court of Appeals from a final judgment rendered by court of original jurisdiction, except as conferred by Code Civ. Proc. § 1336.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Francis D. Bowne against Elizabeth B. Colt and others. From a judgment of the Supreme Court, and from an interlocutory judgment for partition, as modified by the order of the Appellate Division (171 App. Div. 409, 157 N. Y. Supp. 417), defendant named appeals. Appeal dismissed.

Walter E. Ernst, of New York City, for appellant.

William E. Carnochan, of New York City, for respondent.

COLLIN, J. At the outset there is necessarily presented a question of procedure. The action is to secure the partition of two parcels of real estate. The principal issue in the case was between Elizabeth B. Colt, a daughter, and Jessie D. Bowne, the widow, of Robert S. Bowne, and was whether or not the widow had an estate for her life in an undivided one-third of all the real estate involved. The decision of the Special Term was that she did not have the estate, and the consequent interlocutory judgment, entered May 29, 1915, so adjudged. The Appellate Division, upon the appeal of the widow, by its order modified or reversed the interlocutory judgment, in that it struck from it certain provisions, and, by new conclusions of law, modified other provisions, and held that the widow had the estate. Upon and in virtue of the order of the Appellate Division, and in conformity with it, an interlocutory judgment was entered March 16, 1916. Subsequently, the referee, appointed by the interlocutory judgment for the purpose, sold the real estate, and filed the required report of his proceeding. Thereupon and on March 30, 1917, the final judgment, in the ordinary form, confirming the report of the referee, adjudging the completion of the sale and the distribution and disposition of the proceeds, was entered. An appeal to the

Appellate Division from the final judgment has not been taken by any party. Elizabeth B. Colt, by her notice of appeal, has taken this appeal to this court from the final judgment of March 30, 1917, "as well as from each and every part of the interlocutory judgment entered herein on May 29, 1915, as modified by order of the Appellate Division. * * *

We have no jurisdiction to entertain the appeal. There is no authority to appeal to this court directly from a final judgment rendered in the court of original jurisdiction, except as conferred by section 1336 of the Code of Civil Procedure. We have recently declared such conclusion and the reasons for it. *Will v. Barnwell*, 197 N. Y. 298, 90 N. E. 817. Although it may be urged that the Appellate Division did not wholly reverse the interlocutory judgment, it is manifest that it did not affirm it.

The appeal should be dismissed, with costs.

HISCOCK, C. J., and CHASE, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

Appeal dismissed.

(226 N. Y. 440)

In re BUECHNER.**In re GRIFFITH'S WILL.**

(Court of Appeals of New York. June 8, 1919.)

1. WILLS ⇐524(8)—CONSTRUCTION—DEVISE TO CHILDREN OF BROTHER.

Under will giving an estate in trust for a brother's use for life, and on his death directing trustee to divide estate into as many shares as there should be children of such brother "living," and devising one of each of such shares to each of such children absolutely, the brother's two children living at his death took to exclusion of administrator of a third child, who had predeceased him.

2. WILLS ⇐463—CONSTRUCTION—REJECTION OF WORDS.

Words are never to be rejected as meaningless or repugnant, if by any reasonable construction they may be made consistent and significant.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the petition of George C. Buechner, rendering and settling his accounts as trustee under the will of Charles F. Griffith, deceased. From an order of the Appellate Division (175 N. Y. Supp. 896), affirming a decree of the Surrogate's Court of Kings County (105 Misc. Rep. 175, 172 N. Y. Supp. 812), certain parties appeal. Order reversed, and proceeding remitted to Surrogate's Court for entry of decrees.

George L. Ingraham, of New York City, for appellants.

John L. Sheppard, of New York City, for respondent.

CARDOZO, J. The will of Charles F. Griffith has been construed upon the settlement of the accounts of his trustee, and by this appeal the construction becomes subject to revision here.

The testator gave to a trustee one-half of his residuary estate in trust for the use of a brother, William H. Griffith, during life, with remainder as follows:

"Upon the death of my said brother, William H. Griffith, I direct my trustee to divide the said estate so held in trust into as many shares as there shall be children of my said brother William H. Griffith living, and I give, devise, and bequeath one of each of the said shares unto each of the children of my said brother William H. Griffith, absolutely and forever."

Two children of William H. Griffith were living at his death. A third child died before him. The question is whether the administratrix of the deceased child is entitled to a share of the estate. The surrogate has held that there must be a division into thirds. The Appellate Division affirmed by a divided court.

We reach a different conclusion. The will directs the trustee to divide the estate upon the death of the brother into as many shares as there shall be children of that brother "living." The decree directs him to divide it into as many shares as there are children living and dead. The two directions cannot stand together. *Marsh v. Consumers' Park Brewing Co.*, 220 N. Y. 205, 212, 115 N. E. 513; *Mullarky v. Sullivan*, 136 N. Y. 227, 32 N. E. 762; *Low v. Harmony*, 72 N. Y. 408. The mandate of the will is nullified by the mandate of the decree. We are told that this result is justified by the words of gift that follow the direction to divide. At the beginning of a sentence, the testator restricts the shares to the number of living children. The argument is that at the end of the same sentence he abandons the restriction. Nothing in the will suggests so volatile a purpose. The principle of division is not changed by the words of gift which supplement the direction to divide. They have no effect, except to confirm the title of a class already unmistakably described. "One of each of the said shares"—i. e., the shares apportioned to living children—is bequeathed to

each child. There cannot be one share for each, unless allotment and bequest are to follow the same lines. "Futurity is annexed to the substance of the gift" (*Smith v. Edwards*, 88 N. Y. 92), for the only shares bequeathed are the shares produced by the allotment.

This is no case for the application of the rule that, between two inconsistent clauses, the later will be preferred as the expression of the final purpose. Words are never to be rejected as meaningless or repugnant, if by any reasonable construction they may be made consistent and significant. Exclusion is a "desperate remedy." *Adams v. Massey*, 184 N. Y. 62, 69, 76 N. E. 916, 918. It is "only a last resort to be availed of when all efforts to reconcile the inconsistency by construction have failed." *Van Nostrand v. Moore*, 52 N. Y. 12, 20. Here we perceive no conflict, and surely none that is inevitable. This is no case again for subtle distinctions between directions to pay or distribute, and words of present gift. *Fulton Trust Co. v. Phillips*, 218 N. Y. 573, 583, 113 N. E. 558, L. R. A. 1918E, 1070; *Matter of Baer*, 147 N. Y. 348, 41 N. E. 702. Such tests may help to ascertain the membership of a class not otherwise defined. There is no need to resort to them when the testator has defined the membership himself. We think he has done so here, and limited his gift to the children living at the division. A single sentence includes the direction to divide and the gift of the thing divided. The class that is to share in the division is ascertained. The same class must share in the gift to which division is to lead. We need no canon of construction to justify that holding, except, indeed, the primary one, to which all others are subordinate, that the intention of the testator is to be sought in all his words, and, when ascertained, is to prevail. *Robinson v. Martin*, 200 N. Y. 159, 164, 93 N. E. 488; *Mullarky v. Sullivan*, *supra*, 136 N. Y. 230, 232, 32 N. E. 762.

The order of the Appellate Division and the decree of the Surrogate's Court should be reversed, with costs in all courts, and the proceeding remitted to the Surrogate's Court for the entry of a decree in accordance with this opinion.

HISCOCK, C. J., and COLLIN, OUDDEBACK, POUND, CRANE, and ANDREWS, JJ., concur.

Order reversed, etc.

(226 N. Y. 370)

ASSETS REALIZATION CO. v. ROTH.

(Court of Appeals of New York. May 20, 1919.)

1. GUARANTY ⇨4 — INDEMNITY ⇨9(1)—
BOND TO LIQUIDATOR BY STOCKHOLDERS
OF INSOLVENT BANK—PRIMARY LIABILITY
OF SIGNERS.

A bond to a bank which became liquidator for another bank, which bond was signed by the other bank's stockholders, held not a contract of guaranty, but one of indemnity, and the signers' liability not secondary, but primary.

2. ESTOPPEL ⇨68(4)—RULINGS IN FORMER
ACTION BETWEEN PARTIES—RELIEF OF IN-
DEMNIFIERS OR GUARANTORS.

Where the defendant stockholder of an insolvent bank and signer of the bond to liquidator helped induce a ruling to his advantage in another case, that the liquidator's advances were not a debt and that stockholders were not liable under the statutes, and that the liquidator having exhausted the assets had no security for the deficit except the indemnity bond, the court will not, at defendant's instance, rule otherwise when the result is to defendant's detriment, in an action on the bond and the strict rules that are enforced at times for the relief of voluntary guarantors are without application.

3. INDEMNITY ⇨9(1)—BOND BY STOCKHOLD-
ERS OF INSOLVENT BANK—PRIMARY LIABIL-
ITY—CUTTING DOWN BY IMPLICATION.

Where defendant and his associates as stockholders of an insolvent bank to protect their business interest assumed a primary liability as insurers against loss by signing a bond to the bank acting as liquidator, their liability will not be cut down by the implication of conditions not fairly and reasonably involved in the scheme of the transaction.

4. INDEMNITY ⇨12—BOND TO LIQUIDATORS
OF INSOLVENT BANK—DEATH OF LIQUIDA-
TOR LEAVING ASSETS UNADMINISTERED—
RIGHT TO INDEMNITY FOR ADVANCES.

Where one bank became liquidator for another, and took a bond from the stockholders of the latter to indemnify itself against loss for advances, the transaction did not fairly and reasonably involve the implication of the condition that the insolvency and dissolution of the liquidator leaving assets unadministered should cancel the right to indemnities or advances during the life of the liquidating bank.

5. INDEMNITY ⇨12—DISCHARGE OF COVE-
NANT—SALE OF BOND BY RECEIVER.

An indemnity covenant to a bank acting as liquidator and pledgee of a failing bank is not discharged because upon the dissolution of the liquidator the sale of the pledged assets is made by its receiver; and all that the defendant indemnifier may insist upon is a conversion into money of the assets of the insolvent corporation, of which he was a stockholder, and for which he signed indemnifying bond to liquidator, by the liquidating bank if alive, and, if dead, by its successor or receiver.

6. BANKS AND BANKING ⇨72—DISSOLUTION
—EFFECT.

The dissolution of a bank acting as liquidator of another insolvent bank was not equivalent to a voluntary abandonment of the task of liquidation where liquidator's dissolution was forced upon it by the action of the state and the result did not cease to be involuntary because such insolvency may have been due to negligence or other wrong.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Assets Realization Company against Philip W. Roth. From a judgment of the Appellate Division of the Supreme Court for the Fourth Department (179 App. Div. 324, 166 N. Y. Supp. 388), affirming a judgment of the Trial Term entered upon a verdict in favor of the defendant under the direction of court, plaintiff appeals. Reversed, and new trial granted.

Carlos C. Alden, of Buffalo, for appellant
W. O. Carroll, of Buffalo, for respondent.

CARDOZO, J. In August, 1901, the Metropolitan Bank of Buffalo found itself in financial straits. It determined to go into voluntary liquidation and avoid the expense of a receivership. The liquidator selected was the German Bank of the same place. The rights and duties of the two banks are set forth in a written contract. The German Bank was to advance sufficient moneys to pay all the depositors of the Metropolitan Bank in full. It was also to make advances for other purposes. In return and as security for these advances, it received a pledge of all the "assets, property, and effects of every name, nature, and kind" belonging to the liquidated bank. In the management of the property and in the conversion of the assets into money, due diligence was to be used "to make the conversion as rapidly as it can be done without undue sacrifice." There was to be delivered to the liquidator by the Metropolitan Bank "a proper guaranty of certain of its directors and stockholders" against any and all loss as a result of the advances.

This action is brought upon a bond delivered to the liquidator in fulfillment of that covenant. The signers were officers and stockholders of the Metropolitan Bank. Each became severally liable for an amount equal to the par value of his shares. The limit of the aggregate liability of all subscribers was \$57,200. The limit of the defendant's liability was \$21,200. The bond recites the voluntary liquidation of the Metropolitan Bank, the request that the German Bank undertake the work of liquidation, and the covenant to furnish to the liquidator "a guaranty against loss." The recitals are followed by a covenant in these words:

"We, the undersigned, all of Buffalo, New York, do hereby covenant and agree, each for himself and not for the other, to and with the said German Bank that we will at all times hereafter keep and save harmless and indemnify the said German Bank of, from and against all loss damage or injury which it may in any manner sustain by reason of any and every advance which it may make pursuant to the aforesaid agreement, and of and from all costs or expenses that may in any manner grow thereout."

The German Bank took over the assets of the Metropolitan Bank. It paid all the depositors in full. It did this at once; and for that purpose advanced nearly \$800,000. It then went on with the work of liquidation. It had almost finished its task when it too faced disaster. On December 21, 1904, at the suit of the Attorney General of the state, its dissolution was decreed, and a receiver was appointed. Over \$830,000 had then been realized from the assets. The receiver collected about \$3,500 more, and sold the few remaining assets to the plaintiff. They were, in part at least, the odds and ends that almost always remain upon the winding up of any business. From this remnant of assets the plaintiff succeeded in extracting about \$34,000. It did this in co-operation with the defendant and his associates. There is no reason to believe that better results could have been realized by any one. It thus appears that 96 per cent. of the total assets had been liquidated by the German Bank before its dissolution. With the added 4 per cent. produced through the efforts of the receiver and the plaintiff, the proceeds, after deducting expenses, are insufficient to repay the liquidator's advances. There remains a deficit of nearly \$250,000. The plaintiff, as the assignee of the bond of indemnity, brings this action to charge the defendant with his proportion of the loss.

[1-3] The courts below have held that the defendant has been released because the liquidator died before the liquidation was complete. They have viewed the bond as a guaranty, and its signers as guarantors. The decree of dissolution put an end to the liquidator's life. Liquidation in its final stages was the work of substituted agencies. The bond has been read as containing an implied condition that the liquidator shall bear the loss, resulting from its advances unless personal performance of its task shall be continued to the end, and this though personal performance has been made impossible by death.

We reach a different conclusion. The bond which this defendant signed is not a contract of guaranty. It is a contract of indemnity. 1 Brandt on Suretyship and Guaranty, pp. 19, 20; Jones v. Bacon, 145 N. Y. 443, 40 N. E. 216; Same v. Same, 72 Hun, 506, 25 N. Y. Supp. 212; Guild v. Conrad, [1894] 2 Q. B.

885; Nat. Bank v. Smith, 142 Ga. 663, 665, 83 S. E. 526, L. R. A. 1915B, 1116. The liability assumed is not 'secondary, but primary. We so held in Assets Realization Co. v. Howard, 211 N. Y. 430, 105 N. E. 680. There an action was brought against this defendant and others to charge them as stockholders of the Metropolitan Bank with the statutory liability for debts. We held that the liquidator's advances did not constitute a debt; that the stockholders were not liable under the statute; and that the liquidator, having exhausted the assets, had no security for the deficit except the contract of indemnity. The defendant helped to induce that ruling when the result was to his advantage. We will not change it at his instance now when the result is to his detriment. This is no case, therefore, for the application of the strict rules that are enforced at times for the relief of voluntary guarantors. Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 426, 24 Sup. Ct. 142, 48 L. Ed. 242; Ill. Surety Co. v. Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206; St. John's College v. Aetna Ind. Co., 201 N. Y. 335, 341, 94 N. E. 994. We do not say that even under those rules the defendant would be discharged. Wilkinson v. McKimmie, 229 U. S. 590, 593, 33 Sup. Ct. 879, 57 L. Ed. 1342; Equitable Surety Co. v. McMillan, 234 U. S. 448, 458, 34 Sup. Ct. 803, 58 L. Ed. 1394; U. S. v. U. S. Fidelity & G. Co., 236 U. S. 512, 524, 35 Sup. Ct. 298, 59 L. Ed. 696; Richardson v. County of Steuben, 226 N. Y. 13, 122 N. E. 449. That question is not here. The defendant and his associates had a business interest to protect, and in order to protect it they assumed a primary liability as insurers against loss. The liability is not to be whittled down by the implication of conditions not fairly and reasonably involved in the gist and scheme of the transaction.

[4, 5] We think the gist and scheme of this transaction do not fairly and reasonably involve the implication of a condition that the death of the liquidator, leaving assets unadministered, shall cancel the right to indemnity for advances during life. Nearly \$800,000 was owing to depositors. Liquidation through voluntary agents was impossible unless those debts were paid at once. The German Bank was advancing the money necessary to pay them. Loss resulting from the advances was the risk that was in view; protection against such loss the controlling purpose of the bond. The moment advances were made, the risk had been incurred, and the duty to indemnify arose. Liquidation was not the act on which the right to indemnity was to depend. Liquidation was merely the means by which the measure of the loss was to be gauged. The agencies of liquidation were defined during the liquidator's life. They were not defined after its death. They might therefore be any agencies appropriate

In that contingency for the ascertainment of the loss. The death of the liquidator did not wipe out the advances, and business men cannot have expected it to wipe out the covenant. If loss could not be ascertained in one way, it would have to be ascertained in another. The last thing they can have expected was that it would not be ascertained at all.

The case for the defendant is built upon the assumption that the sole relation between the banks was one of personal employment, which the death of either would extinguish. *Lacy v. Getman*, 119 N. Y. 109, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174; *Dolan v. Rodgers*, 149 N. Y. 489, 494, 44 N. E. 167. The relation was that, but it was something more. The German Bank was an agent. But it was also a pledgee. The two functions and capacities were inseparably commingled. Death might terminate the agency. It could not terminate the pledge. *Terwilliger v. Ontario, O. & S. R. R. Co.*, 149 N. Y. 86, 93, 43 N. E. 432. There was no duty to surrender the pledged assets because the liquidator was dead. The right to retain and collect them passed from the pledgee to its successor, and its successor was the receiver. To avail himself of the pledge, the receiver had to convert it into money. *Brightson v. Claffin*, 225 N. Y. 469, 122 N. E. 458. He could not convert it into money, and thus exercise his rights as a pledgee, without becoming at the same time a liquidator. He might not liquidate in the same way as his predecessor, but he would do it in some way, and the process, whatever its form, would ascertain and fix the loss. All this the defendant and his associates, if they thought about the consequences of death at all, must have foreseen and approved. To everything that was essential to the enforcement of the pledge by the successors of the pledgee, they must be taken to have given their assent. This would be true though their position were strictly that of guarantors. Sureties on a bond "have no right to insist upon a sacrosanct prohibition of change" in the performance of a contract. *U. S. v. McMullen*, 222 U. S. 460, 468, 32 Sup. Ct. 128, 56 L. Ed. 269; *Tide Water Co. v. Globe Ind. Co.*, 238 Fed. 157, 151 C. C. A. 233. They may assent to change if they will. "Whether they have done so is simply a question of construction and good sense, taking words and circumstances into account." *U. S. v. McMullen*, supra. The reasonable and probable fix the bounds of contemplation. A covenant of indemnity is not discharged because the subject of the pledge is sold by the executors of the pledgee. The result is not different where, upon the dissolution of a corporation, the sale is made by a receiver. All that the defendant may insist upon is a conversion of the assets into

money by the liquidator, if alive, and, if dead, by its successors. There has been no departure from that course in anything that has been done. The loss has been ascertained and the defendant's duty is to pay it.

[6] The defendant argues that the dissolution of the German Bank was equivalent to a voluntary abandonment of the task of liquidation. *People v. Globe Mut. Life Ins. Co.*, supra, 91 N. Y. 181; *Lorillard v. Clyde*, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113. We think there is nothing in the point. The bank did not seek dissolution, ridding itself of its agreement as of some vexatious burden. Dissolution was forced upon it by the action of the state. The result did not cease to be involuntary because insolvency may have been due to negligence or other wrong. *People v. Globe Mut. Life Ins. Co.*, supra. Mistakes, with corporations as with men, are often paid for in shortened lives. But error is not suicide.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, C. J., and COLLIN, POUND, CRANE, and ANDREWS, JJ., concur.
CUDEBACK, J., not voting.

Judgment reversed, etc.

(236 N. Y. 435)
BARNASKY v. NEW YORK, O. & W.
RY. CO.

(Court of Appeals of New York. May 27, 1919.)

RAILROADS — § 328(1) — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — DUTY WHERE VIEW IS OBSTRUCTED.

A motorcycle rider, familiar with a crossing, and the signs showing there was no flagman on duty, who confined his attention to the north because his view in that direction was obstructed, and who was struck by a train from the south, which he could have observed if he had looked and listened, was guilty of contributory negligence as a matter of law.

Chase and Crane, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John Barnasky against the New York, Ontario & Western Railway Company. From a judgment of the Appellate Division, Fourth Department (180 App. Div. 921, 168 N. Y. Supp. 1101), affirming a judgment for plaintiff entered on a special verdict, the defendant appeals. Judgments reversed, and complaint dismissed.

P. W. Cullinan, of Oswego, for appellant.
Thomas Woods, of Syracuse, for respondent.

McLAUGHLIN, J. On June 14, 1914, the plaintiff, about 11 o'clock in the evening, was riding a motorcycle on Oneida street in the city of Fulton, N. Y. Oneida street, which runs easterly and westerly, crosses, at right angles, Second street, which runs northerly and southerly. The defendant's railroad tracks are laid substantially in the center of Second street. As plaintiff was crossing Second street at its intersection with Oneida street, he was struck by a locomotive attached to a freight train going in a northerly direction, and received serious injuries. He brought this action to recover the damages sustained, upon the ground that the same were due to the negligence of the defendant in its operation of the train. The jury, pending a motion for a nonsuit, rendered a special verdict, in accordance with which the court directed judgment for the plaintiff, which was affirmed by the Appellate Division, Fourth Department, two of the justices dissenting and voting to dismiss the complaint on the ground that plaintiff was guilty of contributory negligence as matter of law. Defendant appeals to this court.

The plaintiff, at and immediately prior to his injury, was going easterly on Oneida street, and the collision occurred about the center of Second street, throwing the motorcycle to the east and plaintiff to the west. Westerly of Second street a building on the southerly side of Oneida street extends within 30 feet of the west rail of defendant's track, while on the northerly side of the street a building extends somewhat nearer the west rail, and at the end and adjacent to the building is a flagman's shanty which extends within about 12 feet of such rail. That portion of Oneida street lying west of the west rail is 42 feet wide between curbs, with a sidewalk on the northerly side 15 to 16 feet wide and on the southerly side 11 to 12 feet wide. Plaintiff, if riding in the center of Oneida street, when he reached a point 75 feet west of defendant's west rail, could see southerly on Second street a distance of at least 30 feet, and as he approached Second street his view southerly in such street increased so that at 45 feet he could see upwards of 100 feet, and at 30 feet, from 800 to 1,000 feet. On account of the building and the flagman's shanty on the northerly side of Oneida street he could not see very much of the track lying to the north of the point where the streets intersect until he had reached a point about 12 feet from the west rail. The train, at the time of the collision, was running at from 15 to 20 miles an hour, and the motorcycle about 6 miles an hour. Plaintiff testified he had the motorcycle under control and could stop it, at the speed at which it was running, almost instantly. When he had reached a point 45 feet west of defendant's track, he stated he looked towards the south and listened, but did not see or hear a train; that he did not again look to the south or

listen until the train was practically upon him, or at least so close to him that he was unable to stop the motorcycle and prevent the collision. The only explanation given by him as to why he did not again look southerly to ascertain whether a train was approaching before attempting to pass over Second street was that, on account of the obstructions on the northerly side of Oneida street, he was looking in that direction to ascertain whether a train was approaching from the north.

The explanation is unsatisfactory, because he was as much obligated to look out for approaching trains in one direction as the other, and besides, by reason of the obstructions on the northerly side of Oneida street, he could not see the tracks to the north for any great distance until he was within 12 or 14 feet of the west rail. He was familiar with the location; had lived in the vicinity for a long time; and had passed over the tracks at this point on very many occasions. He must, therefore, have known if he did not exercise the care required he was liable to be struck by a passing train. Having this knowledge, it was his duty to again look southerly which he could have done in the merest fraction of a second, simply by turning his head or eyes.

Plaintiff's witness Smith, who was also riding a motorcycle easterly on Oneida street, and directly behind the plaintiff, testified that when he was 65 to 70 feet from defendant's track he heard the train approaching and called to plaintiff that there was a train coming. He also testified he saw the train as it came into Oneida street. If the witness Smith could hear the train approaching when 65 or 70 feet from the track, and see it when it reached the point where the two streets intersect, no possible reason is suggested why plaintiff could not also have heard and seen it and avoided the collision. If he did not hear it, it was because he did not listen; if he did not see it, it was because he did not look. The truth is he drove the motorcycle directly in front of defendant's engine, and the collision occurred, which might easily have been avoided.

Giving the plaintiff the most favorable inferences to be drawn from the evidence, it shows that his injuries were caused by his own carelessness in not exercising the care which the law required him to exercise for his own safety.

In reaching this conclusion I have not overlooked the authorities cited by the respondent. They are not in point or are easily distinguishable from the present case. In the most recent (*Elias v. Lehigh Valley R. Co.*, 226 N. Y. 154, 123 N. E. 73) the defendant had for years stationed a flagman at the crossing. This the plaintiff knew. He had seen him discharging his duties on the very day the accident occurred. At the time of the accident the flagman failed to give any indication of the approaching train. He was, either absent from his place of duty or else

failed to discharge it and this was a proper subject for the consideration of the jury as bearing upon the question as to whether the care exercised by the plaintiff was adequate.

In the present case there was no flagman on duty at the time. This fact was well known to the plaintiff, not only by reason of his familiarity with the locality, but by reason of signs indicating the hours when a flagman would be there.

The case in principle cannot be distinguished from *Bowden v. Lehigh Valley R. R. Co.*, 226 N. Y. —, 123 N. E. 867.

The judgments appealed from, therefore, should be reversed, and the complaint dismissed, with costs in all courts. This conclusion renders it unnecessary to pass upon the questions of practice sought to be raised by the appeal from certain orders.

COLLIN, CUDDEBACK, and ANDREWS, JJ., concur.

CHASE and CRANE, JJ., dissent.

HOGAN, J., not voting.

Judgments reversed, etc.

(226 N. Y. 327)

RAMME v. LONG ISLAND R. CO.

(Court of Appeals of New York. May 20, 1919.)

1. RAILROADS \S 114(1)—DAMAGES FOR OBSTRUCTION OF STREETS BY IMPROVEMENT—ELIMINATING GRADE CROSSINGS—PLEADING—ANSWER—NEW MATTER—LICENSE.

In an action against a railroad for damages to business by closing streets while making changes ordered by the Public Service Commission in the manner provided by Railroad Law, $\S\S$ 91-97, for the elimination of grade crossings, the order directing such improvement is new matter constituting a defense within Code Civ. Proc. \S 500, which defendant must allege in its answer and, where the order is not so pleaded, it is error to receive it in evidence.

2. RAILROADS \S 113(1) — OBSTRUCTION OF STREETS BY IMPROVEMENT ELIMINATING GRADE CROSSINGS—OBSTRUCTION BY CITY.

A railroad company causing the obstruction of a street during the making of improvements eliminating grade crossings under orders of the Public Service Commission is not responsible for damage to one's business by reason of the erection of a temporary structure of the city.

3. MUNICIPAL CORPORATIONS \S 671(10)—IMPROVEMENT IN PUBLIC STREET — OBSTRUCTION—CONSEQUENTIAL DAMAGES.

Where improvements are lawfully made in a public street which do not involve direct encroachment upon private property, the person or corporation making them is not liable for consequential damages unless caused by negli-

gence, misconduct, want of skill, or failure to conform to the authority conferred by the orders and licenses permitting the improvements.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Henry Ramme against the Long Island Railroad Company. From a judgment of the Appellate Division (178 App. Div. 904, 164 N. Y. Supp. 1110), which affirmed a judgment of the Queens County Trial Term dismissing the complaint, the plaintiff appeals. Reversed, and new trial granted.

The nature of the action and the facts so far as material are stated in the opinion.

Lyman W. Redington, of Flushing, for appellant.

Louis J. Carruthers, of New York City, for respondent.

CHASE, J. In 1910 and prior to that year the North Shore Division, Port Washington Branch, of the Long Island Railroad Company maintained at grade a single-track steam railroad through that part of the present city of New York known as Flushing. Murray Hill station on that branch of said road was and is situated on the block bounded by Barton place and Madison avenue, north and south, and by Boerum and Wilson avenues, east and west. That block is owned by the railroad company. In that part of the city the said road was constructed wholly or in part on private right of way, but of course had to cross many streets at grade. Murray avenue is the first street east of Boerum avenue, and runs parallel therewith. Madison avenue, after passing the block on which was situated the Murray Hill station, turned northeasterly for a distance of 80 feet—the width of the avenue—and then continued easterly to Murray avenue. The railroad ran north of Madison avenue until it reached about the southeasterly corner of the block on which the station was situated, and then ran diagonally across Boerum avenue to the block south of Madison avenue and between Boerum and Murray avenues.

The plaintiff during the years herein mentioned was in possession of a hotel which is situated on the north side of Madison avenue between Boerum and Murray avenues, and about 75 feet east of Boerum avenue.

In July, 1910, a proceeding was instituted by the Public Service Commission for the First District to eliminate grade crossings at Lawrence street, Main street, Parsons avenue, Percy street, Willson avenue, Boerum avenue, Murray avenue, Twenty-Second street, and Broadway.

On December 30, 1910, an order was entered by the commission directing that changes be made as therein provided, and that the improvement be carried out in the manner

provided by sections 91 to 97, inclusive, of the Railroad Law (chapter 49 of the Consolidated Laws), except that, as therein provided, the railroad company should, as agreed by it, bear the expense thereof over and above an amount specified therein. By the order it provided as to Boerum avenue as follows:

"Boerum Avenue. The railroad shall cross under the street with a clearance of at least 16½ feet from the top of the rail to the lowest member of the bridge. The bridge shall be the full width of the present legal roadway with such additional sidewalk space as may be approved in the detailed plans. The grade of the street shall be raised not to exceed one foot above its present grade."

On October 10, 1911, the commission, having examined competitive bids and the proposed contract and specifications for carrying out said work, approved the form of contract and specifications and authorized the railroad company to enter into a contract and prosecute the work as therein provided. The work of excavation was started by the railroad company March 13, 1913, and it was completed by it May 6, 1914. When completed the grade crossings had been eliminated and all obstructions arising or in any way connected with the changes made by the railroad company were wholly eliminated.

On July 22, 1914, after the obstructions to the streets mentioned were eliminated, the plaintiff brought this action. In the complaint he alleges:

"That on or about prior to March 10, 1913, the defendant, the Long Island Railroad Company, wrongfully and unlawfully closed Wilson avenue, above mentioned, at a point where the tracks of said railroad now pass under said Wilson avenue; that on or about March 10, 1913, the defendant, the Long Island Company, wrongfully and unlawfully closed Boerum and Madison avenues in said Flushing at a point where the tracks of said railroad now pass under Boerum and Madison avenues and at the northwesterly conjunction of said Boerum and Madison avenues, and placed obstructions in said highways or avenues at said point last above mentioned, and wrongfully and unlawfully left the same thereon and kept said highways closed and thus obstructed until May 1, 1914; that customers of plaintiff have heretofore used said highways, and especially Madison avenue, in obtaining access to plaintiff's hotel, but that by reason of the closing of said highways and because of said obstructions they were prevented from so doing, and plaintiff thereby lost his customers and custom and the profits which would have arisen therefrom."

He demanded judgment for \$8,000.

The action was originally brought against the Long Island Railroad Company and the city of New York. The answer of the defendant railroad company is substantially a general denial.

Upon the stipulation of the plaintiff and the city of New York an order was entered January 12, 1916, dismissing the complaint as against the city of New York, and a judgment to that effect was duly entered. The action was thereafter tried as against the defendant Long Island Railroad Company, and the complaint was dismissed by order of the court. An appeal was taken to the Appellate Division, where the judgment entered upon the order of the trial court was unanimously affirmed. 178 App. Div. 904, 164 N. Y. Supp. 1110.

[1] Section 500 of the Code of Civil Procedure provides that the answer of the defendant must contain a general or specific denial of each material allegation of the complaint controverted by the defendant or "a statement of any new matter constituting a defense."

A license to do something that cannot be lawfully done without such license is new matter constituting a defense which must be alleged in the answer. *Haight v. Badgeley*, 15 Barb. 499; *Beaty v. Swarthout*, 32 Barb. 293; *Holroyd v. Sheridan*, 53 App. Div. 14, 65 N. Y. Supp. 442; *Irvine v. Wood*, 51 N. Y. 224, 228, 10 Am. Rep. 603; *Clifford v. Dam*, 81 N. Y. 52; *Donohue v. Syracuse & East Side Ry. Co.*, 11 App. Div. 525, 42 N. Y. Supp. 808.

The defendant did not allege in its answer the proceedings of the Public Service Commission, and its orders therein relating to the elimination of grade crossings at Boerum and other avenues, or the licenses and permits given by the municipality to close the streets affected by such orders. It was not necessary for the plaintiff to give evidence of the proceedings or orders of the Public Service Commission or of the city of New York to establish his cause of action.

After the plaintiff at the trial had rested his case the defendant offered in evidence the said orders of the Public Service Commission. The plaintiff objected to the same as "incompetent, irrelevant, and immaterial, and because there is no such issue presented by the pleadings. The plaintiff is taken by surprise." They were received in evidence subject to such objection. The plaintiff duly excepted to the rulings. We think the rulings were erroneous.

Where the defendant relies upon new matter by way of confession and avoidance of the claim of the plaintiff, it must be specially pleaded. The rule requires that a defendant allege in his answer the facts upon which he claims as a defense to the plaintiff's action that there had been a violation of the revenue laws (*Honegger v. Wettstein*, 94 N. Y. 252); the usury laws (*Fay v. Grimstead*, 10 Barb. 321; *Manning v. Tyler*, 21 N. Y. 567); or that the contract sued upon is based upon a wager (*Goodwin v. Mass. Mutual Life Ins. Co.*, 73 N. Y. 480); or is otherwise il-

legal (*Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31, 24 Am. St. Rep. 454); or where a justification for the acts alleged is claimed (*Wheeler v. Lawson*, 103 N. Y. 40, 8 N. E. 860); or former recovery or another suit pending is asserted (*Brazill v. Isham*, 12 N. Y. 9; *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 782).

The statute of limitations (Code of Civil Procedure, § 413) or the statute of frauds (*Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911), to be available as a defense, must be pleaded.

In the cases mentioned and many others where facts must be shown or the benefit of a special statutory or other reason is claimed to defeat the plaintiff's recovery, the facts or special statute or other reason must be alleged, that the plaintiff may know what the defendant claims as a reason why recovery should not be had. The reasons for the rule in the cases mentioned are applicable to this case.

In *Clifford v. Dam*, supra, an action was brought to recover damages for injuries occasioned by falling through an opening in the sidewalk of a city street. The opening was a coal hole in front of the defendant's premises. The answer in that case was a general denial. The defendant offered to prove on the trial that he had a permit from the proper authorities for the construction of a vault under said sidewalk, and for the coalhole. It was objected to and excluded on the ground, among other things, that it was not pleaded. It was held that, if a permit was material, it could only be to mitigate the effect of an absolute nuisance to one involving care in construction and maintenance; that it was necessary not only to plead the permit, but to allege and prove a compliance with its terms.

In *Donohue v. Syracuse & East Side Railway Company*, supra, a street railroad corporation was sued for personal injuries in which the complaint alleged that the defendant, in constructing and maintaining its railroad and the crossings over it, had dug a trench in which rails were laid, and which trench was left open for six months. In its answer it simply alleged that the accident occurred by the plaintiff's own negligence and want of care, and not by the negligence or want of care of the defendant. It was held that the railroad company was not entitled to show that it had maintained its roadway in the manner stated because the city authorities had compelled it to suspend work thereon.

When a railroad company, in an action by a passenger to recover damages in consequence of an alleged breach of duty which the corporation owed him, claims immunity

under the provisions of a statute, it should plead all of the facts upon which the claimed immunity rests. *Vail v. Broadway R. R. Co. of Brooklyn*, 147 N. Y. 377, 42 N. E. 4, 80 L. R. A. 626.

We cannot say that the plaintiff's substantial rights were not injured by the court allowing the trial to be conducted as if the defendant had fully alleged as a defense in its answer the proceedings and orders of the Public Service Commission and the permits and orders of the municipality. If the plaintiff had not rested upon the pleadings, it is possible that he could have had in court further testimony relating to the manner in which the work was performed.

It was the plaintiff's right to have the orders mentioned, to which he duly objected, excluded from evidence, unless the defendant first amended its answer. Doubtless the defendant should now be allowed to amend its answer on such terms as to the court may seem just, but without such amendment we repeat that the ruling of the trial court admitting the orders of the Public Service Commission in evidence was error.

[2] The defendant did not build or maintain the temporary structure of the fire department of the city of New York of which the plaintiff complains, and it is not responsible for any damage that the plaintiff suffered by reason of its erection and maintenance.

[3] Where improvements are lawfully made in a public street which do not involve direct encroachment upon private property, the person or corporation making the same is not liable for consequential damages unless they are caused by negligence, misconduct or want of skill. *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; *Northern Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Smith v. Boston & Albany R. R. Co.*, 181 N. Y. 132, 73 N. E. 679; *Sauer v. City of New York*, 180 N. Y. 27, 72 N. E. 579, 70 L. R. A. 717; *Bates v. Holbrook*, 171 N. Y. 460, 64 N. E. 181.

If the answer is properly amended, there will still remain for determination the questions as to whether the plaintiff's damages, if any, were caused by negligence, misconduct, or want of skill of the defendant, or by a failure on its part to conform to the authority conferred by the orders and licenses permitting the improvements.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, C. J., and COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

Judgment reversed, etc.

(236 N. Y. 383)

THOMPSON v. POSTAL LIFE INS. CO.
et al.

(Court of Appeals of New York. May 20, 1919.)

1. INSURANCE \Rightarrow 365(2) — **LIFE INSURANCE — WAIVER OF FORFEITURE — PERFORMANCE OF CONDITION.**

Where a life insurer agreed to waive a forfeiture of the policy on condition insured should apply for its restoration, before a medical examiner, and furnish "satisfactory" evidence of his insurability, and insured did so, his medical examination disclosing no defect in health, he satisfied the condition on which the waiver was dependent, though the insurer's taste, fancy, or caprice was not satisfied.

2. PLEADING \Rightarrow 36(3) — **ADMISSIONS — CONCLUSIVENESS — CONTRADICTIONARY EVIDENCE.**

In an action on a life policy, a letter from the insurer to insured tending to prove some agreement between the parties relative to waiver of forfeiture of the policy other than that stated in the complaint and admitted in the answer cannot be considered, since allegations of the complaint admitted by the answer must be taken as true under Code Civ. Proc. § 522.

3. INSURANCE \Rightarrow 619 — **LIFE INSURANCE — LIMITATIONS — STATUTES.**

Action on a life policy, forfeited for default in payment of premium, which forfeiture was waived by the insurer, *held* not barred, insured having died more than two years after repudiation of the policy, by Insurance Law, § 92, providing no action shall be maintained on a forfeited policy unless instituted within two years from the day of default.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Kate H. Thompson against the Postal Life Insurance Company and the Provident Savings Life Assurance Society of New York. From judgment of the Appellate Division (178 App. Div. 490, 165 N. Y. Supp. 500) reversing judgment for plaintiff, and granting judgment absolute dismissing the complaint, plaintiff appeals. Judgment of Appellate Division reversed, and judgment of Trial Term affirmed.

John Ewen, of New York City, for appellant.

Henry F. Cochrane, of Brooklyn, for respondents.

CARDOZO, J. The plaintiff sues upon a policy of life insurance issued by one of the defendants and afterwards assumed by the other. The insurance was on the life of one Charles T. Thompson, and was payable to his wife. Premiums were paid and accepted for more than 15 years. In the end a delay of 6 days provoked a forfeiture of the policy. A quarterly payment of \$26.10 fell due on June 4, 1902. A period of grace extended the

time of payment till July 4, 1912. Payment tendered on July 10, 1912, was rejected by the insurer on the ground that the policy had lapsed. The notice required by section 92 of the Insurance Law (Consol. Laws, c. 28) had been received in due season by the insured. *McCormack v. Security Mut. Life Ins. Co.*, 220 N. Y. 447, 116 N. E. 74. The policy therefore lapsed unless the forfeiture was waived. The complaint alleges that the defendant Postal Life Insurance Company did waive the forfeiture, subject to conditions which were duly performed by the insured. The answer admits the agreement, but denies the performance. "The defendant admits that it offered and agreed to reinstate the said policy, and to waive the forfeiture and lapse of the said policy, provided the said Charles T. Thompson should make application for such restoration, and should take an examination before a medical examiner to be appointed by the defendant, and provided further that the said Charles T. Thompson should furnish satisfactory evidence of his insurability." This admission is followed by the statement that the insured did not furnish satisfactory evidence of his insurability, and that the defendant, for that reason, refused to reinstate the policy.

We think the uncontradicted evidence is that the condition was fulfilled. The insured applied for the reinstatement of his policy upon forms furnished by the insurer. He submitted to an examination by a physician designated by the insurer. Part of the form of application consists of questions to be answered by the insured. The answers give no hint of a defect in health or habits. Another part of the application is a certificate to be filled out by the examining physician. Again, there is nothing to suggest a reason for rejection. In a blank headed "remarks," the examiner supplements the detailed information with this statement:

"Have known applicant for eighteen years and have never heard of his being sick. He is in splendid health, and apparently a good risk."

This is again supplemented by the testimony of a physician that it is impossible to pick a flaw in the health of the insured as disclosed in the report. The insurer received the proofs, and notified the insured on July 30, 1912, that the application was rejected. There was no suggestion of a reason. In letters of later date the excuse was offered that the medical report was unsatisfactory. Even then there was no suggestion wherein it was unsatisfactory. The time of trial arrived, and the medical director took the stand. He testified that he had rejected the application. He was allowed to add that he had done so in the exercise of his discretion and knowledge, the court ruling that this was to be assumed

from the fact of rejection, so that the added statement counted for nothing. No flaw in the report was pointed out. No reason for dissatisfaction was assigned. The insurer had already taken the position, in its letters to the plaintiff, that no reason was necessary. In truth none existed, except the insurer's dissatisfaction with its promise. The trial court found that at the date of rejection the insured was "in good physical health and insurable condition." The finding was not disturbed by the Appellate Division. No other finding would have been consistent with the evidence.

[1, 2] In these circumstances the insured must be held to have satisfied the condition upon which waiver was dependent. It is no answer to say that the evidence of his condition was not satisfactory to the insurer. The agreement did not contemplate the exercise of the insurer's taste or fancy or caprice. *Crawford v. Mail & Ex. Pub. Co.*, 163 N. Y. 404, 57 N. E. 616. "It could not be unsatisfied with the certificate, capriciously. That which the law will say a contracting party ought in reason to be satisfied with that the law will say he is satisfied with." *Miesell v. Globe Mut. Life Ins. Co.*, 76 N. Y. 115, 119. In the case cited we applied that principle to a very similar situation. There are other cases to the same effect. *Dennis v. Mass. Benefit Ass'n*, 120 N. Y. 496, 505, 24 N. E. 843, 9 L. R. A. 189, 17 Am. St. Rep. 660; *Knights Templars' Life Indemnity Co. v. Jacobus*, 80 Fed. 205, 25 C. C. A. 378; *Leonard v. Prudential Ins. Co.*, 128 Wis. 348, 107 N. W. 646, 116 Am. St. Rep. 50. This insurer had agreed to reinstate and waive if satisfactory evidence of insurability was supplied. Evidence that ought to have satisfied was supplied, and thereupon, without further act of the insured or the insurer, the policy was revived. *Miesell v. Globe Mut. Life Ins. Co.*, supra; *Dennis v. Mass. Ben. Ass'n*, supra; *Reed v. Provident Savings Life Assur. Soc.*, 190 N. Y. 111, 120, 82 N. E. 734; *Knights Templars' Life Ind. Co. v. Jacobus*, 80 Fed. 202, 205, 25 C. C. A. 378. An attempt is made to show that the insurer did not agree to waive upon production of proper proofs, but only in that event "to consider" whether it would waive. A letter from the insurer to the insured is quoted to sustain the argument. The letter was received under the plaintiff's objection that it tended to contradict the admissions of the pleadings. It was received under the ruling that it would be given no such effect, and would be taken merely as part of the history of the transaction. There was no issue to be tried in respect of the terms of the agreement. The agreement was stated in the complaint and admitted in the answer. It was not an agreement to "consider." It was an agreement to waive. *Insurance Co. v. Norton*, 96 U. S. 234, 242, 24 L. Ed. 689. If the letter tends to prove some other

agreement, we are not at liberty to consider it. *Horan v. Hastorf*, 223 N. Y. 490, 494, 120 N. E. 58. For the purposes of the action, the allegations of the complaint, admitted by the answer, must be taken as true. Code Civ. Proc. § 522.

[3] One other defense remains to be considered. The defendants plead the statute of limitations in bar of a recovery. Section 92 of the Insurance Law provides that—

"No action shall be maintained to recover under a forfeited policy, unless the same is instituted within two years from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

We held in *Adam v. Manhattan Life Ins. Co.*, 204 N. Y. 357, 97 N. E. 740, that "a forfeited policy" within the meaning of this provision is one rightfully forfeited. A forfeiture asserted without right leaves the policy intact. This policy was forfeited once, but the forfeiture was waived. The subsequent repudiation of the waiver did not work a forfeiture anew. Reinstatement followed automatically upon waiver, as waiver followed automatically upon the announcement of an intent to waive. The insured did not die till November, 1914, more than two years after the repudiation of the policy. No action to recover the amount of the insurance would lie during his life. *Kelly v. Security Mut. Life Ins. Co.*, 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661; *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286, 293. It follows that no such right of action was barred by limitation at his death. He was not required to sue in equity to declare the policy in force. *Miesell v. Globe Mut. Life Ins. Co.*, supra, 76 N. Y. at page 120. He might have done so at his election (*Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516, 29 Am. Rep. 200), but nothing in the statute suggests a purpose to charge him with such a duty. The rule of limitation applies to actions to "recover under" policies. Insurance Law, § 92. That is not an apt description of an action which seeks a judicial declaration that a policy exists. No duty to seek such a declaration rests upon one insured unless this statute has imposed it. The statute has not done so in express terms. It has not done so, we think, by reasonable implication. Such a change, if intended, should find its origin in plainer words. It was not the purpose of the lawmakers in enacting a rule of limitation to effect by indirection a transformation of the law of remedies. In thus holding, we do not leave the statute without some field of operation. It applies to actions to recover the surrender value or like benefits remaining after lawful forfeiture. We are not required to decide that it may not apply to other situations. We think it does not apply to the situation now before us.

The judgment of the Appellate Division

should be reversed, and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.

HISCOCK, C. J., and COLLIN, POUND, CRANE, and ANDREWS, JJ., concur.

CUDDEBACK, J., not voting.

Judgment reversed, etc.

(226 N. Y. 378)

SWEETZ v. O'ROURKE.

(Court of Appeals of New York. May 20, 1919.)

1. CONTRACTS §176(11) — CONSTRUCTION — QUESTION OF LAW.

Whether it was the intention of parties to a contract to drill a well that nothing should be paid for drilling unless fresh water was reached *held* a question of law to be determined by the court from the contract and surrounding circumstances.

2. CONTRACTS §323(1) — PERFORMANCE — QUESTION OF FACT.

Whether the contractor to drill a well drilled until the pipe reached water-bearing gravel *held* a question of fact to be submitted to a jury.

3. CONTRACTS §198(6) — CONTRACT TO DRILL WELL—FRESH WATER.

A contract to drill a well of a specified diameter at a fixed price per foot, and to furnish all material and equipment, and to continue it until the pipe had reached water-bearing gravel, did not obligate the contractor to reach water fresh and potable.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by William H. Sweetz against Joanna M. O'Rourke. From judgment of the Appellate Division (173 App. Div. 947, 158 N. Y. Supp. 1132) reversing judgment for plaintiff on verdict directed by the trial court, and dismissing the complaint, plaintiff appeals. Judgment modified, and as modified affirmed.

On May 27, 1912, the assignor of the plaintiff and the defendant entered into a contract, evidenced by an offer in the form of a letter to the defendant's husband, who was acting for her, and which offer was accepted in the defendant's behalf by a written statement thereon. The letter and statement are as follows:

"Mr. L. M. O'Rourke, New York City—Dear Sir: I will drill you a well on the beach at West Hampton, Long Island, 6 inches in diameter for the sum of \$4.75 per foot.

"I will furnish all material and equipment to put down said well and will use full weight galvanized drive pipe with steel drive shoe on bottom to protect it in driving.

"When pipe has reached water-bearing gravel, will furnish and put down a screen 20 feet in length in order to close out fine sand and to prevent the well from filling up in the future, the screen is to be made from full weight pipe galvanized and covered with brass perforation.

"Payment to be made on completion of well or one-half can remain on note for six months at 5 per cent.

A. S. Durling.

"On condition that the work is prosecuted without delay, delays on account of difficult boring excepted, I hereby accept the terms of above contract, all delays beyond your control excepted.

J. M. O'Rourke."

Plaintiff's assignor entered upon the performance of his contract and drilled to the depth of 432 feet, using pipe and a shoe and putting down a screen all as provided by said contract. Water was obtained from the well, but it is salt and cannot be used for drinking purposes. This action was brought to recover the contract price for drilling the well which plaintiff alleges was completed pursuant to the contract. At the trial the question whether the plaintiff's assignor drilled the well until he reached water-bearing gravel was in dispute. That question was left to the jury for determination. The jury failed to agree. Thereupon the court directed a verdict for the plaintiff, to which the defendant excepted. Judgment was entered upon the verdict. On appeal therefrom to the Appellate Division it was reversed and the complaint was dismissed. Other facts appear in the opinion.

Robert P. Griffing, of Riverhead, for appellant.

Walter Frank, of New York City, for respondent.

CHASE, J. (after stating the facts as above). In determining the rights of the parties it is necessary to answer two questions:

1. Was it the intention of the parties to the contract that nothing should be paid for drilling the well unless fresh water was reached?

[1] That is a question of law to be determined by the court from the contract and the surrounding circumstances.

2. Did the contractor drill the well until the pipe reached water-bearing gravel?

[2] That is a question of fact to be submitted to a jury.

Prior to making the contract, fresh water had been obtained through a well driven to a depth of about 200 feet on property in the vicinity of the defendant's property. We may assume that the defendant's purpose in entering into the contract was to obtain water for drinking and general domestic uses. The parties undoubtedly hoped and expected to obtain fresh water. The hope and expectation was based upon the fact that fresh water had been obtained in the vicinity by

driving a well about 200 feet deep and also upon the commonly accepted belief that water obtained from a stratum of gravel will be potable. In drilling a well for a special purpose, particularly when it is contemplated that it must be continued far below the surface of the ground, there is a material element of chance and uncertainty whether the result will be satisfactory for the purpose designed.

A person who contracts with another to do work is entitled to the prescribed compensation therefor. If the compensation is wholly dependent upon the accomplishment of a particular result, the person for whom the work is done should express such unusual provision in terms so clear as not to be misunderstood.

[3] The contract in this case is simple in its terms and provides for drilling a well of a specified diameter at a fixed price per foot and for furnishing all material and equipment therefor and for continuing the same, until the pipe "has reached water-bearing gravel." The proposed contract or offer was accepted on behalf of the defendant, upon condition that the work be prosecuted without delay. Which of the parties assumed the risk of obtaining in such stratum of gravel the kind and quality of water desired by the defendant?

The word "well" implies water so that a contract to dig a well commonly places upon the well digger the duty of furnishing water; but, if water is found in substantial amount and no specification is contained in the contract as to the quantity, the landowner must pay the contract price whether the quantity is satisfactory or not. *Omaha Consolidated Vinegar Co. v. Burns*, 49 Neb. 229, 68 N. W. 492.

In *Electric Lighting Co. v. Elder Brothers*, 115 Ala. 138, 21 South. 983, where a contract for boring an artesian well was made which provided its dimensions and capacity and further provided that "the water flowing from said well is to be deep strata water, and no strainer will be placed to obtain a flow from intermediate or intervening strata, as water flowing from that source is likely to be of such quality as is not adapted to the use" for which the well is bored, it was held that the party for whom the well is bored assumes the risk that the deep strata water will be of a suitable quality for his purpose.

In *American Well Works v. Rivers* (C. C.) 36 Fed. 880, it was held that a written contract by which plaintiff agrees to sink an artesian well for defendant supplying a given quantity of water does not require that the water should be potable and fit for washing and for making steam, though plaintiff knew the defendant was a hotel keeper and desired water of that character for hotel purposes. See, also, *Farnum on Waters & Water Rights*, vol. 2, pp. 2748, 2749; *Blum v. Brown*, 11

Tex. Civ. App. 463, 33 S. W. 145; *Littrell v. Wilcox*, 11 Mont. 77, 27 Pac. 394; *Miller v. Layne & Bowler Co.* (Tex. Civ. App.) 151 S. W. 341.

A contract to dig a well furnishes great opportunities for dispute between the parties. A guaranty of the kind and quality of the water to be obtained would so materially affect the risk on the part of the well digger that it would necessarily materially increase the price to be charged per foot for digging the well. So material and important a consideration should not have been left to inference. It is not fairly inferred from the contract before us. The defendant apparently relied upon the probability that water found in a strata of gravel would be so cleansed and purified as to be potable. If the defendant had not been satisfied with the offer as it was written, she would have included in her acceptance thereof a further condition that the water to be furnished from the well must be fresh water. That the contract was considered with reference to protecting the defendant's rights is shown in the fact that it contained a proviso in regard to the same being performed without delay. The record includes a correspondence between the parties which commenced when it was found that water-bearing gravel was not reached at about 200 feet depth, and continued until after plaintiff's assignor claimed that he had reached water-bearing gravel, put in the screen, and asserted that he had completed his contract. Each of the parties claims that the correspondence is material to sustain his contention, but it is not of sufficient importance to justify including a statement thereof herein.

We think that the contractor was compelled to drill a well until the pipe reached water-bearing gravel, but that he did not warrant that the water to be obtained from the gravel when reached would be fresh, potable, and fit for domestic purposes.

We agree with the Appellate Division that the judgment of the Trial Term should be reversed, not, however, for the reason stated by it, but because the question as to whether the plaintiff reached water-bearing gravel is one of fact that could not be decided by the court except on motion of the defendant as well as of the plaintiff. A new trial of the action should be granted.

The judgment should be modified by striking from the judgment the provision dismissing the complaint, and inserting in lieu thereof a provision granting a new trial, and as thus modified affirmed, with costs to abide the event.

COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment accordingly.

(226 N. Y. 335)

BROADWAY REALTY CO. v. LAWYERS' TITLE INS. & TRUST CO. et al.

(Court of Appeals of New York. May 20, 1919.)

1. INSURANCE — 146(3) — CONSTRUCTION OF CONTRACT—BURDEN OF PROOF.

Where a title insurance contract is drawn up by the insurer, in construing its terms, if any are doubtful or uncertain, the insurer must bear the burden.

2. INSURANCE — 426½ — TITLE INSURANCE—DESCRIPTION OF PROPERTY INSURED.

A contract insuring the marketability of title, drawn by the insurer, describing the property by metes and bounds, "and also the building now being erected," the lands to be insured being that on which "such building now stands, as shown by the survey of F.," held to cover an encroachment of the building on a public street, notwithstanding the survey showed the building to be entirely within the lot lines.

Collin, Cuddeback, and Andrews, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Broadway Realty Company against the Lawyers' Title Insurance & Trust Company and others. From a judgment of the Appellate Division (171 App. Div. 792, 157 N. Y. Supp. 1088), reversing a judgment of the Trial Term (91 Misc. Rep. 137, 154 N. Y. Supp. 1024), entered on a verdict directed by the court in favor of plaintiff, and dismissing complaint, plaintiff appeals. Reversed, and judgment of Trial Term affirmed.

Arthur H. Masten, of New York City, for appellant.

P. S. Dean, of New York City, for respondents.

POUND, J. This appeal presents the question of the construction of a policy of insurance of the marketability of title of certain premises issued to the appellant by the respondent, which is dated December 16, 1896, but which seems to have been delivered at a later date, as it refers to a survey of February 27, 1897, a duplicate of which is annexed to the policy. The question is whether the premises, the title of which is insured, are the lands described in the policy by metes and bounds only, or, in addition, all the lands on which a building then being erected, known as "Bowling Green Offices," actually stood.

Under the heading "The Description of the Property, the Title to Which is Insured," comes a description of the property by metes and bounds. Then follows these words:

"And also the building now being erected on said premises known as the 'Bowling Green Offices'; the lands the title to which is hereby intended to be insured, being that on which said

building now stands as shown by the survey of Francis W. Ford, dated February 27, 1897, a duplicate of which survey is hereto annexed."

The survey shows Bowling Green Building as entirely within the lot lines, and shows no part of the premises as encroaching upon Broadway. Exceptions are sometimes explicitly made in such policies of any state of facts which an accurate survey would show, and of objection to title of such part of premises as lies within the limits of Broadway; but it seems somewhat significant that such objections are not excepted from the title insured in the policy under consideration.

When the policy was issued, the building therein described encroached beyond the line of the land described by metes and bounds into Broadway. Subsequently the plaintiff was required to remove the encroachment at a cost of about \$16,000. For this sum action was brought and judgment was directed by the trial court. The Appellate Division held that the policy covered only so much of the building as stood upon the land specifically described, that the survey was a part of the contract, and that the policy covered only the hypothetical building shown on the survey, and not the land on which the actual building stood, and dismissed the complaint. This disposition of the case we think was more favorable to defendant than the ordinary and proper rules for the construction of contracts permit.

[1, 2] The contract was drawn by defendant. In construing its terms, if any are doubtful or uncertain, defendant must bear the burden. *Moran v. Standard Oil Co.*, 211 N. Y. 187, 196, 105 N. E. 217. Is its meaning so doubtful that plaintiff has the advantage of a reasonably beneficial interpretation of its language? Ought defendant in reason to have understood that plaintiff would give the policy the meaning which it now seeks to sustain? It does not appear from what source the survey came, and we must not assume that plaintiff should not believe that it was accurate, not only as to the lands, but as to the location of the building. It covers the land upon which a known and designated building stands, and it places such building wholly inside the street line. The policy says, even though in somewhat equivocal language, that an accurate survey of the plaintiff's building is attached to and made part of the policy, and shows no part of the building in the street. We cannot say that plaintiff did not and might not so read it. If it may thus be read, it must thus be read. It is no preposterous supposition that plaintiff's primary desire was to protect itself by insurance against such encroachments, and that the company made or adopted the survey to that end. We cannot take notice that he who runs could read the line of

Broadway on the ground, and that a surveyor could make no mistake about it. Nor can we assume that the words "said building" should be read as if the parties intended them to mean "part of said building."

Griffiths v. Morrison, 106 N. Y. 165, 12 N. E. 580, was an action of ejectment. It held that a conveyance by metes and bounds with "the buildings thereon" conveyed only so much of a building as was on the lot described. If the deed had in terms covered the lot and the land on which the building stood, it would doubtless have been effective. That the encroachment on Broadway was a defect, objection, lien, or incumbrance "created by the act or with the privity of assured," and thus excepted from the terms of the policy, does not appear. The exception protects the insurance company from things hidden or done clandestinely, but not from the very acts insured against.

The judgment appealed from should be reversed, and the judgment of the Trial Term affirmed, with costs in this court and in the Appellate Division.

HISCOCK, C. J., and CARDOZO and CRANE, JJ., concur.

COLLIN, CUDDEBACK, and ANDREWS, JJ., dissent.

Judgment reversed, etc.

(226 N. Y. 343)

HAAS TOBACCO CO. v. AMERICAN FIDELITY CO.

(Court of Appeals of New York. May 20, 1919.)

1. INSURANCE \S 535—INDEMNITY INSURANCE—NOTICE OF ACCIDENT.

Under a policy requiring that immediate notice of accidents insured against be given the insurer, notice need not be given of every trivial occurrence, though it may afterwards prove to result in serious injuries; there being no duty to notify if no apparent harm comes from the mishap, and there is no reasonable ground to believe bodily injury will follow.

2. INSURANCE \S 535—INDEMNITY INSURANCE—NOTICE TO INSURER.

Tobacco company insured against accidents caused by its automobiles, the policy containing the usual clause for immediate notice of any accident to the insurer, held not absolved from making report on an occasion when its automobile knocked down a boy who ran out from the curb and struck the machine; the company's manager having learned of the accident through the newspaper, and driver, but having made no investigation.

Cuddeback, Cardozo, and Pound, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Haas Tobacco Company against the American Fidelity Company. From judgment of the Appellate Division (178 App. Div. 267, 165 N. Y. Supp. 230), reversing judgment of the Trial Term entered upon the verdict of a jury, and dismissing the complaint, plaintiff appeals. Judgment of the Appellate Division affirmed.

Henry W. Killeen, of Buffalo, for appellant.
Charles Newton, of Buffalo, for respondent.

ANDREWS, J. [1] Under a policy requiring immediate notice to the insurer of accidents insured against, the condition does not apply to every trivial occurrence, even though it may prove afterward to result in serious injury. If no apparent harm came from the mishap and there was no reasonable ground for believing at the time that bodily injury would follow, there was no duty upon the insured to notify the insurer. *Melcher v. Ocean Accident & Guarantee Corp.*, 226 N. Y. 51, 123 N. E. 81.

[2] The plaintiff here had a policy of automobile insurance issued by the defendant to protect it against accidents caused by its automobiles, containing the usual clause for immediate notice. It is conceded that on January 20, 1913, one of its machines ran into and struck Joseph Bolger, causing him injuries which subsequently resulted in a judgment in his favor for over four thousand dollars. Notice of this accident was not given until some 10 days later, and the defense is based upon the alleged breach of the condition with regard to notice. The trial judge charged the jury that the plaintiff could not be required to give notice if it had no knowledge of the accident itself, and further that, even if it had knowledge of the occurrence, it was not called upon to report if the circumstances were such as would not call upon a reasonably prudent person to anticipate that they might be the basis for a claim under the policy. Under this charge the jury found a verdict for the plaintiff. The judgment entered upon this verdict, however, was reversed by the Appellate Division, and the complaint dismissed.

Singularly enough, there is no direct evidence as to what actually occurred on January 20th. We do know that injuries were received, serious enough to justify a large recovery in damages; but as to the actual event both sides seemed content to rest upon the subsequent account of the driver of the truck. Having seen in a newspaper a statement that a Haas automobile had hit a boy, the manager of the plaintiff, on the morning of the 21st, asked the driver with regard to it. He replied that "It didn't amount to anything." He was driving into a garage, and the boy ran out from the curb and struck the machine and he was knocked down. The manager

asked if the boy was hurt. The driver replied:

"Only slightly, for I brushed off his clothes and he went away. There was a policeman right there. It wasn't necessary to report any accident. I don't think it amounts to much."

Under these circumstances, the insured was not absolved from making the report required by its policy.

In the Melcher Case, the plaintiff heard that an outside workman employed in repairing his building had been struck by an elevator. He immediately investigated the matter. He saw the workman in question and was told by him while he was at work in the shaft the car had struck him and raised him about a foot. He said that he was not at all hurt, and as a matter of fact he continued at work for the rest of the day, leaving in the evening when the work was completed. The insured never heard anything more of the occurrence and had no reason to suppose that there would be any serious results until some 10 weeks later, when the information reached him that the workman's spine had been seriously injured. He thereupon immediately notified the insurance company. We held that a recovery was permissible. The circumstances in the present case require a different result. A boy struck the machine and was knocked down. True, the driver, who represented the plaintiff, believed he was only slightly hurt, for he walked away, and in his opinion the accident didn't amount to much. But no investigation was made. There was no assurance by the person struck that he was uninjured. There was no opportunity by later observations of determining that he was not in fact injured. The plaintiff relied wholly upon the driver's opinion, an opinion which as subsequent events showed was a mistaken one.

The ruling in the Melcher Case is not to be extended. Under the peculiar circumstances there disclosed, and in view of the full investigation made, it might fairly be said that a reasonable man was justified in believing the occurrence so trivial that no report was required. But where, as here, a boy is knocked down in the street, and at least slightly injured, the insured may not, without any investigation whatever, rely solely upon his own opinion or upon the opinion of his driver that because he went away the injury was too trivial to require attention.

The judgment of the Appellate Division should be affirmed, with costs.

HISCOCK, C. J., and COLLIN and CRANE, JJ., concur.

CUDDEBACK, CARDOZO, and POUND, JJ., dissent.

Judgment affirmed.

(226 N. Y. 427)
**LORD ELECTRIC CO. v. BARBER AS-
PHALT PAVING CO.**

(Court of Appeals of New York. May 27, 1919.)

**1. INDEMNITY §9(1)—CONTRACTS—LIABILITY
OF SUBCONTRACTOR TO PRINCIPAL—DAMAGES
BY FIRE.**

Where a municipal bridge contractor agreed with a subcontractor that, with respect to all the work to be done and materials to be furnished, the subcontractor accepted the conditions and obligations of the general contract with reference to the same work and such general contract made the contractor responsible for all parts damaged during erection, and provided that ample precaution be taken against injury by fire, the subcontractor was liable for injuries from a fire negligently caused by it, to the contractor, who had been compelled to pay for such damages, not only to the property covered by his contract, but also to other property.

**2. ACTION §27(1)—BREACH OF CONTRACT OR
TORT.**

While negligence, considered merely as a tort, is a wrong independent of contract, it may also be a breach of contract, if the contract itself calls for care.

**3. INDEMNITY §14—JUDGMENT AGAINST IN-
DEMNITEE—RES JUDICATA—AMOUNT OF DAM-
AGES.**

A judgment holding a municipal bridge contractor liable for damages by fire was not conclusive as to the amount of the verdict in an action against his subcontractor to recover for the latter's negligence in causing the fire; the question of damages not having been tried on the merits in the first suit.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Lord Electric Company against the Barber Asphalt Paving Company. From a judgment of the Appellate Division (179 App. Div. 926, 186 N. Y. Supp. 1102), affirming a judgment of the Trial Term, setting aside the verdict in favor of plaintiff and dismissing the complaint, plaintiff appeals by permission. Reversed, and new trial granted.

Frederick Hulse, of New York City, for appellant.

Abram J. Rose, of New York City, for respondent.

POUND, J. The city of New York constructed the Manhattan Bridge over the East River. After the structural construction work of masonry and steel had progressed sufficiently, it entered into a contract with plaintiff for surface construction work, including railings, stairways, pavements, track, and electrical equipment. The contract price was about \$400,000. Plaintiff in turn entered into an agreement with defendant to furnish all labor and materials for asphaltting called for

by its contract. The price was about \$11,000. In and by the latter agreement it was "expressly understood and agreed that with respect to all the work to be done and materials to be furnished hereunder [defendant] shall accept all the conditions and perform all the obligations imposed by said general contract upon the [plaintiff] with reference to the same work." Plainly, then, defendant undertook the work subject to all the conditions and obligations which would have been imposed upon plaintiff with reference thereto had it done the work itself. So far as the responsibility for doing this particular work was concerned, it took plaintiff's place and stood in plaintiff's shoes.

The specifications, which were a part of the principal contract, provided that "all parts damaged during erection, as well as at any other time prior to the final acceptance of the work, shall be made good to the satisfaction of the engineer and at the cost of the contractor." They also provided that "during the entire erection of the work ample precaution shall be taken to protect it against injury by fire."

On March 25, 1910, during the progress of the work and before final acceptance, it is alleged that defendant caused a fire which damaged the bridge structure. Plaintiff was held liable under its contract to make the city good for damages to the construction work as a whole (*Lord Electric Co. v. City of New York*, 160 App. Div. 344, 145 N. Y. Supp. 205, affirmed 217 N. Y. 634, 112 N. E. 1063), and the cost of making good the parts damaged was deducted from the amount due it, over its contention that it was bound only to replace the work which it had agreed to perform, to the extent that it was damaged.

This action is a sequel of the first action and is brought to recover on the subcontract from defendant the amount that plaintiff was thus compelled to pay. The complaint alleges the violation of the contract by the negligence of the defendant in taking precautions against fire. The question is solely as to the contract obligations of defendant to plaintiff. The trial court, having reserved decision of defendant's motion to dismiss the complaint, after verdict for plaintiff, held that plaintiff could not recover on its contract because that contract would be searched in vain for any agreement on the part of the defendant to protect the property of the city of New York and to restore and make good any and all property damaged by its act during the progress of its work. The verdict was set aside on the ground that it was contrary to law and the complaint dismissed, with costs. The trial justice said that the situation of the plaintiff was hard, and made one impatient with the processes of law, but he found no escape. The Appellate Division unanimously affirmed the judgment below, and the appeal is here by permission of this court. We think that the action can be maintained.

[1, 2] It may well be that the contract obligation to make good all parts of the bridge damaged during erection was binding upon the principal contractor only, but the plaintiff also agreed with the city to take ample precaution to protect the entire structure against injury by fire, and it follows as a corollary that the defendant, while doing its work, was bound by contract to take ample precautions to protect the entire structure against injury by fire caused by it. Such is the fair and reasonable construction of the contract, and the construction dictated by consistency and a due regard for the rights of litigants in order to give effect to the design of the parties and to comprehend the dangers which they undertook to guard against. Defendant brought its large iron kettles to heat tar and asphalt upon the structure. If the kettles were overheated or improperly covered when fires were started under them on windy days, the safety of the entire bridge structure was threatened. The liability of the plaintiff should not be extended to cover the entire work and the liability of the defendant limited to its own work, when defendant, as to the doing of such work, accepted all the conditions of the principal contract. Although the acts complained of were negligent, the action is on the contract, for the contract imposes upon the defendant while doing its work, the duty of taking ample precaution, as against the dangers it creates, to protect the bridge against injury by fire, and thus imposes the duty of making plaintiff good for any loss resulting from its breach. Negligence, considered merely as a tort, is a wrong independent of contract, but negligence may also be a breach of contract, if the contract itself calls for care.

On the trial the court ruled that the question of negligence was not in the case to be litigated, and it was not litigated. Plaintiff's counsel accepted the suggestion of the court that, because the action was on contract, it was necessary to prove only the cause of the fire. That was the only question submitted to the jury, but the question of ample precaution against fire was also in the case, and might have been submitted on the evidence, which tended to show the manner in which the fire occurred, that defendant's fire boxes were not properly protected, and that sparks which escaped therefrom caused the fire. No proper exception by the plaintiff raises the point that the failure to take reasonable precautions against fire was litigable. Counsel and court adopted as the law of the case the rule of the Appellate Division laid down on appeal from an interlocutory judgment on a demurrer. 165 App. Div. 399, 401, 150 N. Y. Supp. 1000, 1008. That court said:

"The judgment in that action (*Lord Electric Co. v. City of New York*, supra) is conclusive on defendant with respect to the amount the city was entitled to deduct and with respect to its right to make the deduction from the con-

tract price, provided the defendant was responsible for the fire."

Plaintiff's allegations and proof were sufficiently broad to enable it to establish a cause of action based on negligence. When counsel and the trial court were thus led so to shape the course of the trial as to induce the defect of proof which is now complained of, this court should be at pains to minimize the consequences of the mistake, in order to prevent a perversion of justice.

[3] On the question of damages, the ruling was too favorable to plaintiff. On the theory that the judgment in the first action was conclusive, the amount of the verdict was directed at the amount of that judgment and interest, the sum of \$32,304.36. The plaintiff offered evidence tending to show that defendant was responsible for the fire, but relied on the judgment to establish the amount. We are of the opinion that there has been no proof and adjudication of the amount of damage binding upon defendant. The Appellate Division in the first action (*Lord Electric Co. v. City of New York*, supra), which was brought by plaintiff to recover the full amount remaining unpaid on the contract, reversed a judgment for plaintiff and dismissed the complaint on defendant's motion made at the close of the evidence. The order of the Appellate Division thereon shows that the words "on the merits" were stricken out when the order was signed. The city, on the trial of that action, made proof of damage to the bridge, and relied upon the final certificate of the architect to defeat plaintiff's recovery of the amount which it had withheld to cover such damage.

Plaintiff disputed the legal rule which made that amount deductible from the amount due it under the contract. While there was no dispute as to the amount, the Appellate Division made no finding thereon. It held merely that plaintiff was not entitled to recover. The nature of the former judgment is not free from doubt, but we think that it should be taken as a nonsuit rather than a decision on the merits, binding upon the parties to this action, on the question of damages. *Deeley v. Heintz*, 169 N. Y. 129, 134, 62 N. E. 158; *Lindenthal v. Germania Life Ins. Co.*, 174 N. Y. 76, 81, 66 N. E. 629.

Other evidence of damage to the bridge structure appears on the record and it appears that the city compelled the plaintiff to pay a large sum for such damage. A jury should be permitted, on the evidence in this action, to render a verdict for such part of that sum as is shown to have been due to the failure of defendant to comply with the terms of its contract. The record presents two questions of fact: Did defendant negligently cause the fire in violation of its obligations under the contract? Did plaintiff establish damages? The plaintiff is therefore entitled

to a hearing before a jury. The verdict was properly set aside, because it was erroneously directed as to the amount of damages, but the complaint should not have been dismissed. A new trial should have been granted upon defendant's exceptions.

The judgments should be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, CRANE, and ANDREWS, JJ., concur.

Judgments reversed, etc.

(123 N. Y. 384)

In re WATSON'S ESTATE.

(Court of Appeals of New York. May 20, 1919.)

1. TAXATION \Leftrightarrow 859(1) — TRANSFER TAX—STATUTE—CONSTITUTIONALITY.

Tax Law, § 221b (added by Laws 1917, c. 700), imposing an additional tax upon those investments passing by will or distribution which have not been assessed locally or paid the state stamp tax, is constitutional.

2. EVIDENCE \Leftrightarrow 5(2)—COMMON KNOWLEDGE—TAXATION.

It is a matter of common knowledge that under the system of taxation provided by Tax Law, art. 15 (§§ 830-840) and Laws 1911, c. 802, as amended, some owners submitted all or part of their bonded investments to the state tax, others paid upon a limited local assessment provided for by Tax Law, §§ 6, 8, and others not at all, and that a very large part of this kind of property went untaxed altogether. (Per Crane, Cuddeback, and Hogan, JJ.)

3. CONSTITUTIONAL LAW \Leftrightarrow 45 — CONSTITUTIONALITY OF STATUTE—DETERMINATION.

In dealing with the constitutionality of a statute, the court is examining the question of legislative power. (Per Crane, Cuddeback, and Hogan, JJ.)

4. CONSTITUTIONAL LAW \Leftrightarrow 70(3)—CONSTITUTIONALITY OF STATUTE—WISDOM.

Whether the Legislature has acted wisely, made proper choice, worked hardships, or been unfair to a particular kind of property, is never indicative of a limitation; limitations being found in the words and intentment of the Constitution and the fundamental principles of government embodied therein. (Per Crane, Cuddeback, and Hogan, JJ.)

5. CONSTITUTIONAL LAW \Leftrightarrow 68(4)—LEGISLATIVE POWERS—APPROVAL BY COURTS.

The taxing power, both direct and through an inheritance tax, is very broad and submits to few restrictions, and such laws need not be submitted to courts for their approval. (Per Crane, Cuddeback, and Hogan, JJ.)

6. TAXATION \Rightarrow 859(1)—**INHERITANCE TAX—CONSTITUTIONAL RESTRICTIONS.**

Assuming without deciding that the discretion to classify personal property which must pay an inheritance tax before passing by will or inheritance is limited to a classification which is based upon some reason, and not the mere caprice of the Legislature, Tax Law, § 221b, added by Laws 1917, c. 700, comes within such rule. (Per Crane, Cuddeback, and Hogan, JJ.)

7. TAXATION \Rightarrow 859(1) — **TRANSFER TAX—STATUTE—VALIDITY.**

That the beneficiary under the will is punished for misdeeds of the ancestor in not paying a local or state tax is not a valid objection to Tax Law, § 221b, added by Laws 1917, c. 700, imposing an additional tax upon investments passing by will or distribution. (Per Crane, Cuddeback, and Hogan, JJ.)

8. TAXATION \Rightarrow 859(6)—**TRANSFER TAX ON PERSONALTY—STATUTE—VALIDITY.**

There is no foundation in the authorities for the assertion or implication that the inheritance tax laws must look with indifferent eye upon the kind of property transferred and cannot single out personalty as distinguished from realty, and the like. (Per Crane, Cuddeback, and Hogan, JJ.)

9. CONSTITUTIONAL LAW \Rightarrow 68(4)—**TRANSFER TAX—STATUTE—VALIDITY—JUDICIAL FUNCTIONS.**

Difficulties in practical application of Tax Law, § 221b, added by Laws 1917, c. 700, if they exist, are matters for legislative and not judicial consideration. (Per Crane, Cuddeback, and Hogan, JJ.)

10. TAXATION \Rightarrow 859(2) — **TRANSFER TAX—STATUTE—VALIDITY.**

Slight inequalities or injustices which may follow from the application of Tax Law, § 221b, added by Laws 1917, c. 700, as it is applied by the taxing authorities, are not in and of themselves constitutional objections. (Per Crane, Cuddeback, and Hogan, JJ.)

11. TAXATION \Rightarrow 859(2)—**EQUALITY—TRANSFER TAX.**

Tax Law, § 221b, added by Laws 1917, c. 700, imposing an additional tax upon those investments passing by will or distribution which have not been assessed locally or paid the state tax, is not, though it exempts dealers in investments, subject to constitutional objection that it is unequal. (Per Crane, Cuddeback, and Hogan, JJ.)

12. TAXATION \Rightarrow 872 — **TRANSFER TAX—EXEMPTIONS.**

The exemptions specified in section 221 do not apply to Tax Law, § 221b, added by Laws 1917, c. 700, imposing an additional tax upon those investments passing by will or distribution which have not been assessed locally or paid the state tax. (Per Crane, Cuddeback, and Hogan, JJ.)

13. MUNICIPAL CORPORATIONS \Rightarrow 73—**LEGISLATIVE POWER—INTERFERENCE WITH LOCAL AUTHORITIES.**

The tax on investments (Tax Law, art. 15 [§§ 330-340]) is not an evasion or attempt to evade the home rule provision (Const. art. 10,

§ 2), and was not passed with the intention of interfering with the local authorities. (Per Crane, Cuddeback, and Hogan, JJ.)

14. MUNICIPAL CORPORATIONS \Rightarrow 73—**INTERFERENCE WITH LOCAL AUTHORITIES.**

While the assessment of property for the purposes of taxation in this state has always been a function of local officers, their duties may be modified or regulated by the Legislature so long as there is no substantial impairment of the right of home rule or no intent or attempt to evade the constitutional provisions. (Per Crane, Cuddeback, and Hogan, JJ.)

15. CONSTITUTIONAL LAW \Rightarrow 48—**CONSTITUTIONALITY OF STATUTE—PRESUMPTION.**

Every presumption is in favor of the constitutionality of an act of the Legislature, and, if the Constitution and the act can be reasonably construed so as to enable the latter to stand, it is the duty of the courts to give them that construction. (Per Crane, Cuddeback, and Hogan, JJ.)

Hiscock, C. J., and Collin and McLaughlin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

In the matter of the transfer tax upon the estate of Charles W. Watson, deceased. From an order of the Appellate Division (186 App. Div. 48, 174 N. Y. Supp. 19), affirming an order of the surrogate (104 Misc. Rep. 212, 172 N. Y. Supp. 29) which denied an appeal by the Comptroller of the State of New York and confirmed report of appraisers in fixing a transfer tax, the Comptroller appeals. Reversed.

Lafayette B. Gleason, Alexander Otis, and John B. Gleason, all of New York City, for appellant.

Eustace Conway, of New York City, for respondents.

Rumsey & Morgan, Stetson, Jennings & Russell, and Louis O. Van Doren, all of New York City, and Brackett, Todd, Wheat & Wait, of Saratoga Springs, for interveners.

CRANE, J. [1] The question presented for determination is whether section 221b of the Tax Law (Cons. Laws, c. 60), added by chapter 700 of the Laws of 1917, is constitutional. The lower courts have held it to be unconstitutional. The section reads as follows:

"Additional Tax on Investments in Certain Cases.—Upon every transfer of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed, in addition to the tax imposed by section 221a, of five per centum of the appraised inventory value of such investment, unless the tax on such investment as prescribed by article 15 of this chapter or the tax on a secured debt as defined by former article 15 of this chapter shall have been paid on such investment or secured debt and stamps affixed for a period including the date of the death of the decedent

or unless the personal representatives of decedent are able to prove that a personal property tax was assessed and paid on such investment or secured debt during the period it was held by decedent; or unless the decedent was actually engaged in the bona fide purchase and sale of investments as a business, and at the time of his death had maintained an office or place of business in this state for the carrying on of the actual bona fide business of purchasing and selling investments, as distinguished from the purchase thereof for investment purposes, and had owned and held such investment for sale for the purpose of his business and not as an investment for a period of not more than eight months prior to his death."

The personal property of an individual, resident in the state of New York, was, at the time of this enactment, subject to two methods of assessment and taxation. By section 6 and section 8 of the Tax Law he was to be assessed on the full value of his personal property in the tax district where he resided, allowance being made for his debts.

By article 15 of the Tax Law the owner of personal property coming within the description of investments therein defined could pay to the state a tax of 75 cents per hundred dollars upon the face value of such investments and be exempted from any other local or state tax.

Under this system of assessment and taxation certain well-known facts and conditions existed regarding taxation upon personal property which must have been in the mind of the Legislature at the time of the above enactment. A man was not compelled to tax himself or to present to the tax officers of his residence district a full and complete list of his securities. Assessments upon personal property or investments were thereupon made according to such meager information as the assessors could obtain or else according to appearance, reputation, or surmise. It was also a well-known fact that in many local communities no attempt was made to assess personal property at its full value, as according to the tax rate it would have worked extreme hardship.

Under the Laws of 1911, c. 802, as thereafter amended, the tax provided by the state upon investments was permissive and not compulsory; the alternative being that, if the bonds were not submitted in accordance with the methods provided by that law, they were subject to an assessment by the locality as before stated.

[2] Under these conditions it was a matter of common knowledge that some owners submitted all or part of their bonded investments to the state tax, others paid upon a limited local assessment, and others not at all, and that a very large part of this kind of property went untaxed altogether.

Such were the facts as developed in this estate of Charles W. Watson, deceased, which is typical and not exceptional. When

he died in August, 1917, leaving a net estate of \$470,256.95, \$109,470.73 of this consisted of assessable bonds upon which his last assessment in 1914 amounted to only \$30,000; since 1914 he had acquired securities valued at \$59,284.54 which had not been assessed at all. The bonds had not been submitted under the state Tax Law. Thus Charles W. Watson had possessed for some years \$168,755.27, of which only \$30,000 had paid a tax.

This kind of property, therefore, divided itself into three classes, or, if we prefer, varied in three different ways under the operation of the Tax Law, by reason of circumstances and conditions. Some of the investments yielded to local assessment, others submitted to the state tax, and still a large part yielded no tax.

These facts were before the Legislature when they sought to reach this untaxed property in the methods devised by section 221b of the Tax Law. Article 10 of that law had already established an inheritance tax varying in amount according to the degrees of relationship of the transferee. To this was added, by section 221b, an additional tax of 5 per cent. upon those investments passing by will or distribution which had not been assessed locally or paid the state stamp tax.

In considering the constitutionality of this provision, it has been suggested that, while the state may enact an inheritance tax, it must treat all personal property alike and cannot classify it according to nature or kind. Why this suggestion should separate personal property from realty I need not now stop to consider. That in the development of taxation personal property has varied in treatment and in disposition is evidenced by the Mortgage Tax Law (*People ex rel. Elisman v. Ronner*, 185 N. Y. 285, 77 N. E. 1061), the bank stock assessment (*People ex rel. Bridgeport Savings Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592; *Amoskeag Savings Bank v. Purdy*, 231 U. S. 373, 34 Sup. Ct. 114, 58 L. Ed. 274), the stock transfer tax (*People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. [N. S.] 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515; *Matter of Ball*, 161 App. Div. 79, 146 N. Y. Supp. 499; *Matter of Church*, 176 App. Div. 910, 162 N. Y. Supp. 1114), and the special franchise tax (*People ex rel. Met. St. Ry. Co. v. State Bd. Tax Commissioners*, 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. Rep. 674).

[3-5] In dealing with a law's constitutionality, we are examining the question of legislative powers, or, to be accurate, the limitation placed by Constitutions upon power. Whether the Legislature has acted wisely, made a proper choice, created difficulties, worked hardships, or been unfair to a class or to a particular kind of property, is never indicative of a limitation. Limitations are to

be found in the words and intendment of the Constitution and the fundamental principles of government embodied therein. The taxing power, both direct and through an inheritance tax, is very broad and submits to few restrictions. Such laws need not be submitted to courts for their approval and can only meet with disapproval when some fundamental principle has been violated. In speaking of the legislative power, whether it be a police power, a taxing power, or any other power of like nature, we have no ready-made formula which can be easily applied, but must be governed by the principles developed in the law, either by a long series of legislation or by custom, or by judicial expression. However accurate may be our logical process, we must not start with assumed premises, but with those furnished us by the authorities.

Although repeating what has heretofore been said by this court, we turn to a few of these authorities to ascertain the rule which must be applied to the new state of facts arising in this case.

This court said, through Gray, J., in *People ex rel. Elaman v. Ronner*, 185 N. Y. 285, 289, 77 N. E. 1061, 1062, regarding the Mortgage Tax Law:

"I cannot perceive any valid reason why the Legislature could not devise a scheme for raising revenues for the general government and for the various local governments by the apportionment of the proceeds of a tax laid upon a certain species, or class, of possessions. * * * It [the Legislature] may change the methods, or rate, of taxation, and may classify new subjects for taxation. * * * The purpose of a system of taxation, the apportionment of a tax and the property, or persons, to be affected are matters within the legislative discretion. * * * There is no constitutional guaranty that taxation shall be just and equal; though underlying this great governmental power, and implied from the nature of our political institutions, is the principle that taxation shall be equal, in the sense that it shall not be arbitrary and that there shall be no discrimination against persons, by laying greater burdens upon one than are laid upon others in the same calling or condition."

We said in *People ex rel. Hatch v. Rear-don*, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515, regarding the constitutionality of the Stock Transfer Act:

"The classification made by selecting one kind of property and taxing a transfer of that only is assailed as so arbitrary, discriminating, and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws."

"All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption

on account of education, charity, or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation. * * *

"A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings"—quoting from *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 22 Sup. Ct. 431, 440 (46 L. Ed. 679).

Turning to *Genet v. City of Brooklyn*, 99 N. Y. 296, 306, 1 N. E. 777, 783, we find it there stated that—

"The power of taxation being legislative, all the incidents are within the control of the Legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and in the latter case the fixing of a district of assessment; the method of collection, and whether the tax shall be a charge upon both person and property or only on the land—are matters within the discretion of the Legislature and in respect to which its determination is final."

See, also, *Matter of Wendel*, 223 N. Y. 433, 119 N. E. 879.

Passing from the consideration of the general taxing power to the authorities touching the inheritance tax, we find the power almost unlimited. The state having the power to abolish testamentary dispositions and the right to pass property by distribution, we would naturally conclude that it could also determine the nature or kind of property that should pass, or could place a limitation or condition upon the transfer by death of any or all property. See what Mr. Justice Holmes said in *Chanler v. Kelsey*, 205 U. S. at page 479, 27 Sup. Ct. 550, 51 L. Ed. 882. But it is unnecessary for us to touch upon the extent of the power, as we shall confine our attention to the facts as presented and determine whether the power exists in this instance.

We have had occasion to say in *Matter of Delano*, 176 N. Y. 486, 491, 68 N. E. 871, 872 (64 L. R. A. 279):

"The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the Legislature sees fit to create. The payment of a sum in gross, or of an amount measured by the value of the property affected, may be exacted, or the right may be limited to one or more kinds of property and withdrawn as to all others."

The case of *United States v. Perkins*, 163 U. S. 625, 627, 16 Sup. Ct. 1073, 1074 (41 L.

Ed. 287), dealt with a tax upon personal property bequeathed by will to the United States. The opinion states:

"While the laws of all civilized states recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the state may require him to contribute his share for public expenses; the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. * * * In this view, the so-called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. * * * Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

The opinion also quotes a statement of Mr. Chief Justice Taney taken from *Mager v. Grima*, 8 How. 490, 493 [12 L. Ed. 1168]:

"* * * The law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * If a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

The principles enunciated in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288, 18 Sup. Ct. 594, 596 (42 L. Ed. 1037), may be helpful:

"The right [says the opinion] to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

The inheritance tax in this case was attacked as being arbitrary and causing discriminations and creating inequality in the burdens of taxation. Writing of the requirements of the fourteenth amendment and the equal protection of the laws to which all persons are entitled, Mr. Justice McKenna says:

"It merely requires that all persons subjected to such legislation shall be treated alike under

like circumstances and conditions, both in the privilege conferred and the liabilities imposed. * * * Mr. Justice Field said in *Mobile County v. Kimball*, 102 U. S. 691 [26 L. Ed. 238], that this court is not a harbor in which can be found a refuge from ill-advised, unequal, and oppressive state legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity.' * * * There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind, we can solve the questions in controversy."

Referring to the fourteenth amendment and the state Inheritance Tax Laws, the case of *Campbell v. California*, 200 U. S. 87, 95, 26 Sup. Ct. 182, 185 (50 L. Ed. 382), gave occasion for Mr. Justice White to say:

"With the motives of public policy which may induce a state to prefer near relatives by affinity to collateral relatives, we are not concerned, since the fourteenth amendment does not deprive a state of the power to regulate and burden the right to inherit, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority."

The provisions of the New York Inheritance Tax Law, chapter 713 of the Laws of 1887, amending chapter 483 of the Laws of 1885, were under review in *Beers v. Glynn*, 211 U. S. 477, 484, 29 Sup. Ct. 186, 53 L. Ed. 290. A discrimination and inequality existed, for by this law the personalty of a non-resident decedent who owned realty in the state of New York was taxed, whereas no provision was made for taxing the personalty of a nonresident decedent who had not owned any realty within the state. Mr. Justice Brewer said:

"But though the operation of the statutes creates a difference, this even if intentional is not of itself sufficient to invalidate the tax. The power of the state in respect to the matter of taxation is very broad, at least so far as the federal Constitution is concerned. It may exempt certain property from taxation while all other is subjected thereto. It may tax one class of property by one method of procedure and another by a different method."

From what has been said it will be apparent that the discretion given to the Legislature to tax property passing by will or inheritance is very broad.

[6] Assuming without deciding that the discretion to classify personal property which must pay an inheritance tax before passing by will or inheritance is limited to a classification which is based upon some

reason and not the mere caprice of the Legislature, this present law under discussion comes within such a rule.

Holding up the section under discussion for comparison with these authorities as a pattern, does it fall within or without the line of constitutional limitation? In the first place, we may consider this tax as though it were the first and only tax placed upon transfers. The fact that it is an additional tax does not change the principle involved. The tax is, then, one placed upon the transfer of property at the time of death which has not theretofore paid any tax, local or state.

[7-10] The objection cannot be pressed that the beneficiary under the will is punished for the misdeeds of the ancestor in not paying a local or state tax. The beneficiary has no claim to the property of an ancestor except as given by law, and, if the state has a right to impose a tax at all upon the passing of property, the transferee takes only what is left after the tax is paid. The state, therefore, having the power to place an inheritance tax upon property which has escaped taxation during the lifetime of the testator, it is no valid objection that the legatee may deem himself punished by the circumstance. Neither is there foundation in the authorities for the assertion or implication that the inheritance tax laws must look within different eye upon the kind of property transferred and cannot single out personality as distinguished from realty and the like. Difficulties in practical application of the statute are perhaps more imaginary than real; but, if they do exist, such difficulties are a matter for legislative and not judicial consideration. *Matter of McPherson*, 104 N. Y. 306, 324, 10 N. E. 685, 58 Am. Rep. 502. Slight inequalities or injustices which may follow from the application of this law as it is applied by the taxing authorities are not in and of themselves constitutional objections (*Matter of White*, 208 N. Y. 64, 101 N. E. 793, 46 L. R. A. [N. S.] 714, Ann. Cas. 1914D, 75), unless they become so great as to violate the principles stated. It has been said that this is not classification but a mere arbitrary tax upon the right to transfer investments. Is there not, at least, a semblance of reason in seeking to tax upon inheritance property which has not been taxed locally or for state purposes, when such fact can only be discovered upon the death of the owner? The matter at least permits of argument and is not so capricious and whimsical as to be purely arbitrary. It has in it at least an effort for the equalization of taxation and the adjustment of the burdens of government.

The fact that other bodies have come to the same conclusion as our own Legislature may have a slight bearing upon the element of reason in this tax and its freedom from mere arbitrary action.

Thus Connecticut has placed an estate tax upon property upon which no town or city

tax has been assessed during the year preceding death. Section 1190, General Statutes of Conn. And Louisiana exempts from a transfer tax property which has borne its just proportion of taxes prior to inheritance. Quoted in note to *Cahen v. Brewster*, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215; article 235 and art. 236 of the Const. of La.; *Succession of Pritchard*, 118 La. Ann. 833, 43 South. 537; *Succession of Westfeldt*, 122 La. Ann. 836, 48 South. 281.

The objection to a tax that it is an arbitrary discrimination must be approached with the greatest caution. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 158, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736.

[11] A further objection has been urged upon us. It is that the act illegally exempts dealers in investments and thus makes this law unequal in operation.

By section 336 of the Tax Law, as amended by chapter 700 of the Laws of 1917, the owner of any investment, as defined by the article (article 15), shall be assessed upon such an investment in the tax district where he resides upon the fair market value thereof without deduction for his just debts, except that such deduction may be allowed to any person in respect to any investment which, for the purpose of his business, shall be temporarily owned and held for sale by him, then actually engaged in the bona fide purchase and sale of such investments as a business. Such deduction shall not be allowed in respect to such investments held for a longer period than eight months.

Section 221b also contains a like exception from the inheritance tax upon property which has not paid a local or state tax. That is, the section does not apply to a decedent who was actually engaged in the bona fide purchase and sale of investments as a business at the time of his death and had and maintained an office in this state for that purpose. The exception does not apply if the investments are held for eight months. All exemptions do not render tax laws unconstitutional. There are many reasons for exempting a certain amount of property, or a class of property, or institutions, such as charitable organizations and persons carrying on religious work. *American Sugar Refining Co. v. La.*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Northwestern Mut. Life Ins. Co. v. Wisconsin*, 247 U. S. 132, 140, 38 Sup. Ct. 444, 62 L. Ed. 1025.

Dealers in investments, as a business, disposing of their bonds as vendors or brokers within a few months after acquisition, cannot be considered the holders of such property for investment purposes. They may sell indifferently to persons within and without the state; they may hold a large amount of such bonds with borrowed capital for the purpose of organizing or developing corpo-

rate enterprise. It cannot reasonably be expected that a dealer would pay the present state tax on all such securities passing through his hands in transfer from seller to purchaser, or held by him solely for sale on profit. There is a reason, we think, for such an exemption which saves this law from being a violation of that equality demanded of legislation.

[12] Illustrations of how this tax may work inequitably, if the exemptions are allowed to certain relatives under section 221, have been conceived by the courts below. Sufficient to say that in our judgment the exemptions do not apply to section 221b. It is a flat tax of 5 per cent. upon the transfer of property not theretofore taxed as specified. Reference to the investments taxable under this article means the investment securities specified by article 15 passing by inheritance and taxed as stated in article 10. The exemptions are classified by section 221 as exceptions and limitations and are not continued to cover the additional tax.

Again, it must be noted that if the amount of an estate is eaten up by debts so that the assets consisting of these investments do not pass to anybody, of course, there can be no tax. Likewise the investments should pay their proportionate part of the debts without tax.

[13] One of the interveners has taken the position that the said investment tax, article 15 of the Tax Law, is wholly unconstitutional, in that it withdraws a certain portion of property from personal assessment by local officials. The claim is made that this is contrary to the local self-government policy as enacted into the state Constitution by section 2, article 10, and he refers to *People ex rel. Town of Pelham v. Vil. of Pelham*, 215 N. Y. 374, 109 N. E. 513.

No attempt is made by this Investment Tax Law to give to state officials the right to tax for local purposes, or the functions of local representatives. The state has the right to tax for its own purposes. A case might arise where so much property was withdrawn from local assessment as to deprive local officials substantially of all their power, but such is not this case—far from it.

[14] While the assessment of property for the purposes of taxation in this state has always been a function of local officers, their duties may be modified or regulated by the Legislature so long as there is no substantial impairment of the right of home rule or no intent or attempt to evade the constitutional provisions. *People ex rel. Wood v. Draper*, 15 N. Y. 541; *Astor v. Mayor, etc.*, 62 N. Y. 567, 573; *People ex rel. Devery v. Coler*, 173 N. Y. 103, 85 N. E. 956; *Mayor, etc., of N. Y. v. Tenth National Bank*, 111 N. Y. 446, 18 N. E. 618.

By the Mortgage Tax Law (*People ex rel. Elisman v. Ronner*, 185 N. Y. 285, 77 N. E. 1061) the assessment of mortgages was tak-

en from the local authorities and a flat rate fixed by the state, one-half of the moneys going to the state and one-half to the locality. The assessors no longer had any judicial discretion in the assessment of mortgages. All the duties and powers, however, of the assessors were left intact except as to this species of property. The Legislature, by section 4 of the Tax Law, has created a list of exemptions from general taxation, which so far as I can discover have never been questioned as illegal because in violation of article 10, sec. 2. In the franchise tax case (*People ex rel. Met. St. Ry. Co. v. State Bd. Tax Commissioners*, 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. Rep. 674), it is recognized by this court that certain conditions or nature of property which results in its escape from taxation may authorize the Legislature to provide means and methods for its assessment.

In this case of the bond investment tax, a large amount of property could not be reached for assessment by the local authorities. As above stated, there was no means under the law to determine who held such securities and to what amount. The estates passing through the Surrogates' Courts bore witness to the inability of the existing tax system to equalize the burdens and to reach all property.

To remedy this condition, the Legislature passed article 15 of the Tax Law which permitted a flat rate of tax upon such investment securities as might otherwise go untaxed; and, with the intent, no doubt, of inducing bondholders to make known their holdings and to submit to this tax, it exempted such property from the inequality and irregularities of local assessment. This was an attempt to reach a class of property which was not bearing its proportionate part of governmental expenses, to make just the tax laws and to meet a situation which for a long time had been apparent to every one familiar with the subject and which was quite difficult to regulate. The nature of the holdings made the local assessments many times unequal and unjust, often bearing heavier upon a small owner than upon one possessed of large amounts unknown to the assessors.

The withdrawal of property by exemption from local assessment may be so arbitrary or so extensive as to interfere with local self-government and with the principles of home rule. Such instances would clearly be unconstitutional.

The tax on investments, however (article 15 of the Tax Law), is not, in our opinion, an evasion or an attempt to evade the home-rule provisions of the Constitution, was not passed with the intention of interfering with the local authorities in their taxing powers, and is not a substantial change in the duties of assessors.

As I stated in the beginning, the facts of

this controversy are very simple and free from complication. The testator left hardly any debts, and securities within the Investment Tax Law which had not been subjected to any tax by local or state authorities. The circumstances were easily ascertainable and are not disputed. No difficulty has arisen in ascertaining and fixing the amount of the tax.

We treat this case, therefore, as it is presented without trying to devise instances where the law might violate fundamental principles. We cannot now see how it is unconstitutional. Time is more fecund than the mind and instances may arise hereafter which may present other and further questions regarding this law. Experience in application may furnish information which we do not now possess, and as to such questions we reserve the right to consider them as and when they arise.

[15] Every presumption is in favor of the constitutionality of an act of the Legislature and, if the Constitution and the act can be reasonably construed so as to enable the latter to stand, it is the duty of the courts to give them that construction. *People ex rel. Met. St. Ry. Co. v. Tax Commissioners*, 174 N. Y. 434, 437, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. Rep. 674.

It is said that we must treat the Investment Tax Law as though it were a compulsory tax upon the face value of bonds or the actual value without any opportunity to be heard as to the amount assessed. The tax on investments is not compulsory but optional. An owner is not compelled to submit to a state tax. He may register his bonds with the state comptroller and pay a certain amount according to face value and thus free the securities from local assessment. If he does not choose to do this, he can submit to local assessment which is according to actual value with full opportunity to be heard. How can it be claimed that article 15 of the Tax Law is compulsory, or upon what theory can an owner say that he was forced to pay the state tax when he does so voluntarily in order to escape a greater tax according to actual value? We are seeking to force upon an owner a situation which he neither welcomes nor has requested. The tax under the investment law has been in operation since 1911, and millions of dollars have been paid to the state under its reasonable regulations. It has never yet been directly attacked.

When we pass upon the constitutionality of article 15, known as the tax on investments, we cannot read into it any other law,

nor hold it unconstitutional because of the provisions of article 10, providing for tax on transfers. The two laws are separate and distinct and governed by entirely different principles. Leaving out of consideration entirely section 221b, let us determine first whether or not the tax on investments is illegal. We have to construe it as compulsory in order to make it illegal. There is nothing whatever in the law itself that compels submission to a state tax. It is entirely voluntary. The compulsion is said to be in section 221b providing for a tax upon property passing at death. As heretofore stated by me in this opinion, the state is free to place an inheritance tax upon any property passing by death to others. Having placed such a tax upon the actual value of bonds which have paid neither a local assessment nor a state tax (which is optional, and therefore legal), there is no ground for holding such inheritance tax unconstitutional. The selection of such property for inheritance tax is within the powers of the Legislature.

To say that a man is compelled to pay a state tax in order to avoid this inheritance tax when he could pay the ordinary local assessment upon the actual value of his holdings and achieve the same end is carrying the constitutional protection to an unreasonable extent.

What is said about the violation of the "home-rule" provision is equally applicable to the Mortgage Tax Law and would render article 11 (tax on mortgages) also unconstitutional in spite of *People ex rel. Elisman v. Ronner*, 185 N. Y. 285, 77 N. E. 1061. The tax here provided is a tax of 50 cents for each \$100 on the principal or obligation secured, half of which goes to the state. Mortgages are not otherwise taxable.

We therefore conclude that the estate of Charles W. Watson, deceased, must be assessed, under section 221b of the Tax Law, upon that amount of personalty coming within the investment law which was not assessed by the local authorities or over and above the amount assessed and which did not pay any tax to the state.

The order should be reversed, with costs in all courts, and matter remitted to the Surrogate's Court for the entry of a decree in accordance with these directions.

CUDDEBACK and HOGAN, JJ., concur, and CHASE, J., concurs in result.

HISCOCK, C. J., and COLLIN and McLAUGHLIN, JJ., dissent.

Order reversed, etc.

(226 N. Y. 313)

ROSENTHAL PAPER CO. v. NATIONAL FOLDING BOX & PAPER CO.

(Court of Appeals of New York. May 20, 1919.)

1. PATENTS §211(1)—LICENSE—CONCURRENT AND DEPENDENT COVENANTS.

Under a contract whereby the owner of letters patent for a folding clothing, millinery, or suit box granted to the defendant the exclusive right to manufacture and sell the same within certain states in consideration of specified royalty rate per box, which was not to amount to less than \$500 for each year of the five-year contract, an agreement on the part of the licensor that he would protect the letters patent from all substantial infringements was a concurrent and dependent promise.

2. CONTRACTS §173 — COVENANTS — CONSTRUCTION—DEPENDENT AND INDEPENDENT COVENANTS.

The general rule that a covenant, which goes to only a part and not to the whole consideration of a contract, is an independent and not a dependent covenant, although a weighty consideration by which to determine the dependency or independency of covenants, is inferior and submissive to the rule that the expressed intention of the parties controls.

3. CONTRACTS §279(1) — CONCURRENT AND DEPENDENT PROMISES—DEFAULT—PLEADING PERFORMANCE—TENDER—WAIVER OR EXCUSE.

When the promises of the parties are concurrent and dependent, either party defaulting in performance cannot, in the course of performance, sustain an action against the other because he has also defaulted, and neither party can maintain the action until he has performed or tendered performance of his part of the agreement, and he must aver and prove performance, or a tender, or a waiver, or a fact excusing nonperformance.

4. PATENTS §212(1)—LICENSE TO MANUFACTURE—BREACH BY SALE AND ASSIGNMENT OF PATENT—REMEDY OF LICENSEE.

Where the owner of letters patent, during the existence of an executory contract under which he had granted another the right to manufacture certain patented articles, by sale and assignment of the patent disabled himself from performing a concurrent and dependent promise of protection against infringers and infringements, the other party had the option to treat the contract as ended, so far as further performance was concerned, and to maintain an action at once for the damage occasioned by such anticipatory breach, or to wait until there was to be final performance.

5. PATENTS §212(1)—LICENSE TO MANUFACTURE—BREACH OF AGREEMENT—FAILURE TO TERMINATE WHILE EXECUTORY.

The doctrine that, where a party to an executory contract puts it out of his power to perform, the other party may regard the contract as terminated and demand damages sustained, is inapplicable, where the licensor for manufacture of an article under a patent

inexcusably breached the contract by a sale and assignment, so that he could not protect as to infringers and infringements as provided in the license agreement, where the licensee did not exercise its right to terminate the contract while executory, but used the license to contracted termination.

6. PATENTS §212(1)—LICENSE TO MANUFACTURE AND SELL—ASSIGNMENT OF CONTRACT BY LICENSOR—KEEPING KNOWLEDGE OF ASSIGNMENT FROM LICENSEE.

The action of the licensor for the manufacture of a patented article in selling and assigning all his interest in the patent left the defendant licensee free to continue performance under the license contract by which the patented articles were manufactured for a royalty, and the absence of notice to or knowledge of the defendant that the licensor had assigned the contract did not affect the rights of the parties in an action by the assignee of the license to recover royalties, and the licensor did not violate a legal obligation or duty by keeping the assignment unknown to defendant.

7. PATENTS §212(1)—LICENSE TO MANUFACTURE AND SELL—FAILURE TO EXERCISE OPTION TO CEASE PERFORMANCE—REMEDY FOR BREACH.

Where a licensee, under license to manufacture and sell a patented article after it had the option to cease performance and recover damages because of the licensor's sale and assignment of the patent right and assignment of license to another, kept alive the contract and secured the results by manufacturing and selling the article to the end of the contract time, it cannot maintain that it is not subject to the obligations and liabilities of the license contract, including the payment of royalty, and its remedy for breach is recovery by counterclaim or action for damages.

8. PATENTS §213—LICENSE TO MANUFACTURE AND SELL—ASSIGNMENT OF LICENSE BY LICENSOR.

The fact that the terms of a license contract to manufacture and sell a patented article contained promises of the defendant licensee, running to the licensor, and not to him and his assigns, is indecisive of the contract's assignability, and where the contract terms did not forbid assignment, the contract not being purely personal, and an assignment not absolving licensor from his obligations, under the general rule of law it was assignable.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Rosenthal Paper Company against the National Folding Box & Paper Company. From a judgment of the Appellate Division (175 App. Div. 606, 162 N. Y. Supp. 814), which reversed the determination of the Appellate Term (95 Misc. Rep. 235, 158 N. Y. Supp. 845), which reversed an order of the City Court, setting aside a verdict for plaintiff and dismissing the complaint, and reinstated such verdict, plaintiff appeals. Judgment of the Appellate Division revers-

ed, and judgment of the Appellate Term affirmed.

Joseph A. Arnold, of New York City, for appellant.

Franklin M. Clark, of New York City, for respondent.

COLLIN, J. The action was for the recovery of royalties for the use of a patent. Originally brought in the City Court of New York City, the jury rendered a verdict for the plaintiff in the sum of \$1,840.73. The judgment of the City Court set the verdict aside, upon the ground that it was contrary to law, and dismissed the complaint. The Appellate Term, upon the appeal of the plaintiff, reversed that judgment, reinstated the verdict, and upon it rendered judgment for the plaintiff. The Appellate Division, upon the appeal of the defendant, reversed the determination of the Appellate Term, and affirmed the judgment of the City Court. The Appellate Division permitted the appeal to this court.

The action is based upon a contract in writing of March, 1909, between Isse Seligstein and the defendant. January 22, 1912, Seligstein assigned to the plaintiff here the patent involved (and others), which Seligstein held, not as the inventor, but as the assignee of the inventor, and all of his "right, title, and interest in, to, and under" the contract of March, 1909. Plaintiff instituted this action in virtue of the assignment. The contents of the contract of March, 1909, may be adequately stated as follows:

The ownership of Seligstein of letters patent for the millinery or suit box and the desire of the defendant to acquire the exclusive right to manufacture and sell the box within a designated territory are recited. Seligstein sells to the company the exclusive right to manufacture and sell the boxes under said patent within the territory, "upon the following terms and conditions":

(1) The company "agrees to pay Seligstein a royalty of one dollar (\$1.00) per thousand boxes up to an average daily sale of twenty (20) thousand boxes per day, per year of 300 days, and on all boxes sold in excess of said twenty (20) thousand boxes per day, per year of 300 days, the said the National Folding Box & Paper Company agrees to pay a royalty of seventy-five cents (75c.) per thousand boxes, but it is expressly understood that the payment by the said the National Folding Box & Paper Company to said Seligstein for the right to manufacture and sell boxes under said letters patent shall not be less than the sum of five hundred dollars (\$500.00) for each and every year during the life of this contract.

"(2) The said Seligstein promises and agrees that he will faithfully protect said letters patent from any and all substantial infringements of said letters patent.

"(3) The said Seligstein further agrees that during the life of this contract he will not sell within the territory, above described, any box

manufactured under said letters patent No. 906,138, nor any other clothing, millinery, or suit box, and further that he will not during the life of this contract sell any rights for any clothing, millinery, or suit box to any one for the territory hereinbefore described.

"(4) The term of this contract shall be five (5) years from and after the 1st day of March, A. D. 1909. * * *

The defendant, through the period of five years, made and sold the boxes, and regularly paid, quarter-annually, to Seligstein the royalty of \$1 per thousand boxes on all the boxes sold. Those paid royalties aggregated \$917.79. The minimum aggregate royalty to be paid for the five years was \$2,500; that is, not less than \$500 each year. This action is to recover the sum of the difference between those aggregates, with interest.

The City Court set aside the verdict in favor of the plaintiff and dismissed the complaint upon the grounds: (a) Seligstein, by assigning the patent, put it out of his power to perform his agreement to protect the patent from any and all substantial infringements of the letters patent, and, in consequence thereof, the defendant was released from its agreement to pay the royalty; and (b) the defendant did not, by paying royalty throughout the period, waive its right to assert such release, because it did not know of the assignment of the patent until the five years and the contract had expired.

The Appellate Term reversed the order and judgment of the City Court, and reinstated and ordered judgment upon the verdict, upon the ground that the defendant had the full benefit of the contract for its entire period without molestation of any kind.

The Appellate Division reversed the determination of the Appellate Term and affirmed the order of the City Court, upon the grounds: (a) The agreement of the defendant to pay the minimum royalty and the agreement of Seligstein to protect the patent were concurrent and dependent. When Seligstein assigned the patent, he put it out of his power to protect the patent (because the owner of the patent alone had a standing to sue on account of an infringement), and therein and thereby committed a breach of the contract which relieved the defendant from the obligation of full performance on its part. (b) Defendant did not waive this breach, because, in the first place, it was ignorant of it, and, in the second place, plaintiff's complaint alleges full performance by Seligstein of this agreement; and (c) the contract was personal to Seligstein and unassignable.

[1] We take up first the question whether or not the agreement of the defendant to pay the minimum royalty and the agreements of Seligstein to protect the letters patent from substantial infringement, and to refrain from selling, within the designated territory, any box manufactured under the patent, or

any rights for any clothing, millinery, or suit box to any one for the territory were dependent or independent of each other. In *Kington v. Preston*, cited at the bar in *Jones v. Barkley*, 2 Douglas, 684, Lord Mansfield expressed himself to the following effect:

"There are three kinds of covenants: (1) Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff. (2) There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. (3) There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act."

The complexities of modern industrial and commercial transactions have not rendered the classification inaccurate or inadequate. By a long series of decisions, the rule has been established that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties, as expressed by them, and by the application of common sense to each case submitted for adjudication. *Stavers v. Curling*, 3 Bingham's N. C. 355; *Tipton v. Feitner*, 20 N. Y. 423; *Pollak v. Brush Electric Association*, 128 U. S. 446, 9 Sup. Ct. 119, 32 L. Ed. 474; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; *Griggs v. Moors*, 168 Mass. 354, 47 N. E. 128; *Leonard v. Dyer*, 26 Conn. 172, 68 Am. Dec. 382. The efforts put forth in judicial opinions and by text-writers to define or formulate the distinctions of dependence and independence of promises or covenants have revealed their comparative futility and served, in the main, to strengthen the rule. Parties have the right to contract as they will for any lawful purpose, and the problem for the courts is to ascertain, in accordance with established rules of interpretation, the real contract or agreement. If they make their promises dependent or independent throughout, or dependent in part and independent in part, it is not for the courts to thwart them. Their expressed intention and meaning, ascertained from the whole instrument, rather than from technical or conventional expressions, are the guides in determining the character and force of their respective covenants.

In the contract under consideration the intention of the parties is not obscure. They contemplated that the letters patent prohib-

ited to all persons except Seligstein, in the absence of his authorization, the manufacture and sale or the manufacture or sale of any box incorporating the patented invention or inventions and that the contract secured to the defendant the exclusive right, as against the whole world, to manufacture and sell, within the prescribed territory, the box. This exclusive right the defendant sought and Seligstein sold to it. The continued exclusiveness of the right throughout the period of five years was the root of the transaction. The defendant, presumably, could not, in the intention of the parties, pay Seligstein for the right to manufacture and sell a product which others, without price, were manufacturing and selling. It was essential to the purpose of the contract that the protection to and the exclusiveness of the right sold the defendant should be coexistent or concurrent with its ownership of it, and they were so created. The promises of Seligstein were to be kept and performed concurrently with those of the defendant. They were to be performed at all times during the licensed period. The promises of the defendant were dependent or conditional upon those of Seligstein. It is not reasonable to presume that the defendant intended to pay for the exclusive right through the five years without having it throughout the period. They intended that if it did not have the right it should not pay for it. Performance by the defendant was conditioned upon and subject to performance by Seligstein. The reciprocal promises were therefore concurrent and dependent.

The case of *Wilfey v. New Standard Concentrator Co.*, 164 Fed. 421, 90 C. C. A. 543, has a close resemblance to that at bar. The agreements of the owners of the patent in the *Wilfey Case* were broader than those of Seligstein here. They were to protect the claims of the patent (and not merely to protect it from substantial infringement), and the rights of the licensees to its use, and to prosecute infringers of it. The principles upon which the decision was grounded are, if sound, applicable, in part, here. A case of contrary import is *Hard v. Seeley*, 47 Barb. 428, in which, as it seems to us, there is fallacious reasoning. The promises there were held independent for the reason that the vendee of the perpetual exclusive right to make, sell, and use a proprietary medicine was to pay the vendor a sum annually, and therefore the vendor's rights to the money could not depend upon his fulfilling his covenant not to ever communicate the art of compounding the medicine itself. The reasoning was applied through the principle that performance on the part of the vendee was, by agreement, to precede performance by the vendor. It overlooked, however, the fact, which barred the principle, as we think, that the reciprocal performances were to be coexistent and to proceed in equal pace. Continuous performance by the vendor condi-

tioned his right to the continuous payments of the vendee. In their nature and effect the covenants were to be performed at the same time, and are not within the rule that, where the acts stipulated to be done are to be done at different times, the covenants are generally construed to be independent. See Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 N. E. 53.

[2] The general rule exists that a covenant which goes to only a part and not to the whole consideration of the contract is not a dependent and is an independent covenant. *Graves v. Legg*, 9 Exch. R. 709. It expresses one of the weighty considerations by which to determine whether covenants were intended as dependent or independent. It is inferior, and submissive, however, to the rule that the expressed intention of the parties is controlling.

[3] When the promises of the parties are concurrent and dependent, either party defaulting in performance cannot, in the course of performance, sustain an action against the other because he has also defaulted. Neither party can maintain the action until he has performed or tendered performance of his part of the agreement. A plaintiff must aver and prove performance, or a tender or waiver of performance, or a fact excusing nonperformance. *Dunham v. Pettee*, 8 N. Y. 508; *Morris v. Sliter*, 1 Denio, 59; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49.

[4-6] The instant case is, however, presented to us in such a condition and form that those rules are not invocable to the defendant, as a further statement of the facts will disclose. The five-year period of the license contract expired on the last day of February, 1914. Throughout it, the defendant continued to manufacture and sell the boxes under the license and pay the prescribed royalty of \$1 per thousand boxes. The defendant had not notice or knowledge of the assignment of January 22, 1912, of Seligstein to the plaintiff, until after the expiration of the license and the last payment of royalty, or until after March 1, 1914. This action was commenced February 4, 1915. Upon the trial the assignment of Seligstein to the plaintiff was received in evidence, and the making of it and its legal effect were the grounds of the decision of the City Court. There was not, for the purpose of, or within, our consideration, an actual infringement of the patent, or molestation or interference by infringers or infringements, or by Seligstein or his assignee, of the patent, or of the defendant's exclusive licensed right. The defendant had and enjoyed the whole interest or right Seligstein sold him.

We are to determine, under those facts, whether or not the sale and assignment by Seligstein to the plaintiff, on January 22, 1912, of his entire right, title, and interest in, to, and under the letters patent and the

contract between Seligstein and the defendant in and of itself is a bar to this action. The sale and assignment by Seligstein put it out of his power to perform his covenants. In virtue of them he became a stranger to the patent and the contract. He conveyed to the plaintiff the entire and unqualified monopoly which he held. As to infringers and infringements of the patent, he became a person without interest and remediless. *Pope Manufacturing Co. v. Gormully & J. Manufacturing Co.*, 144 U. S. 248, 12 Sup. Ct. 641, 36 L. Ed. 423; *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577. The defendant, nevertheless, cannot have the aid of the doctrine that, where a party to an executory contract puts it out of his power to perform, as did Seligstein, the other party may regard the contract as terminated and demand whatever damages he has sustained. *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 274, 4 Sup. Ct. 390, 28 L. Ed. 423. The license contract ceased, by its terms and execution, to be executory on the last day of February, 1914. While the inexcusable breach of the contract by Seligstein conferred upon the defendant the right to terminate it while executory, the defendant did not exercise the right. It used the license to the contracted termination. The object of the agreement became fully performed.

Manifestly, the defendant could not, after the purpose and object of the contract were accomplished, regard it as executory; it could not rescind it; it could not deem itself deprived of the results accruing through the continuance of the contract and performance upon its part; it could only claim such damages, if any, as had been caused by the breach. Where a party to an executory contract, containing mutual obligations, disables himself from performing it during its performance, the other party has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach, or to wait until there was to be final performance. *Ga Nun v. Palmer*, 202 N. Y. 483, 96 N. E. 99; *Central Trust Co. of Ill. v. Chicago Auditorium Ass'n*, 240 U. S. 581, 589, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580. The opinions in those cases state that the rule has its exceptions. The other party may, however, decline to deem the contract terminated and may insist that it shall continue in force up to the time fixed for its final performance. A contract thus kept alive exists for the benefit of both parties. The party who refuses to regard it as terminated by the breach remains liable to all his obligations and liabilities under it. *Frost v. Knight*, L. R. 7 Exch. 111; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. 255; *Johnstone v. Milling*, L. R. 16 Q. B. D. 460; *Lake Shore & Michigan South-*

ern Railway Co. v. Richards, 152 Ill. 59, 80, 38 N. E. 773, 30 L. R. A. 33; Boehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

This doctrine also has its exceptions, none of which is relevant here. The action of Seligstein left the defendant free to continue as it did in the performance of the contract. The absence of notice to or knowledge of the defendant that Seligstein had assigned the contract does not affect the rights of the parties as presented to us. Seligstein did not violate a legal obligation or duty in keeping it unknown to the defendant.

[7] By the terms of the contract the right of the defendant to manufacture and sell the boxes and its obligation to pay the rated or minimum royalty were conditioned upon the agreements of Seligstein and his performance of them. Seligstein's action gave it the option to cease performance and recover damages. It did not give it the option to manufacture and sell, and not pay the royalties. It manufactured and sold, and thus nullified the conditional quality of Seligstein's promises. Having kept alive the contract and secured the results, it cannot maintain that it is not subject to its obligations and liabilities, for the reason that Seligstein had renounced it. Its remedy is the recovery, in counterclaim or action, of the damages, if any, Seligstein's action or nonperformance caused it.

[8] The assignment transferred to the plaintiff the cause of action and constituted it the real party in interest. Seligstein assigned to the plaintiff all of his "right, title, and interest in, to, and under" the contract. The contract did not, in terms, forbid the assignment. The fact that the promises of the defendant ran to Seligstein, and not to him and his assigns, is indecisive of the assignability of the contract. The general rule now prevailing (as the successor of the archaic view that a contract created strictly personal obligations between the parties and non-assignability was a logical attribute), that any property right, not necessarily personal, is assignable, is overcome only by agreement of the contracting parties or a principle of law or public policy. New York Bank Note Co. v. Hamilton Bank Note E. & P. Co., 180

N. Y. 280, 73 N. E. 48; Smith v. Craig, 211 N. Y. 456, 105 N. E. 798, Ann. Cas. 1915B, 937; Quinn v. Whitney, 204 N. Y. 363, 97 N. E. 724. In this jurisdiction the statute, in effect, so provides. Code of Civil Procedure, §§ 1909, 1910. Seligstein's disqualification from a performance of the contract, consequent upon the assignment by him of the letters patent, casts serious doubt upon the legality, as to the defendant, of the assignment of the letters patent. Devlin v. Mayor, etc., of New York, 63 N. Y. 8; Tolhurst v. Associated Portland Cement Manufacturers, Limited, [1902] 2 K. B. 660; New England Iron Co. v. Gilbert Elevated R. R. Co., 91 N. Y. 153.

There is not, however, cause for impeaching the assignment by Seligstein of his right and interest under the contract in the fact that it and the letters patent were assigned to the plaintiff by the same instrument. American Lithographic Co. v. Ziegler, 216 Mass. 287, 103 N. E. 909. The action of the plaintiff is based upon the contract and the assignment relating to it alone. The contract was not purely personal. Its subject did not involve the personal relation, integrity, or skill of Seligstein. In case he, owning the patent, had died during the performance, his executor or administrator could have performed. The assignment did not absolve him from its obligations. Resort could still be made to him for the stipulated protection or damages for a breach. There is not a reason for holding the assignment unlawful or inoperative. Devlin v. Mayor, etc., of New York, 63 N. Y. 8; Citizens' Loan Ass'n v. Boston & Maine R. R. Co., 196 Mass. 528, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365; Knevals v. Blauvelt, 82 Me. 458, 19 Atl. 818; Hawley v. Bristol, 39 Conn. 26.

The judgment of the Appellate Division should be reversed, and the judgment of the Appellate Term affirmed, with costs in this court and Appellate Division.

HISCOCK, C. J., and CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

Judgment reversed, etc.

(233 Mass. 314)

PRATT & FORREST CO. v. STRAND
REALTY CO. et al.

WILSON et al. v. SAME.

(Supreme Judicial Court of Massachusetts.
Middlesex. June 26, 1919.)1. EVIDENCE \S 21 — JUDICIAL NOTICE —
WRITTEN CONTRACTS.

It is matter of common knowledge that written construction contracts commonly fix the date for their completion.

2. MECHANICS' LIENS \S 142 — NOTICE —
STATEMENT OF COMPLETION DATE OF MAIN
CONTRACT.

Under the Mechanic's Lien Law, \S 2 and 3, as amended by St. 1916, c. 306, \S 1, 2, and sections 7, 8, and 9, substantial accuracy in the statement of the date fixed by the principal contract for the completion of the work to be performed under it is essential to a valid notice of mechanic's lien filed in the registry of deeds.

3. MECHANICS' LIENS \S 142 — NOTICE — DATE
OF COMPLETION OF CONTRACT.

Notice of lien filed in the registry of deeds by the principal contractor specifying April 1st as the date for completion of the work held not a compliance with St. 1915, c. 292, \S 2, 3, as amended by St. 1916, c. 306, \S 1, 2, and sections 7, 8, and 9, the date having been fixed by the written contract to be March 15th, and the time not having been extended in accordance with its provisions.

Case Reserved and Report from Superior Court, Middlesex County.

Suits in equity by the Pratt & Forrest Company and by Erwin A. Wilson and others against the Strand Realty Company and others. On reservation and report to the Supreme Judicial Court. Bills dismissed.

Qua, Howard & Rogers, of Lowell (Albert S. Howard and Melvin G. Rogers, both of Lowell), for complainants.

Stoneman, Gould & Stoneman, of Boston (David Stoneman and Charles S. Hill, both of Boston, and Elijah Adlow, of Roxbury), for defendants.

RUGG, C. J. These are suits in equity to enforce a lien upon the interest of the Strand Realty Company in land in Lowell brought under St. 1915, c. 292, \S 4, as amended by St. 1916, c. 306, \S 3. These statutes make a radical change in the law of mechanics' and other liens upon real estate. Section 1 of the new statute gives a lien to those who labor. The subsequent sections relate more particularly to contractors and subcontractors who furnish either labor or material or both.

It is provided by St. 1915, c. 292, \S 2, as amended by St. 1916, c. 306, \S 1, that any person who has entered into a written contract with the owner for the erection, alteration, repair or removal of a building upon land, or

for furnishing material therefor, or who has made a subcontract respecting the same and who therefore is entitled to enforce a lien under the act, may file in the registry of deeds for the county or district where the land lies a notice giving the date of the contract between the owner and the contractor, a description of the land, a brief statement of what is to be done under the contract, and the date on or before which "said contract is to be completed." A further provision is that—

"A notice of any extension of such contract, stating the date to which it is extended, shall also be filed or recorded in the registry prior to the date stated in the notice of a contract for the completion thereof."

By section 3, as amended by St. 1916, c. 306, \S 2, it is provided that after the required notice has been filed or recorded, any person who subsequently "shall . . . furnish labor or material, or perform labor, under a contract with a contractor or" subcontractor, may enforce a lien therefor on the premises "for any labor performed, or labor or material furnished, subsequent to the filing or recording of said notice and prior to the date of the termination of said contract as stated in said notice or notices." By section 7 of said chapter 292:

"The lien provided for by section two and . . . by section three shall be dissolved unless the contractor, or some person claiming by, through or under him shall, within thirty days after the date on which the principal contract is to be performed," file a statement of his account.

It is provided by section 8 that the lien also shall be dissolved unless a bill in equity to enforce it is filed within 60 days after the filing of the statement, thus referring also to the date for the completion of the principal contract. On the back of the bond to prevent the attachment of a lien for labor, and standing in place of the lien as security, as set forth in section 9, must appear a certificate signed by the principal on the bond, giving, together with other information, the date on which the work under the principal contract is to be completed.

It is manifest from these provisions of the statute that the date of the completion of the principal contract, at all events, so far as fixed by its terms, must be stated in the notice and is an essential part of it. It is provided in section 8 of said chapter 292 that—

"The validity of the lien shall not be affected by an inaccuracy in the description of the property to which it attaches, if the description is sufficient to identify the property, or by an inaccuracy in stating the amount due for labor or materials unless it is shown that the person filing the statement has willfully and knowingly claimed more than is due to him."

There is no such provision respecting inaccuracy in stating the date for the completion of the principal contract.

[1] Sections 2 and 8 of the act relate to written contracts alone. It is matter of common knowledge that such contracts commonly fix the date for their completion.

[2] The irresistible effect of all these provisions is that substantial accuracy in the statement of the date fixed by the principal contract for the completion of the work to be performed under it is essential to a valid notice. This results inevitably from the absolute requirement for the statement of such date in the notice, from the fact that that date is the point of time from which run the several statutory limitations of the act, and from the provision that certain inaccuracies, among which a mistake in this date is not included, shall not affect the validity of the lien.

This conclusion is confirmed by comparison of the pre-existing state of the law as to liens with the changes wrought by said chapter 292. Under the previous lien law there was no provision whereby the record in the registry of deeds disclosed before or at the time of the attachment of a lien the existence of a lien or the fact that one might be claimed. There was no requirement for the record of any facts respecting a building contract, or any information as to its date, or the beginning or ending of work under it before the lien should come into existence. One plain object of the present statute was to require the placing upon record in the registry of deeds of certain information, for the benefit of prospective purchasers of land and other interested persons, touching the incumbrances created or likely to be created by liens, including the time limit within which the furnishing of material and labor under written contracts must be performed. Accuracy in this respect may be thought to be essential for the protection of laborers and subcontractors as well as others who may have occasion to depend upon the record. Whatever may have been the reason of the statute, its terms are clear and are not open to misapprehension as to their meaning.

A lien upon real estate for labor or material performed and furnished thereon is wholly the creature of statute. No such lien exists except as provided by statute. The terms of the statute must be followed in order that such lien may be established.

In analogous cases compliance with the statutory requirement for notice has been held to be a condition precedent to the existence of a cause of action. For example, injuries caused by snow or ice (*Baird v. Baptist Society*, 208 Mass. 29, 94 N. E. 296; *O'Neill v. Squire*, 230 Mass. 294, 119 N. E. 797); injuries caused by defects in highways (*Nash v. South Hadley*, 145 Mass. 106, 13 N. E. 376; *Driscoll v. Fall River*, 163 Mass. 106, 39 N. E. 1003; *Goodwin v. Fall River*, 228 Mass. 529,

117 N. E. 796); injuries within the scope of the employers' liability act (*Grebenstein v. Stone & Webster Engineering Co.*, 209 Mass. 196, 95 N. E. 503; *Harding v. Lynn & Boston R. R.*, 172 Mass. 415, 52 N. E. 535). See, also, in this connection, as to requirement for written notice of filing exceptions, *Chertok v. Dix*, 222 Mass. 226, 110 N. E. 272, and of entry of appeal from decree of probate court, *O'Neill v. O'Neill*, 229 Mass. 503, 118 N. E. 895. In the absence of some provision saving the validity of imperfect notices, there must be compliance with the specified requisites. *Bowes v. Boston*, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365; *Hatch v. U. S. Casualty Co.*, 197 Mass. 101, 83 N. E. 398, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290; *Boruszowski v. Middlesex Mut. Assur. Co.*, 186 Mass. 589, 72 N. E. 250.

The result is that, where it is sought to maintain a lien under the present statutes for labor and material performed or furnished under or by virtue of a written contract, either by a principal contractor or by a subcontractor, there must be filed in the registry of deeds for the county or district where the land is located, by some person entitled to maintain the lien, a written notice stating amongst other matters the date when the contract is to be completed.

The relevant facts in the case at bar are that the Strand Realty Company entered into a contract in writing under date of September 27, 1916, with A. B. Beal, whereby the latter, called the contractor, agreed to erect a building upon its land. That contract contained a provision in these words:

"The contractor shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit, the fifteenth day of March, nineteen hundred and seventeen. It is understood and agreed that the time of completion of work comprehended in this contract is the essence of this agreement."

After a clause requiring the payment of liquidated damages to the Strand Realty Company by the contractor for delay after March 15, 1917, and of bonus by the Strand Company to the contractor for completing the work before that day, follow these words:

"Except that in the event the contractor shall be entitled to one hundred eight (108) full working days for the completion of the entire building in accordance with the specifications hereinafter referred to, Saturday not being figured as a working day; and if the said contractor does not have said number of days, he shall be entitled to such extension beyond March 15, 1917, as shall give him his said number of days as above provided; but in no event shall the same be extended beyond April 1, 1917, in which case said penalty shall only apply to such time as shall extend beyond said aforesaid number of days, including duly authorized extensions. What shall constitute a full working day shall be determined by the architects herein named, whose decision shall be final. No

fraction of less than half a day shall be considered in determining the time to which the said contractor is entitled for said work. The contractor is to make a daily report to the architects as to whether the preceding day was a full working day or not, and if any question arises as to whether any day should be considered as a suitable working day, or if the contractor fails to make his daily report, the architects are to be the sole judges as to whether the day in question should be considered as a full working day or not."

[3] On October 19, 1916, the contractor filed a notice otherwise sufficient, in which it was stated:

"Said contract is to be completed on or before April 1, 1917."

The plaintiffs are subcontractors under the original contract with Beal. They depend for the validity of their liens upon the sufficiency of this notice filed by the contractor. There was no evidence tending to show that at any time the architects made any determination oral or written as to the number of working days beyond March 15, 1917, to which the contractor was entitled, within which to complete the contract. It is expressly stated in the report that there was never any written extension of the contract and no express oral extension to any date certain. Upon these facts the notice stating April 1, 1917, as the date on which the contract was to be completed was not a compliance with the statute. The date was fixed by the written contract with perfect clearness to be March 15, 1917. There might be extension beyond that date in accordance with the terms of the contract until a time not later than April 1st, but that extension could be made only upon the conditions therein set forth with which there was no compliance. There is no evidence that when the notice was recorded on October 19, 1916, anything had occurred to warrant the conclusion that there would be any ground for extension of the time for the completion of the contract to April 1st. No such extension then had been granted expressly or impliedly. Whether any such extension would be given or agreed upon or equitably required was then wholly prophetic. There was no foundation whatever for the notion that April 1, 1917, was the date, except that it was the latest date on which the contract by any possibility could be completed under its terms as written. It was not the date fixed by the contract, and April 1st as a date for completion could only become operative by the occurrence of subsequent events.

The incorrect statement of the date for the completion of the contract was fatal to the creation of the lien. Hence cases like *Rockwood v. Walcott*, 8 Allen, 458, 462, are not in point.

It may be that cases may arise where the landowner may be estopped to deny an exten-

sion of time. But here the initial or original notice was fatally defective. The landowner does not appear upon this record to have misled by words, silence or conduct either of the plaintiffs upon that point. Acceptance of material by the landowner after the original contractor had become incapable of completing the contract and long after March 15th, whatever other effect it may have, is not an estoppel to object to the sufficiency of the original notice recorded long before that time. The principle, upon which *D'Almeida v. B. & M. R. R.*, 224 Mass. 452, 113 N. E. 187, and the numerous cases there cited was decided, does not aid the plaintiffs upon these facts.

This appears to be a hard case. We can, however, only interpret and apply the statute as we find it. We cannot recast it. Let the entry be in each case:

Bill dismissed without costs.

(233 Mass. 301)

PIERCE v. WORCESTER CONSOL. ST.
RY. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. June 24, 1919.)

1. STREET RAILROADS ⇨117(5)—INJURIES ON
TRACK—NEGLIGENCE OF CONDUCTOR—QUES-
TION FOR JURY.

In an action for injuries to a pedestrian, struck by a street car, question of negligence on the part of the conductor *held* for the jury under the evidence.

2. STREET RAILROADS ⇨114(5)—INJURIES ON
TRACK—NEGLIGENCE OF CONDUCTOR—SUF-
FICIENCY OF EVIDENCE.

In an action for injuries to a pedestrian, struck by a street car, finding that the negligence of the conductor, in failing to comply with a rule requiring him to signal a stop when the trolley left the wire, contributed to plaintiff's injuries, *held* justified by the evidence.

Exceptions from Superior Court, Worcester County; Jabez Fox, Judge.

Action by Burton A. Pierce against the Worcester Consolidated Street Railway Company. Verdict for plaintiff, and defendant excepts. Exception overruled.

Drury & Walker, of Worcester, for plaintiff.

Charles C. Milton, John M. Thayer, and Francis H. Dewey, all of Worcester, for defendant.

CARROLL, J. The plaintiff, while standing on West Boylston street near New Bond street in the city of Worcester, waiting for a freight train to cross New Bond street, was struck by one of the defendant's cars and injured. The jury found for the plaintiff. It was not disputed there was evidence for the jury of the plaintiff's due care and of the

negligence of the motorman. The defendant asked the court to rule that there was no evidence of the conductor's negligence; and the exception to the refusal to grant this request is the only question open on the record.

[1] The jury could have found that the plaintiff, a workman in the night shift of the Norton Company, was returning from lunch about 12:30 a. m.; that he crossed West Boylston street and stood with his hand resting on the northerly side of a 12-inch pole about 4 feet and 3 inches from the westerly rail of the defendant's track; that the freight train was proceeding upgrade, making considerable noise; that the defendant's car was going in a southerly direction "at a very fast rate of speed"; that 100 feet north of New Bond street the trolley came off, the lights went out, and were not turned on until after the plaintiff was injured; that the speed of the car was not lessened before the plaintiff was struck, and when the car was stopped its rear end was 250 feet away from the place of the accident; that no "whistle, gong, shout or warning of any kind" was given by the defendant's employes.

From the motorman's evidence it might be found that he saw the plaintiff before he was injured; that the conductor came forward and "said something" (but it did not appear what he said) and "was just getting up on the platform." The conductor testified that at a point 600 or 700 feet north of New Bond street he started down the running board to the front of the car to get ready to "run the railroad crossing" south of New Bond street; that as he was stepping up off the running board, he noticed the trolley was off and started for the rear of the car to put it on; that he observed the people "standing on the south side of the crossing," when he was "at the front end of the car." There was evidence that 35 feet north of New Bond street there was a "flat curve to the left in the southerly bound track." Rule 313 of the defendant company, namely:

"When approaching switches, frogs or sharp curves, power must be shut off 100 feet in advance, speed of car reduced, and car allowed to drift slowly over the same"

—was in evidence, as well as rule 357, namely:

"*Trolley Pole, Leaving Wire.*—Should the trolley leave the wire, the conductor must at once signal the motorman to stop, and pull down the trolley. After the trolley is fairly on the wire, he must ring two bells for the motorman to start, first looking around and through the car to see if any persons are boarding or leaving same. See that passengers keep their hands off the trolley rope."

"*Trolley Catchers.*—Conductors are responsible for trolley catchers and retrievers, and must see that same are securely fastened in place. When changing ends they must see that catch-

ers do not slip, so as to cause damage to glass or other part of the car."

On these facts, it cannot be said that as matter of law there was no evidence of the conductor's negligence. There was some evidence for the jury to consider, and the defendant's request was refused rightly.

The jury could say that the conductor knew the plaintiff was in a place of danger; that the plaintiff's attention was probably directed toward the passing freight train; that in the absence of light on the street car he might be ignorant of its approach, and the conductor should in some way have warned him of his danger or signaled the motorman to stop the car; especially when he knew the car was moving at a high rate of speed, without lights, and when no signal from the gong or whistle was given.

[2] Under rule 357 the conductor was required at once to signal the motorman to stop; and it could have been found that by failing to give this signal when the trolley left the wire, and by neglecting to connect the trolley with the wire, leaving the car in darkness, he failed to comply with the rule, and that this neglect contributed to the plaintiff's injuries. See *Stevens v. Boston Elevated Railway*, 184 Mass. 476, 69 N. E. 338; *Partelow v. Newton & Boston St. Ry.*, 196 Mass. 24, 30, 81 N. E. 894; *Olund v. Worcester Cons. St. Ry.*, 206 Mass. 544, 546, 547, 92 N. E. 720; *Leavitt v. Boston Elev. Ry.*, 222 Mass. 346, 347, 110 N. E. 961.

Exception overruled.

(223 Mass. 216)

HIPPODROME AMUSEMENT CO. v. WIT.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 23, 1919.)

1. APPEAL AND ERROR \Leftrightarrow 695(1)—REVIEW—FINDINGS—ABSENCE OF EVIDENCE.

Where the evidence is not reported, findings of the superior court on questions of fact cannot be disturbed.

2. LANDLORD AND TENANT \Leftrightarrow 200(1)—ASCERTAINMENT OF RENT—PERCENTAGE OF ASSESSMENT—REFUSAL TO ASSESS PARCEL SEPARATELY.

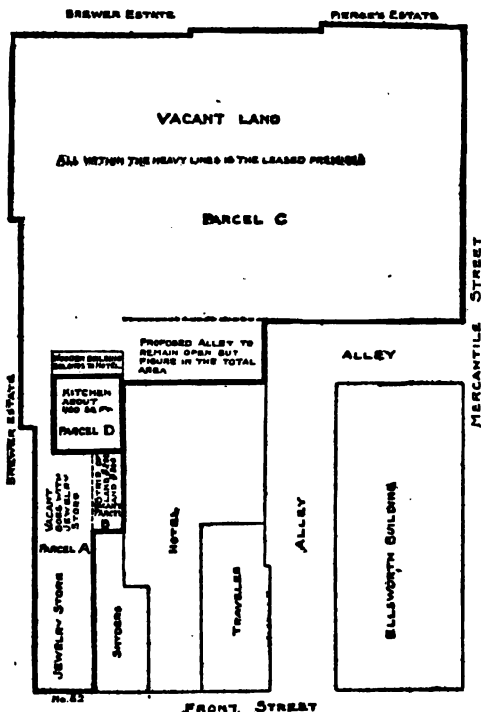
Where an amusement company leased premises divided into four tracts, the rent reserved for parcels A and B being a fixed yearly amount based on a graduated scale during the term, while for parcels C and D the lessee covenanted to pay 9 per cent. of the valuation of each parcel as assessed by the proper authorities of the city, etc., and the assessors subsequently declined to assess the parcels separately, because the owners of the reversion as well as the lessor declined to acquiesce in any division of the premises, the lessee company, having voluntarily executed the lease, not under misrepresentations, can have no relief by suit to compel the

lessor to consent to a special assessment, but must respond to proportionate valuation of entire tract.

Report from Superior Court, Suffolk County; Charles F. Jenney, Judge.

Suit by the Hippodrome Amusement Company against Ignatz Wit, resulting in finding of facts and order for decree for respondent. On report to the Supreme Judicial Court. Decree in accordance with the report dismissing the bill ordered to be entered.

The sketch plan referred to in the opinion here follows:



Frank N. Nay, Max Levenson, and Joseph M. Levenson, all of Boston, for plaintiff.
A. K. Cohen, of Boston, for defendant.

BRALEY, J. While the lease dated March 23, 1914, does not in terms refer to the sketch plan, the bill alleges and the answer admits that the plan was followed in the description of the leasehold and the apportionment of the rent. It is apparent from the plan, on which the areas do not appear, that the demised premises comprise an entire tract divided into contiguous parcels which are respectively designated as A, B, D and C, of which only parcel A abutted on a public way. The trial judge finds that at the execution of the lease this parcel which is referred to by him and by counsel as "front land" had a value of about \$30 a square foot, while parcels C and D, or the "rear land," were each worth only \$5 a square foot.

But he also states that while the parties during the negotiations preceding the lease knew that the front land was of much greater value than the rear land, there was no evidence before him showing any estimate of valuation on which either party acted. The inquiry would be of little moment if it were not for the provisions of the lease which, instead of naming a round sum as a yearly rental for the entire leasehold, treats the parcels as if each parcel was a separate demise. The rent reserved for parcels A and B concerning which there is no dispute, is a fixed yearly amount based on a graduated scale during the term and the lessor pays the taxes on lot A. But for parcel C and for parcel D subsequently acquired by the plaintiff as provided in the lease, the lessee covenanted to pay a yearly rental equal to 9 per cent. of the valuation of the parcel as assessed by the proper authorities of the city, "or those having the power in the premises to value said land for the purposes of taxation, such percentage to be based on such tax valuation as of April 1, in each year for the year ending the following March 31, and if the assessment date shall hereafter be changed then the rental year shall begin as of such assessment year." While parcel C at the date of the lease was vacant land, the plaintiff, as contemplated by the lease, has erected thereon a building to be used by it as a theater, access to which by the public is over parcel A in connection with parcels B and D, and at the termination of the lease the building is to become the property of the lessor.

It appears from the record that the entire tract held by the defendant as the lessee of one Leland contains 18,122 square feet, while the premises demised to the plaintiff exclusive of lot A comprise 8,091 square feet of which lot D has an area of 360 and lot C an area of 7,607 square feet.

[1] The defendant demands rental for lots C and D on the basis of the taxable valuation of \$12 per square foot, at which as a uniform rate the judge found that the land as a whole had been assessed to the defendant prior to the plaintiff's lease and that "the rate was a reasonable assessment per square foot for the entire area as a large part, nearly two-thirds, of the total area was back land." The evidence is not reported, and this finding as well as the further finding that the total rental of lots C and D from the beginning of the term to and including March 31, 1917, computed at 9 per cent. on the valuation of the land as assessed prior to the lease at \$12 a square foot, amounts to \$42,994.12, of which sum the plaintiff has paid \$36,469.13, leaving a balance due when the bill was filed of \$6,533.80, cannot be disturbed. The bill, however, alleges and the plaintiff contends that in order to determine the fair and proper rental it is necessary

that the assessors should make a separate assessment of lots C and D with the buildings thereon, and it is found that although so requested by the plaintiff, the assessors have declined to make a separate assessment because the owners of the reversion as well as the lessor decline to acquiesce in any division of the premises.

[2] The plaintiff being confronted with this situation asks that the defendant may be decreed to consent to a "special assessment being made of * * * lots C and D, * * *" or that the court "shall determine by special assessment or otherwise the fair assessable value * * * from the date of the lease April 1, 1917, the date of the next assessment by the assessors. * * *". If the plaintiff under the wording of the covenant is within the grip of a bargain which it now maintains is extremely burdensome and unduly advantageous to the lessee, the hardship arises as shown by the record from its voluntary and deliberate act in executing the lease, and not from any misrepresentation or fraudulent conduct of the defendant.

It is plain that the rental is to be ascertained on the valuation of the leasehold as a whole or in parts which may change from year to year as the assessors in the performance of their duties as public officers may in their own judgment determine. *Wall v. Hinds*, 4 Gray, 256, 269, 64 Am. Dec. 64. And finding no error in the computation previously stated of the amount due from the plaintiff to the defendant, a majority of the court are of opinion that a decree in accordance with the terms of the report should be entered dismissing the bill.

Ordered accordingly.

(233 Mass. 297)

PEROTTI'S CASE.

(Supreme Judicial Court of Massachusetts.
Hampden. June 25, 1919.)

1. MASTER AND SERVANT ~~§~~417(4)—WORKMEN'S COMPENSATION ACT—DEPOSITIONS—REVIEW—PRESENTATION OF QUESTIONS.

Where the claimant for compensation under the Workmen's Compensation Act, though attention was called to the subject of depositions, chose to go to hearing before the single member of the Industrial Accident Board without asking for the taking of depositions, the question whether there was an unreasonable refusal by the board to make request for the taking of depositions, under part 3, § 3, of the act, as amended by St. 1915, c. 275, is not presented.

2. MASTER AND SERVANT ~~§~~406—WORKMEN'S COMPENSATION ACT—MOTIONS TO TAKE DEPOSITIONS—AVERMENTS.

Averments in the motions to take depositions in proceedings under the Workmen's Com-

pensation Act for death of a servant are not evidence, and cannot be taken as true.

3. MASTER AND SERVANT ~~§~~388—WORKMEN'S COMPENSATION ACT—PRESUMPTION OF DEPENDENCY—WIDOW OF FOREIGN SUBJECT.

An alien's widow, residing in a foreign country, is not entitled to the benefit of the conclusive presumption of dependency established by the Workmen's Compensation Act, but the extent of her dependency on his wages is a question of fact.

4. MASTER AND SERVANT ~~§~~417(7)—WORKMEN'S COMPENSATION ACT—DECISION OF BOARD ON QUESTIONS OF FACT—REVIEW.

The decision of the Industrial Accident Board is final on questions of fact, as the extent of dependency, where no presumption applies, and is not open to revision.

Appeal from Superior Court, Hampden County.

Proceeding under the Workmen's Compensation Act by Angela Perotti for compensation for the death of Angelo Perotti, the employé, opposed by John Schena, the employer, and the Employers' Liability Assurance Corporation. Compensation was awarded, the award affirmed by the superior court, and from its decree the claimant appeals. Decree affirmed.

Silvio Martinelli, of Springfield, for appellant.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellee.

RUGG, C. J. This is an appeal from a decree of the superior court entered in accordance with the findings and decision of the Industrial Accident Board, affirming and adopting those of the single member. It is conceded that the employé, a subject of Italy, received fatal injuries in the course and arising out of his employment by a subscriber under the act. This proceeding is brought by his widow, a resident of Italy.

At the hearing before the Industrial Accident Board a motion was made in behalf of the widow that depositions of witnesses be taken in Italy. This was denied. The reasons are not stated, but in that connection it is stated that at the hearing before the single member the insured objected that the testimony of the claimant should be taken by depositions. The single member overruled the objection and proceeded with the hearing. A motion was made in the superior court which, although quite informal, is treated as in substance a motion to recommit to the Industrial Accident Board in order that depositions of witnesses in Italy might be taken.

[1] It is provided by St. 1915, c. 275, amending part 3, § 3, c. 751, St. 1911, as theretofore amended, that "upon the written

request of the board or of any member thereof," filed with the clerk of the superior court, commission to take depositions shall issue. The natural inference from the words of this statute is that ordinarily the decision whether such depositions ought to issue or not rests with the board or any member of it. See *Derinza's Case*, 229 Mass. 435, 438, 118 N. E. 942. It is not necessary to determine whether under any circumstances an unreasonable refusal by the board to make such request is reviewable. That question is not presented on this record. The claimant, although attention was called to the subject of depositions, chose to go to hearing before the single member without asking for the taking of depositions.

[2] There is nothing on the record except bald denials of the motions for the taking of depositions. The averments in the motions are not evidence, nor can they be taken as true. There is nothing to indicate that there was any real reason in their support or that they were not denied rightly.

[3,4] The findings of the single member and of the board on review as to the extent of dependency involve no question of law. Manifestly the widow, under the circumstances disclosed, was not entitled to the benefit of the conclusive presumption of dependency established by the act. *Nelson's Case*, 217 Mass. 467, 105 N. E. 357. The extent of her dependency upon the wages of the deceased employé was a question of fact. *Gorski's Case*, 227 Mass. 456, 460, 116 N. E. 811. No ruling of law appears to have been made and none was requested. The decision of the board is final on questions of fact and not open to revision. *Pass' Case*, 232 Mass. 515, 122 N. E. 642, and cases there collected.

Decree affirmed.

(233 Mass. 304)

STEVENS v. YOUNG et al.

(Supreme Judicial Court of Massachusetts. Essex. June 25, 1919.)

1. ESTOPPEL §22(2) — RECITALS IN DEED — EXTINGUISHMENT OF AVENUE.

Though the description in a petition for registration of title to land consolidates the descriptions as if all of petitioner's lots constituted an entire tract, never divided as shown by the plan recorded by petitioner's predecessor, petitioner, claiming under such predecessor, being bound by the recitals in her deed, is estopped on her own title from contending that so much of an avenue as lies within the description of the deed has been extinguished as to other lot owners who have appurtenant rights to use the avenue.

2. ESTOPPEL §22(2) — DEEDS — PLAN SHOWING STREETS.

The rule that, where a sale of lots is by a plan incorporated by inference in the grant,

the grantee is estopped to deny the location of the streets and avenues shown does not control when it appears from the deed and attendant circumstances the parties did not impliedly intend the grant to include all of the proposed ways.

3. DEEDS §98 — CONSTRUCTION — INTENTION OF PARTIES.

The intention of the parties to a sale of lots in so far as consistent with legal rules of construction of the deed governs.

4. COVENANTS §17 — ABANDONMENT OF PLAT — RIGHTS OF GRANTEE.

Where the owner of land filed a plan subdividing it into lots, which plan was recorded, but the purpose of a subsequent conveyance was not to follow, but to abandon the layout of the plan, the grantee acquired no right of passage in or over an avenue shown on the plan from his easterly line to another avenue shown thereon.

Exceptions from Land Court, Essex County; C. T. Davis, Judge.

Proceedings for registration of title to land by Lydia M. Stevens against Ebenezer G. Young and others. Decree for petitioner, and respondent Young excepts. Exceptions overruled.

This was a proceeding to register in the land court a certain parcel of land described in the petition as follows:

"A certain parcel of land with the buildings thereon situate in said Swampscott, bounded and described as follows: Easterly by Humphrey street 138.39 feet; northerly by Crossman avenue 402.47 feet; westerly by land now or formerly of James L. Taylor and George H. Lampard 135.75 feet; and southerly by land now or formerly of Ebenezer G. Young 431.56 feet, containing 56,610 square feet of land, and be said contents and any or all of said measurements more or less."

The above-described land is shown on a plan filed with said petition, and all boundary lines are claimed to be located on the ground as shown on said plan.

Said parcel is approximately rectangular in shape, and comprises lots 13, 14, 15, 16, 17, and 18, as shown on plan of land of S. J. Crossman, recorded in Essex So. Dist. Reg. of Deeds, Book 1568, page 600. See Exhibit A. It also includes a parcel of land lying between 16 and 17, marked "Locust avenue" on said plan. The respondent Young is the owner of lots 30 to 40, inclusive, on said plan.

The petitioner seeks to register her title to that part of Locust avenue between lots 16 and 17 without its being subject to any right of way for the benefit of the respondent Young or his land.

In 1889 one Crossman acquired title to a nine-acre tract, which included with others both the petitioner's and the respondent's

land. The first conveyance made out of this original tract was made in 1900, when a block of four lots, being lots 13, 14, 15, and 16 on said plan, were conveyed to the petitioner's predecessor in title. This parcel was described as bounding by Locust avenue. The next conveyance was in 1906 to the immediate predecessor in title of the respondent, and included lots 30 and 40, inclusive, on said plan, and carefully described the parcel by reference to the recorded plan. It, however, described it as a solid tract without any reference to its lot numbers on said plan. On its northerly boundary it is described as "across land marked 'Locust avenue' on said plan."

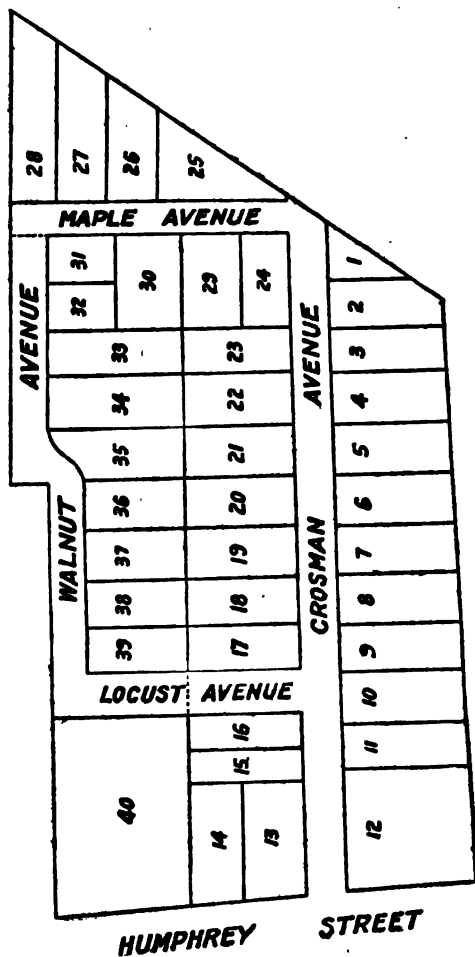
There is no reference other than that above quoted, to Locust avenue. The respondent's predecessor was given by said deed a right to use Maple and Crossman avenues as shown on said plan for street purposes in common with others, but there was no mention of any rights in Locust avenue. A copy of said deed marked "Exhibit C" is annexed to and made a part of this bill of exceptions. In April, 1912, all the remaining lots were conveyed by reference to said plan, the lots on the westerly side of Locust avenue opposite those conveyed in 1900 being described as bounding easterly on Locust avenue. This deed contained the clause "together with the right of way in and over the streets or avenues shown on said plan as if the same were public highways." Of the lots so conveyed the petitioner in May, 1912, acquired lots 17 and 18 on said plan, which were described as bounding easterly by Locust avenue, and the deed contains the words, "together with a right of way in common with others so far as we are enabled to grant the same in and over the streets and avenues shown on said plan, as if the same were public highways." A copy of said deed marked "Exhibit D" is annexed to and made a part of this bill of exceptions. The two lots thus conveyed were also made subject to certain restrictions, among them "that no part of any building shall be erected or placed within fifteen feet of the line of said Crossman or Locust avenues." The petitioner's predecessors therefore obtained title subject to the restrictions and conditions in their deed to the land on both sides of Locust avenue.

The principal question involved in the registration is the right of the respondent to use the land marked "Locust avenue" as a right of way for the benefit of his land. The case was heard upon the petition and answer and the record title as shown by the examiner's report, and upon the stipulation that any party might treat as in evidence anything appearing in the examiner's report, or upon the docket of the court. So much of the evidence as is material to the rights of the respondent in the locus is embodied in

this bill. The respondent has acquired all the rights of his predecessor in title.

A copy of the plan above referred to is incorporated in and made a part of this bill of exceptions, and is marked "Exhibit A." The deed by which the petitioner acquired lots 13, 14, 15, and 16 on said plan is also incorporated in and made a part of this bill of exceptions, and is hereto annexed, marked "Exhibit B." The deed by which the respondent acquired his land is also incorporated in and made a part of this bill of exceptions, and annexed hereto, marked "Exhibit E." The decision of the land court is incorporated in and made a part of this bill of exceptions and is hereto annexed, marked "Exhibit F." The court held as appears from said decision that the respondent had no right in or over any of the way marked Locust avenue, and ordered that a decree issue, registering the title of the petitioners accordingly. To this ruling the respondent seasonably alleged an exception, and now prays that this bill of exceptions be allowed.

The plan or plat recorded by the predecessor in title of parties follows:



Trull & Wier and John M. O'Donoghue, all of Lowell, for petitioner.

Starr Parsons, H. Ashley Bowen, and Chas. D. C. Moore, all of Lynn, for respondent Ebenezer G. Young.

BRALEY, J. It appears that Samuel F. Crossman, having acquired the ownership of nine acres of land, caused a plan to be prepared dividing the tract into lots numbered consecutively from one to forty with proposed avenues or streets which connected with Humphrey street a public way. The plan was recorded in the registry of deeds, and by mesne conveyance the petitioner has become the owner of lots 13, 14, 15, 16, 17, and 18, while the respondent Young owns lots numbered 30 to 40, inclusive. By the first deed in 1900 Crossman conveyed to one Entwistle the petitioner's predecessor in title lots 13, 14, 15 and 16. The exact wording of the grant does not appear. We assume on the record that the description in the deed to the petitioner is the same as in the deed of Crossman to Entwistle. The premises are described by metes and bounds as one indivisible tract, giving the northwesterly boundary as "Locust street or avenue so called," after which follow the words, "Being lots 13, 14, 15 and 16 on a plan of land drawn for Samuel F. Crossman * * * and recorded with Essex County (South District) Deeds, Book 1468, page 600." By deed dated August 6, 1907, the respondent Young acquired title from one Linnihan to whom the land had been conveyed November 21, 1906. This deed also described the premises as one parcel, beginning "at the most westerly corner thereof at the point in the northeasterly boundary line of land * * * where the southeasterly side line of Maple avenue as shown on a plan of lots owned by S. F. Crossman * * * and recorded * * * would intersect said boundary line if continued in a straight line," and after giving the courses and distances the description is followed by this sentence, "Together with the right to use said Maple avenue and Crossman avenue as shown on said plan for street purposes in common with others." The petitioner May 22, 1912, gained title to lots 17 and 18 under a deed which describes the parcel as bounded "northeasterly by Crossman avenue one hundred and twenty feet, southeasterly by Locust avenue one hundred thirty-five & $\frac{75}{100}$ feet; southwesterly by lots 38 and 39 on a plan of land hereinafter mentioned, one hundred and twenty feet, and northwesterly by lot 19 on said plan, one hundred thirty-five and $\frac{75}{100}$ feet, being lots numbered 17 and 18 on a plan of this and other lots * * * together with a right of way in common with others so far as we are enabled to grant the same in and over the streets and avenues shown on said plan as if the same were public highways. * * * Said premises

are conveyed subject to the following restrictions which shall remain in force for twenty years from the date hereof, viz.: No building shall be erected or placed on either of said lots costing less than three thousand dollars. Said premises shall be used for a dwelling only. No three tenement house or a house to be occupied by three families or any house known as a three tenement house shall be erected or placed on the granted premises, and no part of any building shall be erected or placed within fifteen feet of the line of said Crossman or Locust avenues except the steps may extend within said restricted space."

[1-4] While the description in the petition for registration consolidates the descriptions as if lots 13, 14, 15, 16, 17 and 18 constituted an entire tract which never had been divided as shown by the plan, the petitioner who claims under Samuel F. Crossman, being bound by the recitals in her deeds, is estopped on her own title from contending that so much of Locust avenue as lies within the description of the deed of May 12, 1912, has been extinguished as to other lot owners who have acquired appurtenant rights to use the avenue. Downey v. Hood, 203 Mass. 4, 10, 89 N. E. 24, and cases there cited. But this well settled rule where the sale is by a plan which by reference is incorporated in the grant does not control when it appears from the deed and the attendant circumstances that the parties did not impliedly intend the grant to include all of the proposed ways. Atty. Genl. v. Whitney, 187 Mass. 450, 455. The description in the deed under which the respondent claims undoubtedly conveys as if they were one parcel, not only lots 30 and 40, but also the fee in Walnut avenue and in the westerly half of Locust avenue. The fee having passed, the respondent, subject to the prior rights, if any, of other lot owners, could use those proposed ways for the benefit of his own estate as he might determine. The land, however, is conveyed as stated in the decision of the trial court "as a solid tract without any reference to the lot numbers on the plan," the northerly boundary being described as "running across land marked Locust avenue." And immediately following the description and constituting part of the grant are the words previously quoted, "together with the right to use said Maple and Crossman avenues as shown on said plan for street purposes in common with others." It is true, but quite beside the point, that no change appears of record in the plan as originally drafted. The parties, of course, could enter into any bargain they wished to make. The evidence warranted a finding that the purpose of this conveyance was not to follow but to abandon the layout of the plan and the purchase could be made under terms which, while passing the fee in Walnut ave-

nue and that part of Locust avenue, conferred no easement in the remainder of Locust avenue. The intention of the parties in so far as consistent with legal rules of construction governs. *Bott v. Burnell*, 11 Mass. 163, 167; *Allen v. Holton*, 20 Pick. 458; *Hobart v. Towle*, 220 Mass. 293, 107 N. E. 954; *Coolidge v. Dexter*, 129 Mass. 167; *Taft v. Emery*, 174 Mass. 332, 334, 54 N. E. 864. We are accordingly of opinion that the judge correctly ruled that the respondent's grant included only Maple and Crossman avenues, and that he had acquired no right of passage in or over Locust avenue from his easterly line to Crossman avenue. *Light v. Goddard*, 11 Allen, 5, 8; *Regan v. Boston Gas Light Co.*, 137 Mass. 37; *Pearson v. Allen*, 151 Mass. 79, 23 N. E. 731, 21 Am. St. Rep. 426.

Exceptions overruled.

(233 Mass. 223)

MORSE et al. v. STOBBER et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 23, 1919.)

1. VENDOR AND PURCHASER §130(2)—MARKETABLE TITLE—SHOWING TITLE DEHORS RECORD.

A title not good on the record may be shown by oral or other evidence outside the record to be marketable beyond any reasonable doubt.

2. COURTS §90(4)—CONSTRUCTION OF FEDERAL ACT BY STATE COURT—SUBSEQUENT ACCEPTANCE.

Construction of an Act of Congress by the Supreme Judicial Court in a prior case must be accepted as sound by the court, in the absence of a contrary decision by the Supreme Court of the United States.

3. ARMY AND NAVY §34 — MORTGAGES — FORECLOSURE—SOLDIERS AND SAILORS RELIEF ACT.

Under act of Congress approved March 8, 1918, Soldiers and Sailors Relief Act, § 302 (U. S. Comp. St. 1918, § 3078½ff), the safe course for the mortgagee of property in which a person in the military service of the United States owns any interest, legal or equitable, is to foreclose under the order of a court of equity, for it is only by pursuing such course that he gets a record title not open to attack under the act.

4. ARMY AND NAVY §34—MORTGAGE FORECLOSURE — SOLDIERS AND SAILORS RELIEF ACT—BURDEN OF PROOF.

A mortgagee who foreclosed under power of sale without an order of the court during the time specified in the act of Congress of March 8, 1918, Soldiers and Sailors Relief Act, § 302 (U. S. Comp. St. 1918, § 3078½ff), assumes a heavy burden of proof when he undertakes to enforce specific performance of his agreement to convey by good title the land so foreclosed, but it is not a burden of proof incapable as a matter of law of being sustained by showing

that in point of fact no person in the military service of the United States had an interest in the land covered by the mortgage.

5. ARMY AND NAVY §34—FORECLOSURE OF MORTGAGE — GOOD TITLE — QUESTION OF FACT.

In suit for specific performance of a contract to buy premises title to which was secured by plaintiffs as mortgagees through a mortgage foreclosure, the question whether a person in the military service of the United States had any interest in the premises, so that the foreclosure under power of sale and not by order of court was invalid as to such person under the act of Congress of March 8, 1918, Soldiers and Sailors Relief Act, § 302 (U. S. Comp. St. 1918, § 3078½ff), thus keeping plaintiffs from conveying good title, was one of fact and not of law.

Case Reserved from Supreme Judicial Court, Suffolk County.

Suit by Robert M. Morse and Augustus P. Loring, trustees under the will of Benjamin Adams, against William J. Stober and others. On reservation by a single justice of the Supreme Judicial Court for the determination of the full court. Case ordered to stand for hearing.

Charles S. Rackemann and John Noble, both of Boston, for plaintiffs.

John D. Graham and George A. Sawyer, both of Boston, for respondents.

RUGG, C. J. This is a suit in equity praying for the specific performance of an agreement to buy real estate. The question is whether the plaintiffs are able to convey "a good and clear title thereto free from all incumbrances" except certain taxes and party wall agreements. The pertinent facts are that the plaintiffs, being the holders of a first mortgage in the common form containing the statutory conditions and the statutory power of sale created by St. 1912, c. 502, made entry in due form to foreclose the mortgage on August 5, 1918, certificate whereof was seasonably recorded, and without order of court sold the premises in accordance with the power at public auction on September 4, 1918, all for breach of the condition of the mortgage, and became themselves the purchasers at the foreclosure sale. Deed in usual form was executed and recorded. Contract of sale was thereafter made between the plaintiffs and the defendants Holdsworth and Farrington. The latter refuse to carry out the contract and accept the deed on the ground that the foreclosure was not made in pursuance of an order of court as provided by section 302 (3), chapter 20, of act of Congress approved March 8, 1918 (40 U. S. Stats. at Large, 444 [U. S. Comp. St. 1918, § 3078½ff]), known as the Soldiers and Sailors Relief Act.

The affidavit of sale made and filed in

accordance with the power of sale set forth that the owner of the equity of redemption was not in the military service of the United States. Three persons, being all whose names appear of record as having had an interest in the premises in question since August 1915, a date antecedent to the entry of the United States into the great war, are joined as defendants and it is alleged that no persons other than these have any legal or equitable interest in the premises. The bill has been taken for confessed against one of these three defendants, and the other two have answered that they have never been in the military service of the United States and have no interest in the premises. The answer of the defendants Holdsworth and Farrington admits all the allegations of fact in the bill and that, according to their information and belief, no party interested in said premises was in the military service of the United States as defined in said act of Congress; but it avers that because the power of sale to foreclose the mortgage was not exercised under and by authority of a court as required by said act of Congress, the plaintiff cannot give a good and sufficient title to the premises and that therefore specific performance of the agreement ought not to be enforced.

[1] The meaning of a good and clear and sufficient title is settled in this commonwealth by repeated decisions. It was said by Knowlton, J., in *Conley v. Finn*, 171 Mass. 70, at 72, 50 N. E. 460, 461 (68 Am. St. Rep. 399), summarizing the effect of numerous earlier cases there collected:

"The general rule is, that, in order to maintain a suit for specific performance against a purchaser of real estate, the plaintiff must show that the title is good beyond a reasonable doubt. * * * But the mere possibility or suspicion of a defect is not enough to relieve a purchaser from liability under his contract. * * * In *First African Methodist Episcopal Society v. Brown*, 147 Mass. 296, 298 [17 N. E. 549], Mr. Justice Devens says of the doubt which will relieve a purchaser of real estate from his obligation specifically to perform his contract, that it 'must be reasonable, and such as would cause a prudent man to pause and hesitate before investing his money. It would be seldom that a case could occur where some state of facts might not be imagined which, if it existed, would defeat a title, when questions as to the validity of a title are settled beyond reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made. * * * It would be often practically impossible for a party to negative all objections which might be imagined, and which, if they existed, would defeat his title.'"

In *Close v. Martin*, 208 Mass. 237, at 239, 94 N. E. 388, 389, it was said:

"When the defendant insisted upon a title which the attorney could absolutely guarantee

never would cause him trouble, he asked for a better title than equity requires a purchaser to accept. A title which is good beyond a reasonable doubt is a title which equity requires a purchaser to take." *Foster, Hall & Adams Co. v. Sayles*, 213 Mass. 319, 321, 100 N. E. 644.

In the application of these principles it has been held that a defect in title which had been cured by disseisin might be found good and marketable (*Aroian v. Fairbanks*, 216 Mass. 215, 103 N. E. 629), and that the condition of a bond, secured by mortgage, although undischarged of record, had been fully performed (*Shanahan v. Chandler*, 218 Mass. 441, 105 N. E. 1002). A title not good on the record thus may be shown by oral or other evidence outside the record to be marketable beyond any reasonable doubt, so that specific performance of a contract for conveyance will be enforced in equity. The contract here in suit did not call for a title clear and perfect on the record of the registry of deeds. The rights of the parties to the suit now at bar must be determined according to these well-settled principles.

The act of Congress does not require in terms that all mortgages upon real estate be foreclosed under order of court. Grave constitutional questions might lie in the way of an act of such sweep. It does provide that "no sale under a power of sale" to enforce an obligation originating prior to the date of the approval of the act of Congress, "and secured by mortgage * * * upon real or personal property owned by a person in the military service [as defined in the act] at the commencement of the period of the military service and still so owned by him," "shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court." (U. S. Comp. St. 1918, § 3078½ ff.)

[2, 3] It was held in *Hoffman v. Charlestown Five Cents Savings Bank*, 231 Mass. 324, 121 N. E. 15, decided last November, that the act of Congress applies to equitable as well as legal interests constituting property in real estate and owned by a person in military service, without limitation as to use or amount, whether known to the mortgagee or not, and whether appearing of record or not. The act of Congress in this regard takes no account of our statutes as to registration of deeds. The foreclosure of a mortgage by sale, under a power of sale affecting any such property right of a person in military service, is forbidden by the act unless made under order of court as therein provided. It further was said in that opinion:

"Clause 3 of section 302 was enacted to secure to every person in the military service of the United States who owns property subject

to a mortgage within the act the relief to which he is entitled under the act. The defendant has urged against this construction of the section that if that be the true construction of it the result is that until the termination of the time specified in the act no mortgage can be foreclosed by any mortgagee except under an order of court and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act. We are of opinion that since this is the result of the true construction of the act this must be taken to have been the intention of Congress."

This construction of the act of Congress (in the absence of a contrary decision by the Supreme Court of the United States) must be accepted as sound. It does not mean, however, that in all cases it is and must be impossible to satisfy a court of equity beyond a reasonable doubt that no person in the military service of the United States had any interest in the property subject to the mortgage which has been foreclosed. The meaning of the decision in *Hoffman v. Charlestown Five Cents Savings Bank* is that the safe course for the mortgagee is to foreclose his mortgage under the order of a court of equity. It is only by pursuing that course that he gets a record title not open to successful attack under the said act of Congress, and therefore in that way alone can he be certain that the foreclosure of his mortgage will not be made in violation of that act of Congress. But it is not a proposition unprovable in the nature of things or practically impossible to show beyond doubt in a court of equity that no person in the military service of the United States had an interest in the premises described in a mortgage foreclosed without order of court.

[4] A mortgagee who forecloses his mortgage under the power of sale therein contained, without an order of court during the time specified in said chapter 20 of the act of Congress, known as the Soldiers and Sailors Relief Act, assumes a heavy burden of proof when he undertakes to enforce specific performance of his agreement to convey by good title the land so foreclosed. But it is not a burden of proof incapable of being sustained as matter of law. Circumstances attendant upon the history of a particular title and its record owners may be such as to exclude every rational hypothesis compatible with the notion that a person in the military service of the United States has an interest in it likely to be affected by the foreclosure. Evidence may make it clear beyond a reasonable doubt that no such person has any interest in specified real estate. The allegations of the present bill,

to the effect that no person in the military service of the United States has an interest in the premises, in the nature of things is or may be susceptible of legal proof.

[8] The question, whether in truth a person in the military service of the United States had any interest in the premises which are the subject of the present suit, was one of fact and not of law. *Shanahan v. Chandler*, 218 Mass. 441, 443, 444, 105 N. E. 1002. Its decision depends upon the hearing and weighing of evidence. No evidence has been presented. The case is reserved merely upon the bill and answer. It follows that the case must stand for hearing. If the plaintiffs succeed in maintaining the burden of proof and demonstrating to the satisfaction of the court that no person in the military service had any interest in the property according to the principles heretofore stated, then they will be entitled to a decree. Otherwise, the bill must be dismissed.

Case to stand for hearing.

(233 Mass. 325)

LAMB v. JORDAN et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. June 26, 1919.)

1. WILLS \S 551—CONSTRUCTION—BEQUEST TO CHILDREN OF DECEASED BENEFICIARY.

Under a will giving in trust for testator's two grandchildren, sons of his deceased son, a sum equal to the amount such deceased son would have received if he had been living at testator's death, the grandchildren were put in the place of their father as beneficiary so far as concerned the amount of their benefit subject to the conditions of the will as to survivorship and trust.

2. WILLS \S 534—CONSTRUCTION—SHARE IN RESIDUE BY DEVICES ON CONDITION.

A will, giving testator's grandson and granddaughter, children of a deceased daughter \$500 each on the expressed condition that they should not contest the will, excluded such grandchildren from sharing in the residuary estate.

3. WILLS \S 527—CONSTRUCTION—SHARE IN RESIDUE OF ESTATE.

Under a will giving all the rest, residue, and remainder of testator's estate to his children, share and share alike, children of deceased children to take by right of representation subject to the conditions previously set forth, four children of testator's deceased son and daughter, previously provided for, held not entitled to share in the residue of the estate.

4. WILLS \S 470—CONSTRUCTION AS UNIT.

A will should be read as a unit, and all its clauses harmonized each with the other, so as to constitute a rational entity so far as is consistent with the words used.

5. WILLS ¶459 — CONSTRUCTION — LANGUAGE.

Testator's omission to express his intention cannot be supplied by conjecture, but if the whole will convinces that testator must have intended a gift of an interest not expressly bequeathed, or must have denied a benefaction not manifested by apt phrase, the court must supply the defect by implication.

6. WILLS ¶488 — INTENTION — EXTRINSIC EVIDENCE.

Extrinsic evidence to show testator's intent and to explain the will was inadmissible, where there is no uncertainty or ambiguity.

Appeal from Supreme Judicial Court; Suffolk County.

Petition for construction of the will of William McKie by Ethel B. Lamb against Robert F. Jordan and another, executors, and others. From the decree, defendants appeal. Reversed, and decree ordered entered.

R. H. Sherman, of Boston, for appellants.
John S. C. Nicholls and William W. Risk, both of Boston, for appellee.

RUGG, C. J. This petition calls for the construction of the will of William McKie, late of Boston. The testator was a widower about seventy-five years old at the time of its execution. His prospective heirs were two grandchildren, William and Edward McKie, minor children of his deceased son, Eldred, two other grandchildren, William F. and Ethel B. Rome, then aged respectively about twenty-five and twenty years, children of his deceased daughter Belle, and four daughters, one a spinster, one a widow, and two married. These persons all survived him, are beneficiaries under the will, and are parties hereto. The will contains six clauses. The first relates to the payment of debts and the last nominates executors. These have no pertinency to the present litigation and need not be considered further. The controversy is confined to the other four clauses, which are in these words:

"Second. To my grandson William H. Rome, Jr. five hundred dollars upon the expressed condition that he shall not contest this will. If he does contest then he takes nothing. Third. To my granddaughter, Ethel B. Rome, five hundred dollars upon the expressed condition that she does not contest this will. If she does contest then she takes nothing. Fourth. To Robert F. Jordan and Millie W. McKie in trust for my grandchildren, sons of my deceased son Eldred E. McKie, a sum equal to the amount that my said son would have received had he been living at the time of my death, the income or whatever part thereof that said trustees shall deem necessary, to be paid said children in equal part, and said principal to be paid to the said children as they arrive at the age of thirty five. In the event of either of them dying before reaching said age, and not

having married, then his part shall go to the survivor. Fifth. All the rest, residue and remainder of all my estate, real, personal and mixed, I give, devise and bequeath to my children share and share alike, the children of my deceased children to take by right of representation, subject to the conditions heretofore set forth."

The Rome grandchildren did not contest the will.

Clauses second and third, considered by themselves, are plain. Each gives a definite legacy of \$500 upon the explicit prerequisite that the legatee shall not contest the will. Otherwise such legatee is to take nothing under the will. Each of these clauses is complete in itself. Each has the appearance of finality. Commonly a devise or legacy upon condition that the beneficiary shall not contest the will is the full expression of testamentary bounty.

[1] The meaning of clause fourth is not doubtful. Its rational purport is to put the two McKie grandchildren in the place of their father so far as concerns the total amount for their benefit, but to give it in trust with right of survivorship in case of the death of either unmarried before reaching the age of thirty-five years. It is to be observed that this clause does not say that these grandchildren are to receive the share which their father would have received had he survived the testator and the latter had died intestate. Its terms are that there shall be given to trustees "a sum equal to the amount that my son would have received had he been living at the time of my death." That amount is not determined by the share he would have received in the event of intestacy of his father. It is determined by the amount which would have come to him under the will. That this is its meaning is made clear from the following clause fifth. This is a residuary clause in which no person is named but in which the beneficiaries are indicated by reference to classes of relatives. Manifestly all his children living at the time of the testator's death are included. If his son Eldred had been living, of course he also would have been included within the scope of the words used. Since he had died previously, his share is to go to his two children by right of representation. However, it does not go to them as a free and absolute gift, because it is "subject to the conditions heretofore set forth," that is to say, the conditions as to survivorship and trust which are contained in clause fourth. While these perhaps are not conditions in the narrowest and most technical sense, they are limitations upon full enjoyment and in a general and popular signification may properly be described as conditions. Any other construction would involve giving to the McKie children a double share in the grandfather's estate to the detriment of his own surviving children, a re-

sult not naturally to be reached without unambiguous expression of purpose.

[2] The Rome grandchildren are excluded from sharing in the residue for two reasons: (1) In the first place the natural inference from the form of words used in clauses second and third is that the legacy given in each of these clauses is the complete expression of the design of the testator for the benefit of these legatees. When a testator makes a gift to one of his next of kin on the express condition that he shall receive nothing if he publishes his disappointment by making contest as to the validity of the will, that usually is a full and consummated statement of testamentary purpose. That is the impression conveyed by the words used in clauses second and third. (2) In the second place this interpretation is the only one which imputes intelligence to the testator in phrasing these clauses. If the Rome grandchildren are included among those who are to share in the residue of the estate, then the five hundred dollars given to each by the second and third clauses would be a gift of that sum more than would be received by any other next of kin of equal degree or than would be received by the Rome grandchildren if they should contest the will successfully. It would be a gratuity of five hundred dollars more than they possibly could get in any other way, upon the express condition that each one does not contest the will. It would be a gift to induce them not to do something which no rational person would think of doing. Such a provision would be without sense. It would have no foundation in reason. Such vacuity of mind cannot be attributed to the testator unless there is no escape from it.

[3, 4] Clause fifth is not couched in accurate or felicitous language. Its construction is not free from difficulty. But the necessary meaning seems to us to be that which we have stated. By giving to the words "subject to the conditions heretofore set forth" a narrowly constricted and somewhat technical construction, by unduly enlarging the scope of the phrase "the children of my deceased

children to take by right of representation" beyond the limitations imposed by their context, and by ignoring the normal inferences and eliding the irresistible deduction from the expressions of clauses second and third, the conclusion might be reached that both the Rome and the McKie grandchildren share in the residue. But we think that would be contrary to the intent of the testator as manifested by his whole will. That instrument should be read as a unit and all its clauses harmonized one with the others so as to constitute a rational entity so far as is consistent with the words used.

[5] The decision of all questions respecting the construction of wills "depends upon the intention of the testator as manifested by the words he has used, and an omission to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces the conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words," or a benefaction to be denied which is not manifested by an apt phrase, "the court must supply the defect by implication, and so mould the language of the testator as to carry into effect as far as possible the intention which it is of opinion that he has on the whole will sufficiently declared." *Metcalf v. Framingham Parish*, 128 Mass. 370, 374. *Polsey v. Newton*, 199 Mass. 450, 85 N. E. 574, 15 Ann. Cas. 139; *Jones v. Gane*, 205 Mass. 37, 44, 91 N. E. 129. The application of that principle leads to the conclusion which has been stated.

[6] Extrinsic evidence to show the intent of the testator and to explain the will was inadmissible.

The result is that the decree is reversed and a decree is to be entered to the effect that the Rome and McKie grandchildren take only under clauses second, third and fourth and are excluded from benefits under clause fifth. Costs as between solicitor and client are to be allowed out of the estate, the amount to be determined by a single justice. So ordered.

(189 Ind. 100)

TERRE HAUTE, I. & E. TRACTION CO. v.
STEVENSON. (No. 23307.)*

(Supreme Court of Indiana. June 27, 1919.)

1. RAILROADS \S 328(11)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK.

That plaintiff's buggy top was up and back curtain down did not excuse her for not looking for an approaching interurban car before going upon the track at a private crossing.

2. RAILROADS \S 338—INJURIES AT CROSSING—LAST CLEAR CHANCE.

Where the motorman of an interurban car when 500 feet away from a private crossing saw plaintiff's buggy approaching crossing, and knew plaintiff had no knowledge of approaching car, but failed to slow down or stop, and struck the buggy, the motorman was guilty of negligence subjecting his company to liability under the last clear chance doctrine, despite plaintiff's contributory negligence.

3. RAILROADS \S 320—INJURIES AT CROSSING—GENERAL DUTY OF CARE.

A special duty to use due care in favor of one in danger on a railroad's crossing or track to the knowledge of the company's employé arises only in the case of actual notice to the employé of the particular person's peril, though a general duty exists to use due care for the protection of persons who may or may not be in danger at crossing, but are not known to be in danger.

4. RAILROADS \S 338—INJURIES AT CROSSING—LAST CLEAR CHANCE—CONTINUING CONTRIBUTORY NEGLIGENCE.

The last clear chance doctrine applies to render an interurban railway liable for injuries at a crossing to plaintiff, whose peril the motorman appreciated, though plaintiff's contributory negligence continued up to the moment of her injury.

5. RAILROADS \S 320—INJURIES AT CROSSING—DUE CARE—SPEED OF CAR.

When the motorman of an interurban car saw the horse of one driving a buggy along a parallel highway, leaving the highway and turning to go on and over a crossing, it became his duty to observe due care, an element of which was the speed of the car.

6. RAILROADS \S 338—INJURIES AT CROSSING—KNOWLEDGE OF PERIL—PROOF.

Plaintiff, injured at an interurban railroad's crossing and charging that the motorman of the car knew she had no knowledge of its approach when driving her buggy towards the crossing, need show only such facts and circumstances as would have caused a reasonably prudent person to realize that she probably did not know of her peril, and that it would continue.

7. RAILROADS \S 345(3)—INJURIES AT CROSSING—KNOWLEDGE OF MOTORMAN—EVIDENCE.

In an action against a railroad for injuries to plaintiff in her buggy at a crossing, proof of facts and circumstances which should have caused the motorman, as a reasonably prudent

person, to realize that plaintiff probably did not know of her peril as she approached the crossing, was admissible under the allegation of the complaint that he knew she did not know her peril.

8. RAILROADS \S 348(6)—INJURIES AT CROSSING—KNOWLEDGE OF MOTORMAN—SUFFICIENCY OF EVIDENCE.

In an action against an interurban railroad for injuries to plaintiff in her buggy at a crossing, evidence held sufficient to sustain the allegation of the complaint that the motorman of the car knew in time to stop or check it that the occupants of plaintiff's buggy did not know of the car's approach.

9. APPEAL AND ERROR \S 1048(6)—HARMLESS ERROR—EVIDENCE.

In an action against an interurban railroad for injuries at its crossing to plaintiff in her buggy, sustaining objection by plaintiff to a question asked of plaintiff's witness, a motorman, on cross-examination, held harmless to defendant, which could have avoided the harm, if any, by adopting the witness or calling him in defense.

10. EVIDENCE \S 554—ANSWER OF MEDICAL EXPERT—SPECULATION.

In an action for personal injuries, a doctor's answer as an expert that such an injury might permanently affect plaintiff's nervous system was proper, and not inadmissible as speculation.

11. RAILROADS \S 351(22)—TRIAL \S 258(4)—INJURIES AT CROSSING—INSTRUCTION ON "LAST CLEAR CHANCE."

In an action against an interurban railroad for injuries to plaintiff in her buggy at a crossing, recovery being sought under the doctrine of "last clear chance," instruction held proper, as charging that actual knowledge of the motorman as to plaintiff's peril was required, and that failure of the motorman to use ordinary care to discover plaintiff would not charge the railroad with liability.

12. TRIAL \S 296(3)—INSTRUCTION—CURE OF ERROR.

In an action against an interurban railroad for injuries to plaintiff in her buggy at its crossing, instruction that it was the duty of the motorman to have used every reasonable means to have avoided the collision, in view of other instructions that the motorman's obligation was to use the care of a reasonably prudent person, held harmless to the railroad.

13. TRIAL \S 296(11)—INSTRUCTION—CURE OF ERROR.

In an action for injuries against an interurban railroad, where other instructions informed the jury their verdict must rest on the evidence and law as stated, the omission of an instruction to limit the amount of damages to the showing made by the evidence of the extent of the injury and suffering was harmless to the railroad.

14. TRIAL \S 260(1)—INSTRUCTION—REPETITION.

Requested instructions substantially covered by others given were properly refused.

Appeal from Circuit Court, Vermillion County; Barton S. Aikman, Judge.

Action by Emma L. Stevenson against the Terre Haute, Indianapolis & Eastern Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

McNutt, Wallace & Sanders, of Terre Haute, Conley & Conley, of Newport, and W. H. Latta, of Indianapolis, for appellant.

James E. Piety and John O. Piety, both of Indianapolis, H. B. Aikman, of Newport, and Wm. F. Elliott, of Indianapolis, for appellee.

HARVEY, J. This cause was transferred to the Supreme Court under Acts 1901, p. 590. Appellee was injured by a collision at a private crossing between appellant's interurban car and a buggy in which appellee and her daughter were riding.

The complaint, in substance, alleges that a public highway near the point in question runs parallel to the interurban track of appellant, and upon the other side of the track from the plaintiff's home; that said crossing is a part of the private drive leading from said highway over the track to her home.

To avoid a judgment upon a verdict for plaintiff appellant relies upon allegations of error in overruling its demurrer to the complaint; and overruling its motion for a new trial.

By a fair construction it appears from the allegations of the complaint that as the vehicle turned into said private approach to said track the plaintiff did not look for the car, nor did her daughter, who was driving. It is not alleged that there were obstructions preventing them from seeing the car. It is not alleged that they listened for a car, nor that there was anything to prevent them from hearing had they listened. It is alleged indirectly that neither of them knew of the car's approach, and that in such ignorance they continued to approach, and drove upon the track.

[1] The fact alleged that the buggy top was up and the back curtain thereof down does not excuse those in the buggy for not looking. It rather emphasizes the need of their looking. So considered, the complaint shows contributory negligence, and is therefore insufficient, unless further allegations show that this contributory negligence does not bar recovery.

[2] An effort to show that such contributory negligence does not bar a recovery is found in further allegations to the effect that, when more than 500 feet from this private crossing, the motorman had a clear and unobstructed view of the horse and buggy, and saw it turn from the highway into said private drive at about 60 feet from said private crossing, and knew it was approaching said crossing to go over the same, and he continued to have such unobstructed view until

the collision occurred; that the motorman knew that the buggy top was up and the back curtain down, and knew that neither plaintiff nor her daughter knew of the approach of the car, but knew that they were not aware of their perilous situation; that the motorman, so knowing, could have stopped said car within a distance of 100 feet before reaching said crossing, but the motorman, notwithstanding said knowledge, wrongfully, carelessly, and negligently failed to stop the car or check the speed, and wrongfully, carelessly, and negligently ran said car toward and over said crossing without sounding its gong or whistle, or giving any warning of any kind, and so ran said car at from 35 to 45 miles per hour against said horse and buggy; that, if the speed of the car had been checked, plaintiff could have crossed said track in safety, or a warning given to plaintiff would have caused her to stop the horse before reaching the crossing.

These allegations show a clear chance in defendant to have avoided collision after discovery of the peril, which is sufficiently alleged. The alleged discovery by defendant of such chance, and the alleged failure to use due care after such discovery, show a cause of action, notwithstanding plaintiff's admitted negligence.

Appellant asserts that, as the complaint shows that the contributory negligence of plaintiff continued to the time of the collision, and further shows that the negligence of plaintiff was concurrent with the alleged negligence of defendant, the doctrine of last clear chance does not apply.

[3, 4] The traveler's peril known to the motorman creates a special duty to take advantage of his chance, if he have a chance. This duty to avoid a collision continues so long as the peril continues. When a traveler is in a perilous situation resulting from his own negligence, and the peril is known to the motorman in time to clearly afford an opportunity to avoid injuring the one in peril, his duty to use the chance arises and continues while the peril lasts, whether the negligence of the traveler continues or is concurrent, or whether the traveler becomes duly, though ineffectively, diligent. Neither concurrence nor continuance of the traveler's negligence alone is a defense when the motorman has a last clear chance to avoid the injury by due diligence after the discovery of the peril. Such continuance of the negligence of the traveler would be a defense if the motorman did not know of the peril thereby created, though the motorman was at the time negligent in not knowing. No special duty to use due care in favor of a particular party arises without actual notice of the particular party's peril. A general duty exists, in the absence of such actual knowledge, to use due care for the protection generally of parties who may or may not be in danger at crossings, but are not

known to be in danger, and contributory negligence is a defense when this general, and not a specific, duty of the motorman is violated.

We are aware that in *Wabash Railway Co. v. Tippecanoe, etc., Co.*, 178 Ind. 113, 98 N. E. 64, 88 L. R. A. (N. S.) 1167, it is said that concurrent negligence of the injured prevents the application of the doctrine of last clear chance. While in the case referred to the injured party claimed exemption from the consequences of his own negligence by asserting that the defendant had a clear chance to save him, the facts disclose no such chance; they tend only to show negligence on the part of the defendant in not knowing of the peril of the plaintiff, and it was the absence of knowledge in said cause, and not concurrent negligence, that prevented the application of the doctrine of last clear chance.

There are some expressions in the opinion in *Indianapolis Traction, etc., Co. v. Croly*, 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091, to the effect that, if the motorman, in the exercise of due care, should have known of plaintiff's peril, there was a liability, though the injured was also negligent. We do not believe, however, that such expressions control the real meaning and effect of such opinion. The opinion clearly defines the special duty arising from knowledge, and separates a case wherein knowledge exists from a case wherein only the general duty, which is also clearly defined, to the public about and upon the highway, is involved.

The Appellate Court, in *Union Traction Co. v. Bowen*, 57 Ind. App. 661, 103 N. E. 1096 (the opinion being written by the judge who wrote the opinion in the *Croly* Case), emphasizes the distinction.

The decisions of this and the Appellate Court requiring knowledge may be found in the following: *Evans v. Adams Express Co.*, 122 Ind. 362, at page 366, 23 N. E. 1039, 7 L. R. A. 678; *C. I., St. L. & O. Ry. Co. v. Long*, 112 Ind. 166, 18 N. E. 659; *Indianapolis, Peru, etc., Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; *Wright v. Brown*, 4 Ind. 95, 58 Am. Dec. 622; *Indianapolis Street Railway Co. v. Bohn*, 89 Ind. App. 169, 78 N. E. 210; *So. Ind. Railway Co. v. Fine*, 163 Ind. 618, 72 N. E. 589; *Indianapolis Traction, etc., Co. v. Smith*, 38 Ind. App. 160, 77 N. E. 1140; *Indianapolis Street Railway Co. v. Marschke*, 166 Ind. 490, 77 N. E. 945; *L. E. & W. Ry. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843; *Dull v. Cleveland, etc., Co.*, 21 Ind. App. 571, 52 N. E. 1013; *Elwood Street Ry. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535; *Citizens' Street Railway Co. v. Damm*, 25 Ind. App. 511, 53 N. E. 564; *Hammond, etc., Co. v. Eads*, 82 Ind. App. 249, 69 N. E. 555; *Citizens' Street Ry. Co. v. Lowe*, 12 Ind. App. 47, 39 N. E. 165; *Muncie Street Ry. Co. v. Maynard*, 5 Ind. App. 372, 32 N.

E. 343; *Krenzer v. Pittsburgh, etc., Ry. Co.*, 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252, cited in 8 Am. St. Rep. 629, note; *Wright v. Gaff*, 6 Ind. 416; *Indianapolis v. Wright*, 22 Ind. 376; *Summit Coal Co. v. Shaw*, 16 Ind. App. 9, 44 N. E. 676.

The foregoing decisions overcome the following to the contrary, wherein the latter call for the application of the rule: *Indianapolis Street Railway Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; *Indianapolis Street Railway Co. v. Seerley*, 35 Ind. App. 467, 72 N. E. 169, 1034.

The last clear chance contemplates a peril which the motorman knowing can avoid by due care. To hold that his failure to use due care after learning, and thus having an opportunity to avoid the injury, in other words, to hold that after having the last clear chance he is excused if the traveler's negligence continues, or concurs, is to destroy the last clear chance doctrine, and to hold that contributory negligence is a defense under such circumstances.

The rules relating more properly to proximate and remote cause should not be confused with rules defining the relative obligations of the parties where the plaintiff is in peril and the defendant knows it in time to avoid the collision. The cause of the peril seen, whether it be contributory negligence in its broadest sense, or continued contributory negligence, or concurring contributory negligence, or accident, is immaterial. The failure of the motorman to perform the special duty raised by his knowledge of the peril and by his opportunity is the actionable cause. The better holding, indeed the holding that in recent years has been most frequently announced, is that it is a negligent failure to avoid a discovered peril that makes applicable the rule of last clear chance. See notes in 7 L. R. A. (N. S.) 182; 36 L. R. A. (N. S.) 957; 38 L. R. A. (N. S.) 1187; 20 R. C. L. 117-143. To hold otherwise is to permit a comparison in degree of the negligent acts of the respective parties, and misapply the doctrine of proximate and remote causes.

[5] Appellant asserts that it is not alleged that the high rate of speed of the car proximately caused or contributed to the injury. In view of the fact that the main public highway paralleled the track, the motorman was, so far as persons traveling the parallel highway were concerned, justified in this case in running at any rate of speed needed in appellant's public service. Neither the motorman nor the traveler on the parallel highway then owed the other any duty, so far as this case is concerned. When, however, the motorman saw the horse leaving the parallel highway and turning to go in over the crossing, and knew it was approaching said crossing for the purpose, it became the duty of the motorman to observe due

care, and then the high speed alleged became important as one of the elements to be considered in determining what was due care under the circumstances.

It is not the theory of the complaint that the speed was the cause. It is the theory rather that, notwithstanding the speed of the car, it could have been stopped or checked, or a signal given, in time to have avoided the collision had the motorman used due care. His failure so to do is alleged to be the proximate cause.

The demurrer was properly overruled.

[8-8] It is claimed that the motion for a new trial should have been sustained because of the insufficiency of the evidence, particularly in that there is no evidence to sustain the allegation that the motorman knew in time to stop or check the speed of the car that the occupants of the buggy did not know of its approach.

It is true there is little positive or direct evidence relating to these allegations. The motorman admits that he saw the buggy traveling the parallel road when he was 800 or 900 feet from the crossing, and that he saw the horse turn into the curve to the private drive leading to the crossing. He testifies that the horse was trotting when he first saw it, and there was testimony that it continued to trot after turning until it reached the crossing. The evidence is undisputed that the distance from the traveled portion of the highway to the track, measured with the curve of the private driveway, is not more than 60 feet. The appellee testified that she knew nothing of the car until her horse was on the crossing.

The jury might reasonably infer that one allowing the horse to trot the entire 60 feet on the drive that led only to the crossing did not know of the approach of the car, and might also reasonably have inferred that, as the motorman saw the vehicle so approaching the track, and saw no act indicating that the horse's movement would be checked, he did know that the occupants of the buggy were probably unaware of the car's approach, and would enter upon the crossing. It is not necessary that the plaintiff prove that the motorman knew the state of her mind. It is only necessary that such facts and circumstances be shown as would cause a reasonably prudent person to apprehend or realize that she probably did not know of her peril, and that the peril would continue. Proof of such facts and circumstances is permissible under the allegation that he knew that she did not know.

Considering these undisputed facts, and all the other evidence and circumstances before the jury, we cannot say that the evidence was insufficient.

[9] The witness McClain, motorman, called as witness by the plaintiff, was asked on cross-examination, "How far it takes to stop this car when it is going at the rate

of 30 miles per hour?" Objection that this was not cross-examination was sustained. The plaintiff had not asked, so far as the brief discloses, anything on this subject. The chief object in calling the witness was to show his knowledge of the presence of the buggy and his distance from it when he first saw it. We doubt whether this was proper cross-examination, but, if it was, no harm justifying a reversal results from the ruling. The witness was then the defendant's motorman. The court may in its discretion have deemed it best to confine the cross-examination within narrow limits. The defendant could have avoided the harm, if any, by adopting the witness or calling him in defense, neither of which the defendant did.

[10] Appellant asserts that its motion for a new trial should be sustained because of the court's refusal to strike out the words "it might" from the answer of Dr. Combs to a question as to whether the injury would permanently affect plaintiff's nervous system. The basis of the motion was that the answer was speculative. An expert may answer such a question. One not specially learned cannot know, or intelligently answer, as to such matter. One specially learned cannot in many cases be positive, and can only express a general conclusion in indefinite terms. The doctor was the one to know how definite the answer could truthfully be made. Such an answer by one so skilled is not speculative.

[11] Instruction No. 8, given, is criticized because it is said to omit the element of actual knowledge of the motorman as to plaintiff's peril, and renders the defendant liable in this case if the motorman failed to use ordinary care to discover it. We do not so read the instruction. It says, "If * * * the motorman saw * * * and realized, or should have realized, the peril," it was his duty, etc. Knowledge of the peril made it his duty to realize. His failure to realize after discovery is the negligence. On this point the instruction is supported by *Evansville, etc., Traction Co. v. Johnson*, 54 Ind. App. 601, 608, 609, 97 N. E. 176.

The trial court repeatedly informed the jury that knowledge of the danger was necessary, and that the theory of the complaint would not support a verdict if the jury found only that the motorman should have discovered or known of the danger.

The above observations also answer appellant's objection on similar grounds to instruction No. 20.

Further complaint is made of instruction No. 8 because it tells the jury that it was the duty of the motorman "to have used every reasonable means to have avoided" the collision.

[12] While we do not approve the use of the terms "every reasonable means" in this connection, we are of opinion that, when

said words are considered with other instructions to the effect that such care as a reasonably prudent person would use under like circumstances measures the motorman's obligation, there was no reversible error. The words "reasonable means" may be fairly construed, and must have been understood by the jury, to mean such means as a reasonably prudent person would use under like circumstances.

[13] Complaint is made of instruction No. 22 because it omitted to limit the amount of damages to the showing made by the evidence of the extent of the injury and suffering. This limitation is not expressly stated in this instruction, but, as other instructions informed the jury that their verdict must rest on the evidence and the law as stated, the omission does not justify a reversal.

[14] Complaint is made of the giving and refusal to give of other instructions. We have considered all such complaints. Many of such objections are based upon alleged omissions of what we find to be single elements fully covered by other instructions. Some are asserted to be assumptions invading the province of the jury; but the instructions as a whole show that the court submitted the matter of such alleged assumptions to the jury in other instructions.

In view of the very full instructions given, and the fact that they carefully limited the case submitted to the specific case made by the complaint, we cannot see that the defendant was harmed.

The judgment is affirmed.

(188 Ind. 400)

INDIANA PIPE LINE CO. v. CHRISTENSEN. (No. 23242.)

(Supreme Court of Indiana. June 27, 1919.)

1. JUDGMENT \S 606 — **NUISANCE** \S 50(8) — **DAMAGES—CONTINUING NUISANCE.**

In case of continuing abatable nuisance, damages can be recovered only to the date of the action, as there is a presumption that the cause which produces the damages will be removed by the abatement of nuisance; but if the nuisance is not abated, successive actions may be maintained so long as it is permitted to continue, in which damages may be recovered for all injury occasioned prior to the commencement of the action and within the statute of limitations, not extending back of a former recovery.

2. NUISANCE \S 50(1) — **DAMAGES—CONTINUING NUISANCE.**

In case of continuing abatable nuisance, whereby injury to products of soil is caused; the measure of damages is the depreciation in the rental value of the real estate affected.

3. ACTION \S 53(2) — **PERMANENT INJURY.**

Where damages to land are caused by a single completed wrongful act resulting in an injury, the effects of which will continue indefinitely, the damages occasioned by such injury must be compensated in a single award, as there is no continuing wrong on which to base successive actions.

4. DAMAGES \S 110 — **MEASURE—PERMANENT INJURY.**

Where a portion of land is permanently appropriated by wrongful act, or where it so occupied as to deprive the owner permanently of the occupation or use of the portion of his land, the general rule as to measure of damages is the depreciation in the market value of the land occasioned by the appropriation or trespass.

5. TRESPASS \S 20(3) — **TRESPASS QUARE CLAUSUM FREGIT—NATURE OF ACTION.**

The foundation of the action of trespass quare clausum fregit is the breaking by defendant of plaintiff's close, and it can be maintained by a person in possession having no interest in the soil, but an interest in the profits only.

6. TRESPASS \S 50 — **TRESPASS QUARE CLAUSUM FREGIT—ACTION—RIGHT TO MAINTAIN.**

In an action of trespass quare clausum fregit it is only necessary for plaintiff to prove that he was in possession of the land, and that defendant entered thereupon without right, such proof entitling plaintiff to recover at least nominal damages, without any proof of injury, and on proof of injury to products of the soil plaintiff may recover compensatory damages.

7. ACTION ON THE CASE \S 1 — **INJURIES TO RIPARIAN OWNER'S LAND BY POLLUTION OF STREAM.**

Under the common-law forms of pleading, trespass on the case is the proper remedy for injuries to the soil and products, occasioned by the escaping of oil carried by the waters of a creek and deposited on land.

8. ACTION \S 32 — **FORMS OF ACTION—COMMON-LAW RULES.**

The common-law forms of action are abolished, but the rules of common law are not abrogated, and they obtain in civil actions under the Code, whenever applicable to facts pleaded and proved.

9. TRESPASS \S 27 — **TRESPASS ON THE CASE—ACTIONS—DEFENSE.**

As a wrongdoer who injures land, as by allowing oil to escape from its pipe line, which was carried by the waters of the stream onto the premises, can be compelled to pay only a single compensation, such a wrongdoer, when sued for the injury to the freehold by one in possession, may set up that there was a valid outstanding title in another.

10. TRESPASS \S 46(2) — **TRESPASS ON THE CASE—ACTIONS—DEFENSE.**

Proof that plaintiff was in entire possession of the large farm he claimed will make a prima facie case of title against an oil company, from whose pipe line crude oil escaped, which

was deposited on the farm by the waters of a creek.

11. TRESPASS \Leftrightarrow 46(2) — **TRESPASS ON THE CASE—ACTIONS—DEFENSE.**

In action by one in possession and claiming to own a farm against an oil company, from whose pipe line oil escaped, which was carried by the waters of a creek onto the land, a prima facie case made out by possession can be rebutted only by a showing that the true record title was not in the one suing.

12. ACTION \Leftrightarrow 53(2) — **DAMAGES** \Leftrightarrow 225 — **MEASURE—SUCCESSIVE ACTIONS.**

In an action by plaintiff, on whose farm oil which escaped from defendant's pipe line was deposited by the waters of a creek, held that, under the pleadings and evidence, the recovery, on account of injury to land, must be limited to damages resulting to the land from the oil which had been permitted to flow thereon prior to the commencement of the action, and the entire damage must be recovered in the single action, there being no claim by plaintiff that the oil company had in any wise appropriated any part of his property.

13. APPEAL AND ERROR \Leftrightarrow 1004(1)—**REVIEW—VERDICT.**

Where it appears from the record that a verdict is based on improper items of damages, the verdict will be held to be excessive, and new trial will be awarded.

14. DAMAGES \Leftrightarrow 138—**PERMANENT INJURY—EVIDENCE.**

In an action by landowner, whose farm was injured by oil escaping from defendant's pipe line, which was carried onto the premises by the waters of a creek, held that, though some of his stock were injured or killed by eating grass or drinking water contaminated with oil, an award of \$17,000 must be deemed excessive, in the absence of evidence showing that the oil, which killed vegetation permanently, destroyed the fertility of the soil, for it is obvious the award must have been made on that theory.

Appeal from Circuit Court, La Porte County; James F. Gallaher, Judge.

Action by Christian Christensen against the Indiana Pipe Line Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with direction to sustain defendant's motion for new trial.

H. D. Bushnell, Holman, Bernetha & Bryant, of Rochester, Simmons & Daily, of Bluffton, and Myers, Gates & Ralston, of Indianapolis, for appellant.

George Burson, of Wenamac, Darrow & Rawley, of La Porte, and Francis M. Trisal, of San Pierre, for appellee.

LAIRY, C. J. This was an action to recover damages for the loss of cattle and the permanent injury to the 700-acre farm of appellee, Christian Christensen, occasioned by the escape of oil from the pipe line of appellant, Indiana Pipe Line Company. Ap-

pellee's complaint alleges among other things that he is the owner of 700 acres of land in Stark county, Ind., which he has used for the past 20 years for the combined purposes of general farming and stock-raising, and which is located on both sides of Pine creek below the point where Pine creek is crossed by appellant's pipe lines, which are used for the purpose of transporting crude petroleum oil across the state of Indiana. It is alleged that appellant negligently, carelessly, and knowingly failed to make any proper inspection of its pipe lines, and knowingly allowed the pipe lines to become disjointed, rotten, decayed, eaten with corrosion, and leaky, so that at divers times during the years 1914, 1915, and 1916 great quantities of crude petroleum oil escaped from appellant's pipe lines and flowed over and upon 500 acres of appellee's land, permeating, saturating, and poisoning the soil. The complaint states, that, by reason of the escape of such oil, the grasses and other vegetation of appellee's lands were destroyed, and the cattle of appellee became sick and died from the effects of the oil on the grass and in the water which they drank. It is also alleged that the use of the entire 700-acre tract was impaired by reason of the destruction of the productive qualities of the 500 acres. A trial by jury resulted in a verdict and judgment in favor of appellee for the sum of \$17,000.

[1, 2] The controlling question presented by the several assignments of error relates to the measure of damages applicable to a case of the kind here presented. Appellant asserts that the evidence shows only an injury to the products of the soil by a continuing abatable nuisance and insists on the rule of damages applicable in such cases. In cases of this character damages can be recovered only to the date of the action, as there is a presumption that the cause which produces the damage will be removed by an abatement of the nuisance. If the nuisance is not abated, its continuance, resulting in a damage, is a new and separate injury, which gives rise to a new cause of action. Successive actions may be maintained so long as the nuisance is permitted to continue, in which damages may be recovered for all injury occasioned prior to the commencement of the action and within the statute of limitations, not extending back of a former recovery. The measure of damages in such a case is the depreciation in the rental value of the real estate affected. *Cleveland, etc., R. Co. v. King* (1900) 23 Ind. App. 573, 55 N. E. 875; *Vandalia R. Co. v. Yeager* (1915) 60 Ind. App. 118, 130, 110 N. E. 230.

[3] The rule stated applies to a tort of a continuous nature. By that is meant a wrongful act which produces a state of affairs, the continuance of which constitutes a new wrong each moment; but it does not apply to a single completed wrongful act re-

sulting in an injury, the effects of which will continue indefinitely. The damages occasioned by such an injury must be entirely compensated in a single award, as there is no continuing wrong on which to base successive actions. The award covers all resulting damages, both past and prospective. *City of Lafayette v. Nagle* (1887) 113 Ind. 425, 15 N. E. 1; *Porter v. Midland R. Co.* (1890) 125 Ind. 476, 25 N. E. 556.

[4] Where a portion of the land is permanently appropriated, or where it is so occupied as to deprive the owner permanently of the occupation or use of a portion of his land, the general rule as to the measure of damages is the depreciation in the market value of the land occasioned by the appropriation or trespass. In the case of *Indiana, etc., R. Co. v. Eberle* (1886) 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225. Judge Mitchell, speaking for the court, said:

"Whether the plaintiff may recover for the permanent depreciation in the value of his property depends upon the permanent character of the injury and the frame of the action. Where the character of the injury is permanent, and the complaint for damages recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to acquire, as a result of the suit, the plaintiff's title to the right appropriated, we can see no reason why the damages may not be assessed on the basis of the permanent depreciation in value of the property injured, as in *Henderson v. New York, etc., R. Co.*, 78 N. Y. 423; *Lohr v. Metropolitan Ele. R. R. Co.* [104 N. Y. 268], 10 N. E. 528; *Wichita, etc., R. Co. v. Flechheimer* [36 Kan. 45], 12 Pac. 362; *Wood, Nuisances*, § 856; *City of North Vernon v. Voegler*, 103 Ind. 314 [2 N. E. 821]."

In the case at bar the court adopted the measure of damages applicable to the assessment of damages for lands appropriated. Evidence was admitted as to the market value of the entire 700-acre tract of land immediately before it was overflowed by the oil which escaped from defendant's pipe lines and the value of the same land after such overflow; and, under the instructions, the jury was permitted to base its award of damages on evidence of this character. Appellant asserts the trial court erred in applying this rule for the assessment of damages to the facts as disclosed by the evidence in this case.

There is evidence to show that in the years 1914, 1915, and 1916 quantities of oil escaped from the pipe lines owned and operated by appellant company and was carried on the surface of the water down the ditches constructed through lands owned by appellee, and that, by reason of the water overflowing the lands of appellee, the oil was carried on and over parts of said land, where it remained on the grass and vegetation and in the soil after the water receded or evaporated. A part of the land, having an area of about 506 acres, was prairie land, and the

remainder consisted of higher land, on which the buildings were situated. There is no evidence that the high land was affected by the oil, but there is evidence to show that oil was found in considerable quantities on portions of the low land, and that it permeated the soil and was found on the grass and vegetation growing thereon. The evidence shows that the low land prior to the overflow produced native perennial grasses, which were valuable for pasturage and for hay, and that, in the years following the floods and before the trial, which began on the 28th day of September, 1916, portions of the land on which this grass had previously grown failed to produce the grass, being covered by weeds instead. As disclosed by the evidence, the land had been previously used for a stock farm, the low lands being utilized as meadow and as pasture for the cattle, and the buildings constructed on the higher land being of a size and character suitable for the storage of feed and the shelter of stock. There can be no doubt that it was the theory of the plaintiff below that the injury to the real estate was of a permanent character, affecting the value of the farm as a whole, and that the trial court adopted that theory on the trial.

Appellant takes the position that, under the law and the evidence, appellee was not entitled to recover permanent damages to the farm as a whole, measured by the diminution in the market value of the fee-simple interest therein, for the reason that the evidence fails to show any title in appellee as to that portion of the farm lying north of the meander line established by the government survey and containing about 192 acres. It is asserted that appellee was required under the law to prove title to the land affected, and that the evidence shows that the title to the part of the farm on which the buildings are located north of the meander line in section 36 rests in the state of Indiana or in the government of the United States. This position of appellant is met by appellee with the proposition that a person who is in possession of land claiming to be the owner may maintain an action against a wrongdoer for permanent injury to the land without disclosing anything further than his possession and claim of ownership; and that such wrongdoer cannot set up an outstanding title in a third party for the purpose of defeating a recovery. As sustaining this proposition, appellee cites several authorities which he claims to be in point: *Bristol H. Co. v. Boyer* (1879) 67 Ind. 236; *Ohio, etc., R. Co. v. Trapp* (1891) 4 Ind. App. 69, 30 N. E. 812; *Cleveland, etc., R. Co. v. Born* (1911) 49 Ind. App. 62, 96 N. E. 777; *Barber v. Barber* (1863) 21 Ind. 468; *Winship v. Clendenning* (1865) 24 Ind. 439.

Appellant cites a number of cases to sustain the proposition that it is necessary for the plaintiff to prove title to the land in cases

where he seeks to recover damages for permanent injury to the freehold. *Thompson v. Norton* (1860) 14 Ind. 187; *Broker v. Scobey* (1877) 56 Ind. 588; *Start v. Clegg* (1882) 83 Ind. 78; *Lafayette v. Wortman* (1886) 107 Ind. 404, 8 N. E. 277; *Burrow v. Terre Haute* (1886) 107 Ind. 432, 8 N. E. 167; *Porter v. Midland Co.* (1890) 125 Ind. 476, 25 N. E. 556.

[5] The cases cited have been of no material assistance to the court. The foundation of the action *quare clausum fregit* is the breaking by defendant of plaintiff's close. Its purpose is to recover damages for an invasion of the plaintiff's right of possession, and it can be maintained by a person in possession having no interest in the soil, but an interest in the profits only. *Darling v. Kelly* (1873) 113 Mass. 29.

[6] In such an action it is only necessary for plaintiff to prove that he was in possession of the land and that the defendant entered thereon without right. Such proof entitled the plaintiff to recover nominal damages. The cases cited by appellee hold that in such cases plaintiff need not prove title, proof of possession being sufficient, and that a defendant cannot prove title in another to defeat the action. It is well settled that one rightfully in possession may maintain an action against one who wrongfully invades his possession, even though it be the owner of the fee-simple interest in the land. He may recover nominal damages without proof of injury, and on proof of injury to the products of the soil he may recover actual possessory damages. An examination of the cases cited by appellee will show only such damages were proved and allowed as affected the plaintiff's possessory rights.

The cases cited by appellant do not sustain the position to which they are directed. They do not hold that it is necessary for plaintiff, in an action *quare clausum*, to prove a fee-simple title to the land. They hold that it is only necessary to prove possession either actual or constructive. If actual possession cannot be shown, constructive possession must be proven. In these cases actual possession was not shown, and proof of constructive possession follows the title. It was held to be necessary to show a chain of transfers extending back to the government, or to a person in possession at the time of his transfer, not for the purpose of proving title, but for the purpose of proving possession.

[7, 8] Under the common-law forms of pleading, an injury such as is here described could not have been redressed in an action *quare clausum*, because the damages were not the direct result of force, but resulted indirectly from the wrongful act of the defendant. The proper form of action would have been trespass on the case; but the rule of law which required only proof of possession, where the damages sought were based

on injuries affecting the possessory rights of plaintiff, would of necessity be applicable in the latter form of action. The common-law forms of action are abolished in this state, but the rules of common law are not abrogated. These rules obtain in civil actions under our Code, whenever applicable to the facts pleaded and proved.

[9, 10] Appellant in this case proceeds on the theory that he is the owner in possession of the 700 acres of land described in his complaint, and he seeks to recover damages for injury to his personal property, to the products of the soil, and also for injury of a permanent nature to his interest and estate in the land itself. If he had pleaded and proved damages only to his possessory rights, there could be no doubt that proof of possession would be sufficient to entitle him to recover damages of that nature; but the damage recovered, as shown by the evidence, the instructions, and the verdict, was the diminution of the market value of the fee-simple interest in the whole tract of land described.

The court is required to determine whether damages of this kind can be recovered by plaintiff on proof of mere possession or whether it is necessary for him to prove his interest in the land in order to entitle him to recover damages of a permanent nature. It may be that proof of possession being *prima facie* evidence of ownership would be sufficient to make a *prima facie* case in favor of plaintiff. Can the defendant rebut the *prima facie* case so made by evidence showing the true state of the title and thus disclose title in a third person? It is said that the defendant, having no interest in such a title, cannot be permitted to set up or assert it against the plaintiff. The purpose of such evidence is not to establish or enforce an outstanding title against plaintiff in such a way as to affect his title or interest in the land as between him and the owner of such outstanding title. The purpose of such evidence is to rebut the *prima facie* case of ownership made by plaintiff, and to show that the damages which he seeks to recover for permanent injury to the freehold did not accrue to him on account of his interest in the land, but that such damages accrued in favor of another on account of his interest therein. It is true that the defendant can have no interest in having an outstanding title enforced against the plaintiff, but when he is called on to make compensation for an injury of such a nature as to affect and reduce the value of the fee-simple estate in the land, he has an interest in having the court determine whether plaintiff, by reason of his interest in the land, is entitled to recover for the injury claimed. If this question cannot be presented by a defendant, he may be required to make compensation for an injury which materially diminished the market value of the fee-

simple estate in land at the suit of a person having only a possessory interest therein, after which he could be compelled, at the suit of the owner of the fee, to make a second compensation for the same injury. The law will enforce only a single compensation, even as against a wrongdoer. The reasons stated would seem to compel the conclusion reached by the court; but, aside from the reasons upon which the conclusion rests, it is fully sustained by authorities bearing directly on the subject. *Sedgwick on Damages*, § 70; *Kelly v. New York, etc.*, R. Co. (1880) 81 N. Y. 233; *Wallace v. Goodall* (1846) 18 N. H. 439; *Thomas v. Ohio Coal Co.* (1916) 199 Ill. App. 50; *McLeod v. Spencer* (1908) 21 Okl. 165, 95 Pac. 754, 17 L. R. A. (N. S.) 958, 129 Am. St. Rep. 774.

The court has reached the conclusion that, in cases where a plaintiff seeks to recover damages for an injury, which permanently affects the land by reducing its market value, it is incumbent on him to prove such an interest in the land as entitles him to receive damages of that nature. It was therefore incumbent on appellee to prove title to the entire farm. Appellant proved that he was in possession of the entire farm of 700 acres and that he claimed to own it. Proof of actual possession under a claim of ownership is sufficient to make a *prima facie* case of title, where the title to real estate is not directly in issue, but arises only indirectly as an incident to the right of the plaintiff to recover damages against a trespasser. *Hungerford v. Redford* (1872) 29 Wis. 345; *Rotch's Wharf Co. v. Judd* (1871) 108 Mass. 224; *Advance, etc., Co. v. Eddy* (1887) 23 Ill. App. 352. In this case appellant is sued as a wrongdoer, and the title is in issue only indirectly, as affecting the measure of damages. In the absence of countervailing proof, the *prima facie* title shown by appellee will stand.

[11] The attention of the court has not been called to any evidence to meet the *prima facie* case made by appellee. Appellant attempts to question the title of appellee to a part of the land lying in the fractional northeast quarter of section 36, township 33 north, range 4 west, but no attempt is made to defeat the title of appellee by showing the true state of the record title. The evidence must be held sufficient to sustain appellee's title to the entire farm. Appellant asserts that there is no evidence to show any permanent injury to the land and that a verdict on such theory is not sustained by the evidence.

[12-14] Appellee does not claim that any part of his land has been appropriated or permanently occupied by appellant, so as to deprive him of its use or occupancy. Appellee still has the possession and use of all the land described in his complaint, in the condition in which it was left after the water receded, leaving the deposit of oil on its

surface. The evidence does not show a condition created by appellant causing a continuance or intermittent flow of oil, which will exist through the future, killing the vegetation and rendering the land unproductive so long as the pipe lines are maintained and operated. Appellee does not seek to recover damages on the theory that appellant has wrongfully appropriated to its use a portion of his land for the purpose of flowing oil thereon throughout the future. On such a theory he would be entitled to be awarded damages for a permanent injury to the land, and by the payment of the amount awarded appellant would acquire a right against appellee to use the land so appropriated for that purpose. The wrongful act on which the action is based is not treated as a continuing nuisance, but a completed tortious act, resulting in permanent injury to the land affected. Under the pleadings and the evidence in this case, the recovery must be limited to damages resulting to the land from the oil which had been permitted to flow thereon prior to the commencement of the action; but the entire damage resulting therefrom must be recovered in one action. *Porter v. Midland R. Co.*, *supra*; *West Leigh Colliery Co. v. Tunnicliffe* [1908] 10 Ann. Cas. 74.

It is the theory of appellee, as disclosed by the record, that the effect of the oil which appellant had permitted to flow upon the land had killed the grass and vegetation growing thereon, and had so affected said land as to permanently destroy its fertility and productive value. Under such a theory the wrongful act has been completed, and all of the damage to flow therefrom has been consummated. The abatement of the condition which might occasion further damage could neither enhance nor diminish the amount of recovery, as, under the theory adopted, damages can be recovered only for the injury already inflicted. It can be readily seen that a recovery for the amount of depreciation in the rental value of the land to the time of the commencement of the action would not compensate appellee for the loss sustained, if it is true that the fertility and productive value of the land was permanently destroyed.

Appellant asserts, however, that there is no evidence in the record from which the jury could find that the fertility or productive value of the soil was destroyed. In the opinion of the court, appellant is correct in this statement. The evidence in the case is so voluminous that it is impracticable, within the scope of this opinion, to review it at length. It is shown that great quantities of oil found its way upon the land, and was left there after the water receded. Evidence was introduced showing that samples of soil furnished by appellee was analyzed, and that as much as 7½ ounces of crude oil to the cubic foot was found, while in other

samples taken from the land no oil was found. There is evidence to show that crude oil has a harmful effect on certain things, and that it will kill vegetation, but none to show that it would affect the fertility or productive value of the soil itself. It is shown that, after the flood, portions of the land did not produce the native grass that had grown there prior to that time, and that the surface in places was bare of vegetation, while in other places the ground was covered with weeds. This might justify the inference that the oil killed the grass and destroyed the sod and roots, especially if the failure of the grass to grow was confined to the places most affected by the oil; but it would not justify an inference that the soil had lost its fertility or productive value. There is also evidence by Mr. Helmer and Mr. Kottka as to oil on the Bunge farm on which these gentlemen had resided. This evidence shows that a flow of oil on portions of those lands had destroyed the native grasses and parts of a timothy meadow. This evidence shows that there is a place in the pasture where the grass had been killed out by oil about 11 years before the trial, and that practically nothing had grown on that place since; but it does not show that there had been any attempt to reseed it to grass or to cultivate it in any other kind of crop.

Appellee testified that he plowed up a part of one 40-acre tract that had been overflowed by oil, and that, in 1916, he sowed a part in oats, a part in millet, and a part he planted in corn. He testified that he got one wagon load of bundles of oats out of a field of 20 acres, that there was no corn crop at all, and that 15 acres of millet produced only one wagon load. He stated that the land had produced before that, and gave some figures as to the crops in the years 1914 and 1915; but there was no evidence to show whether the failure of the crops in the year 1916 on the particular fields to which he referred was due to a condition of the soil produced by the flow of oil or whether it was due to some other cause. The attention of the court has not been called to any other evidence showing an effort to produce crops on any of the land affected. There is no evidence to show that it would not produce grass, if properly seeded, or that it would not, under favorable conditions, produce other crops. The evidence most favorable to appellee is not sufficient to warrant a finding that the productive quality of the soil was destroyed or permanently injured from the effects of the oil.

As heretofore stated there is evidence to show an injury to the products of the soil, and also to show that appellee's stock pasturing on his lands was injured, and that some of it was killed, as a result of oil swallowed in eating grass and drinking wa-

ter on the land. Under the evidence, appellee was entitled to a verdict for these items of evidence. When the amount of the verdict is considered in connection with the evidence in relation to the items of damages for which appellee is entitled to recover, it seems apparent that the jury must have awarded damages on account of permanent injury to the productive qualities of the soil. In testifying to the market value of the land before the oil flowed over it, and of the same land immediately afterward, the witnesses must have based their testimony on the assumption that the fertility of the soil was destroyed, and that the land would remain in that condition for an indefinite period; and the jury must have based the damages as awarded by its verdict on the depreciation in the market value of the land as shown by such evidence. Where it appears from a record that a verdict is based on improper items of damages, the verdict will be held to be excessive, and a new trial will be awarded. *Cleveland, etc., R. Co. v. Hadley* (1907) 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1; *City of Indianapolis v. Stokes* (1914) 182 Ind. 31, 105 N. E. 477; *Board of Com'rs v. Fertich* (1897) 18 Ind. App. 1, 46 N. E. 699.

The same rule must be applied, where the verdict appears to be based on an item of damage which has no evidence to sustain it. For the reasons stated, appellant's motion for a new trial should have been sustained.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(188 Ind. 364)

FELKER et al. v. CALDWELL. (No. 23377.)
(Supreme Court of Indiana. June 25, 1919.)

1. OFFICERS — §82 — CLAIM TO OFFICE — INJUNCTION.

Where title to a public office is clearly unsettled, a claimant of the office may be enjoined by one occupying the office under a claim of right until the former shall have established his title in an action at law.

2. CONSTITUTIONAL LAW — §48 — STATUTES — PRESUMPTION OF VALIDITY.

A statute on the books at any given time, not judicially declared unconstitutional or invalid, is presumably a valid law.

3. STATES — §4 — VALIDITY OF STATE STATUTE — STATE QUESTION.

Whether a state statute is inhibited by the Constitution of the state is a state and not a federal question.

4. STATES — §4 — STATUTE — INTERFERENCE WITH INTERSTATE COMMERCE — EFFECT OF FEDERAL DECISION.

One appointed by the Governor state supervisor of oil inspection under Acts 1901, c. 226

(Burns' Ann. St. 1914, § 7890), was not affected in his title to the office by a decision of the federal court holding the act invalid as a revenue measure as to interstate shipments of oil.

5. OFFICERS — 82 — OFFICER DE FACTO — RIGHT TO INJUNCTIVE RELIEF.

In view of Acts 1881, c. 78, Acts 1891, c. 27, state supervisor of oil inspection appointed by the Governor under Acts 1901, c. 226 (Burns' Ann. St. 1914, § 7890), held at least a de facto officer, and a de jure officer in case the act of 1901 was valid, so that he was entitled to injunctive relief against a rival claimant to the office, appointed by the state geologist, who was interfering with the duties of the office.

Lairy, C. J., and Townsend, J., dissenting.

Appeal from Circuit Court, Marion County; Lewis B. Ewbank, Judge.

On rehearing. Former opinion set aside, and judgment below affirmed.

For former opinion, see 121 N. E. 538.

Charles E. Cox and Myers, Gates & Ralston, all of Indianapolis, for appellant.

John F. Robbins and Ele Stansbury, both of Indianapolis, and U. S. Lesh, of Huntington, for appellee.

MYERS, J. On July 7, 1917, appellee brought this suit against appellants, Felker and his deputies, and thereafter such steps were taken and proceedings had that a temporary injunction was granted, enjoining the appellants and all other persons assuming to act as deputies, or otherwise, from in any manner interfering with appellee as state supervisor of oil inspection, or his deputies in the discharge of their duties, until such time as it shall first be established by the adjudication of a competent tribunal that said Adam H. Felker had a superior title to the said office of state supervisor of oil inspection, or until the further order of this court. It further appears that appellee, on June 22, 1917, was appointed by the Governor of the state of Indiana, state supervisor of oil inspection under the provision of an act of the General Assembly approved March 11, 1901. Acts 1901, p. 516; section 7890, Burns 1914. He thereupon gave bond and qualified as required by law.

On July 2, 1917, appellant Felker was appointed by the state geologist as state supervisor of oil inspection under the provisions of an act of the Legislature. Acts 1891, p. 29. Felker gave bond and qualified as required by the law under which he claims to act, appointed deputies throughout the state, and proceeded to take steps to enforce the law relating to the inspection of oil, etc.

The errors here assigned on the rulings of the trial court challenge the legality of the order of the trial court granting a temporary injunction.

Appellants insist that a court of equity is without jurisdiction to grant injunctive relief in a case where it clearly appears that the real controversy involves the title to a public office.

Appellee takes the position that by virtue of his appointment and commission he was a de facto officer acting under color of authority, and as such officer he was entitled to have the status quo preserved as against an adverse claimant who was interfering with him in the performance of the duties of such office, until such time as the title thereto could be determined in a proper proceeding for that purpose.

[1] Appellants' insistence is not well taken, for the reason that the title to the office of state supervisor of oil inspection was clearly an unsettled question, and in such cases one claimant to the office may be enjoined by one occupying the office under a claim of right until the former shall have established his title in an action at law. *Parsons v. Durand*, 150 Ind. 203, 49 N. E. 1047; *Brady v. Sweetland*, 13 Kan. 41; *State v. Superior Court*, 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 898; *Reemelin v. Mosby*, 47 Ohio St. 570, 26 N. E. 717; *Rhodes v. Driver*, 69 Ark. 606, 65 S. W. 106, 86 Am. St. Rep. 215; *Stenglein v. Saginaw Cir. Judge*, 128 Mich. 440, 87 N. W. 449; *Guillotte v. Poincy*, 41 La. Ann. 333, 6 South. 507, 5 L. R. A. 403; 2 *Joyce on Injunctions*, § 1880; 2 *High on Injunctions* (4th Ed.) § 1315.

In this state public offices are either constitutional or legislative. In this case the office in question is not a constitutional one; consequently it must be one created by the Legislature or none exists. However, the power of the Legislature to create it is not questioned nor is there any constitutional objection urged.

[2] In considering the questions here presented, the circumstance existing at the time the trial court gave its decision must not be overlooked. With this observation in mind, it will be seen that at that time the act of 1901, *supra*, was on our statute books, and presumably a valid law. *State ex rel. Shea v. Billheimer*, 178 Ind. 83, 96 N. E. 801; *Hanly v. Sims*, 175 Ind. 345, 93 N. E. 228, 94 N. E. 401; *Cincinnati, etc., R. Co. v. McCullom*, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165. At least if it was unconstitutional or invalid for any reason, it was not so judicially declared.

This court in the case of *Parker v. State*, 133 Ind. 178, 200, 32 N. E. 836, 843 (18 L. R. A. 567) said:

"It seems to be well settled that one who is elected or appointed to an office under an unconstitutional statute, before it is adjudged to be so, is an officer de facto."

[3, 4] Appellee was appointed and qualified under the act of 1901. This act for more

than 16 years was acquiesced in by all parties concerned as well as the public generally. True, on June 27, 1917, the District Court of the United States for the District of Indiana, on the ground that the act of 1901 was a revenue measure, enjoined appellee from inspecting and interfering with oils which were interstate shipments. However this may be, the question of the validity of the act under which appellee was appointed was not then pending before, or determined by, any court of this state, nor had this court passed on the effect of the federal court decision. We take it for granted that the federal court did not pass on the question as to whether or not the act was inhibited by our state Constitution. That is a state question. *Ex parte Spencer*, 228 U. S. 652, 664, 33 Sup. Ct. 709, 57 L. Ed. 1010. While the decision of the federal court had the effect of excluding interstate shipments of oil from the operation of certain provisions of the statute under which appellee was acting, yet it is not our understanding that such decision in any wise affected appellee's title to the office of state supervisor of oil inspection. The question of title to the office is not here involved, and will not be considered as a question presented by this record. *Parsons v. Durand*, *supra*.

In 1881 (Acts 1881, p. 571) a general law on the subject of inspection of oils was enacted, and the Governor was thereby authorized to appoint for the term of two years a suitable person, with certain specific qualifications to perform the duties required by that act.

In 1891 (Acts 1891, p. 29) the General Assembly expressly created the office of state supervisor of oil inspection, prescribed the duties thereof, fixed the compensation of such officer, and abolished the office known by the act of 1881 as state inspector of oils, and gave the appointive power to the state geologist, who was authorized to fill the office by appointment for a term of four years. This enactment was challenged and held valid by this court in the case of *State ex rel. Yancey v. Hyde*, 129 Ind. 297, 28 N. E. 186, 13 L. R. A. 79.

[5] Looking to the law in force in 1891, on the subject now being considered, it will be seen that the two acts 1881 and 1891 together furnished the law at that time in this state on the subject of oil inspection. That law for a period of 10 years thereafter was enforced by an officer characterized as "state supervisor of oil inspection."

The 1901 act was entitled "An act regulating the inspection of oils and other petroleum products, providing penalties for its violation, and repealing all former laws and laws in conflict therewith." This act as its title indicates has reference to the manner of inspecting oils and other petroleum products only. It has no provision expressly creating an office, but provides that such inspection as therein designated shall be made by the

state supervisor of oil inspection, and office theretofore created by positive legislative action, and at that time being administered by an incumbent who, so far as it appears from this act, was to continue in office until January 1, 1903, when by the provisions of this act the Governor was to appoint his successor, and every four years thereafter. Under this act, the duties of the state supervisor of oil inspection were not materially different from those required of this officer under the act of 1881, except that his duties were extended to include the inspection of gasoline, petroleum-ether, or similar or like substances under whatever name called.

Under the former acts this officer was compensated by fees collected from those requiring his services, while in the 1901 act he received a salary of \$2,500 per year, to be paid out of the state treasury. His salary since 1903 has been by the appropriation act increased to \$3,500 per year, with an addition of \$600 for office expenses, and in 1915 the Legislature appropriated \$500 for office expenses, \$500 for traveling expenses, and \$900 for clerk hire. Acts 1915, p. 349. A minor change was made in the appointment of deputies who were to receive only one half of the fees provided for inspection, and the other one half was to be paid to the state treasury for the benefit of the general fund of the state. Appellant calls our attention to these changes, and insists that they tend to show that the General Assembly in passing this last act contemplated, and intended to create, another and different office from that created by the act of 1891. We are not convinced that this act should be so construed. We are not prepared to say that a mere change in compensating this officer from a fee basis to a salary basis is sufficient to create a new office, but, on the contrary, we are persuaded that the Legislature, in re-enacting the act of 1881 relative to the duties of the inspecting officer and method to be followed by him in inspecting oil, gasoline, petroleum-ether, and other petroleum products, and providing that the state supervisor of oil inspection shall perform these duties, did intentionally recognize the office created by the act of 1891 as an existing office, so that when the Governor of this state appointed appellee as the successor of the resigned incumbent, as shown by this record, the appointment was to a legally existing office, and appellee's possession of the books, papers, and paraphernalia of the office under his appointment made him a *de facto* officer at least, and a *de jure* officer in case the act under which he received his appointment was valid. So that when the proceedings in this case brought to the attention of the trial judge acting as a chancellor a state of facts showing an existing office with two claimants, one in possession performing the duties of the office, claiming his authority to act under

an appointment authorized by the law not judicially declared invalid, and the other claiming the right to administer the affairs of the same office by virtue of his appointment under another law, a de facto officer was shown on the part of the former, entitling him to injunctive relief. *Johnston v. Jones*, 23 N. J. Eq. 216.

In *Carleton v. People*, 10 Mich. 250, it is said:

"All that is required when there is an office to make an officer de facto is that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of election or appointment, as the case may be. It is not necessary his election or appointment should be valid, for that would make him an officer de jure."

In the case of *Erwin v. Jersey City*, 60 N. J. Law, 141, 144, 37 Atl. 732, 733 (64 Am. St. Rep. 584) it is said:

"When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon and performs the duties of such office, his acts will be held valid in respect to the public, whom he represents, and to third persons, with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so."

See, also, *Parks, Pet'r*, for Writ of Habeas Corpus, 3 Mont. 428, 430; *Buck v. Hawley et al.*, 129 Iowa, 406, 408, 105 N. W. 688.

Since the submission of this cause, the act of 1901 has been held invalid by this court in the case of *Caldwell v. Felker*, 119 N. E. 999. That case was a proceeding in quo warranto to try the title to the office of state supervisor of oil inspection, wherein it was held that the act of 1881 is in force except as amended and modified by the act of 1891.

The question involved in this latter case was clearly for the law side of the court. When the question thus presented was determined, the remedy invoked and granted in this case served its purpose, but it is necessary that the cause be sent back to the trial court for a final disposition in that court.

Our attention has been called to the case of *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178, as authority for the proposition that, "There cannot be a de facto office, under a constitutional government."

In our view of the instant case, the question suggested is unimportant in the decision of this case, and we therefore express no opinion on it. However, in the case, *State of Maine v. Poulin*, 105 Me. 224, 74 Atl. 119, 24 L. R. A. (N. S.) 408, 134 Am. St. Rep. 543, the question of whether or not there may be a de facto officer without a de jure office is thoroughly considered, as also the case of

State v. Carroll, 88 Conn. 449, 9 Am. Rep. 409, and the *Norton Case*, the two leading cases often referred to in the books as sustaining the doctrine appellants would have this court announce. Each of these cases is analyzed, and the conclusion reached that there can be no reasonable doubt that there may exist a de facto office as well as a de facto officer. See, also, *Land v. Mayor, etc.*, of Bayonne, 74 N. J. Law, 455, 68 Atl. 90, 122 Am. St. Rep. 391, 12 Ann. Cas. 961, and note to same case, 15 L. R. A. (N. S.) 93; *Bales v. Bailey*, 106 Minn. 138, 118 N. W. 676, 19 L. R. A. (N. S.) 775, 130 Am. St. Rep. 592, 16 Ann. Cas. 338. Judgment affirmed.

LAIRY, C. J., and TOWNSEND J., dissent.

(188 Ind. 380)

BENNETT v. STATE. (No. 23513.)

(Supreme Court of Indiana. June 26, 1919.)

1. INDICTMENT AND INFORMATION \S 137(7)—MOTION TO QUASH.

Where an indictment was good as an indictment for assault and battery, a motion to quash, directed to the whole indictment, was properly overruled, though it attempted to charge an assault and battery with intent to commit murder.

2. HOMICIDE \S 337—APPEAL—DEFECTIVE INDICTMENT.

Where defendant was convicted of assault and battery and the indictment sufficiently charged the commission of that crime as defined by Burns' Ann. St. 1914, \S 2242, defendant cannot complain that the indictment was defective in so far as it attempted to charge the offense of assault and battery with intent to commit murder.

3. CRIMINAL LAW \S 1141(2), 1144(1/2)—APPEAL—PRESUMPTIONS.

As a general rule, the appellate court, in the absence of a showing in the record to the contrary, will indulge all reasonable presumptions in favor of the judgment and rulings of the trial court, and in order to overcome such presumptions error must affirmatively be shown by the record; the burden of so showing being on the party complaining of the error.

4. CRIMINAL LAW \S 1144(14)—APPEAL—PRESUMPTIONS—INSTRUCTIONS.

Where all of the instructions were not in the bill of exceptions and it did not affirmatively show that the trial judge did not copy the indictment and a section of the statute into his written instructions filed in the case, it will on appeal be presumed, where defendant complained that after a proper and timely request to instruct the jury in writing the judge read the indictment and such section of the statute, that the judge complied with the request, either by copying same in the instructions before reading, or rereading them after insertion.

5. CRIMINAL LAW §1124(3)—APPEAL—RECORDED—MOTION FOR NEW TRIAL.

Under Burns' Ann. St. 1914, § 2165, a motion for new trial, complaining that the verdict was contrary to the law and not sustained by the evidence, cannot be considered by the appellate court, where the evidence was not in the record.

6. CRIMINAL LAW §1130(2) — APPEAL — BRIEFS.

Where defendant asserted that the trial court erred in finding for the state on his plea in abatement to the indictment, but did not set out in his brief any copy of the plea or state the substance thereof, and there was nothing in the brief to show disposition of the plea, nothing is presented for review by the appellate court.

7. CRIMINAL LAW §266—STANDING MUTE—ENTERING PLEA FOR DEFENDANT.

Under Burns' Ann. St. 1914, § 2072, it was proper, where defendant stood mute, to enter for him a plea of not guilty.

Appeal from Circuit Court, Greene County; Thos. Van Buskirk, Special Judge.

Stanley Bennett was convicted of assault and battery, and appeals. Affirmed.

Charles C. Whitlock, of Terre Haute, and Webster V. Moffett, of Bloomfield, for appellant.

Ele Stansbury and Dale F. Stansbury, both of Indianapolis, for the State.

WILLOUGHBY, J. This was a prosecution against appellant and another by indictment under section 2240, Burns' R. S. 1914, for assault and battery with intent to commit murder. The appellant was tried separately by jury, and a verdict rendered finding him guilty of assault and battery only. Judgment was rendered on the verdict, and defendant appeals.

The errors relied on for reversal are:

(1) Error in overruling appellant's motion to quash the indictment.

(2) Error in the court overruling appellant's motion for a new trial.

[1, 2] The indictment, omitting the formal parts and signature, is as follows:

"That at Greene county, in the state of Indiana, on the 4th day of December, 1917, one Stanley Bennett and William Stevenson did then and there unlawfully and feloniously, and in a rude and insolent and angry manner, touch, beat, strike, kick, and wound Will R. Vosloh, with the felonious intent then and there and thereby to kill and murder said Will Vosloh."

A motion to quash was directed to the whole indictment. If it was good as an indictment for assault and battery only, the motion was correctly overruled. Greer v. State, 50 Ind. 287, 19 Am. Rep. 709; McGuire v. State, 50 Ind. 284; Stucker v. State, 171 Ind. 441, 84 N. E. 971.

Appellant insists that the indictment does not correctly charge the felonious intent to murder. The indictment sufficiently charges the commission of the crime of assault and battery as defined by section 2242, Burns' 1914, and, as the accused was convicted of assault and battery only, he is not in a position to complain or insist that the indictment does not sufficiently charge the felonious intent. Having been convicted of assault and battery only, the sufficiency of the indictment as to the intent presents a moot question which we are not required to decide. Stucker v. State 171 Ind. 441, 84 N. E. 971; Parks v. State, 159 Ind. 211, 215, 64 N. E. 862, 59 L. R. A. 190.

There is no attempt to bring any evidence into the record. There is no bill of exceptions purporting to contain the evidence or any part of it. There is in the record a bill of exceptions containing certain instructions given by the court and certain instructions requested by the defendant and refused by the court; but it does not appear from said bill of exceptions that it contains all of such instructions given or tendered and refused.

[3, 4] Appellant claims that the court erred, in this, that the appellant made a proper and timely motion to require the court to instruct the jury in writing, but that, notwithstanding such request, the judge read, in giving his instructions in the case, the original indictment, and in another instruction he read section 2240, Burns' R. S. 1914, from the printed volume. The bill of exceptions does not show affirmatively that the judge did not copy said indictment and said section 2240 into his written instructions filed in the case. For aught that appears in the bill of exceptions, he may have had them copied in his instructions before reading, or, when objection was made, he may have then copied said statute and indictment into his instructions, and then reread them.

In Smurr v. State, 88 Ind. 504, cited by appellant, the court say:

"It is proper, of course, for the court to make extracts, which are law and applicable to the case, from any law book, and to copy the same in its written charge and to read the charge containing such extracts to the jury."

The bill of exceptions does not show that this was not done. Therefore we must presume that it was done. As a general rule, the appellate court, in the absence of a showing in the record to the contrary, will indulge all reasonable presumptions in favor of the correctness of the judgment or rulings of the trial court, and will presume that the proceedings had in the progress of the cause were regular and free from error. In order to overcome such presumption, error must affirmatively be shown by

the record, and the burden of so showing it is on the party, usually defendant, complaining of the error. 17 O. J. pp. 218, 214, 215; *Bader v. State*, 176 Ind. 268, 94 N. E. 1009; *Woodward v. State*, 174 Ind. 743, 93 N. E. 169; *Campbell v. State*, 148 Ind. 527, 47 N. E. 221; *Duncan v. State*, 110 Ark. 523, 162 S. W. 573; *Niswonger v. State*, 179 Ind. 653, 102 N. E. 135, 46 L. R. A. (N. S.) 1.

In the absence of an affirmative showing of error, the presumption is that the ruling of the trial court was correct. *Malone v. State*, 179 Ind. 184, 100 N. E. 567; *Woodward v. State*, 174 Ind. 743, 93 N. E. 169; *Campbell v. State*, 148 Ind. 527, 47 N. E. 221.

In *Hollon v. State*, 186 Ind. 374, 114 N. E. 5, the court says:

"Certain questions are sought to be presented as to instructions given and refused; but it does not appear from the bill of exceptions containing such instructions whether it contains all of the instructions in the case. As said in *State v. Winstandley*, 151 Ind. 495, 496, 51 N. E. 1054: 'When, in a criminal case, it is not affirmatively shown by the bill of exceptions that it contains all the instructions given by the court to the jury, this court must presume that such bill of exceptions does not contain all the instructions given. *Cooper v. State*, 120 Ind. 377, 383, 384, 22 N. E. 320. In such case, the presumption is that the substance of the instructions asked was embraced in the instructions given by the court, which are not contained in the bill of exceptions, and that, if any instructions given by the court and set out in the bill of exceptions are erroneous, they were corrected or withdrawn by other instructions given by the court, and not set forth in the record.'" *Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860; *Bd. of Com'rs of Jackson Co. v. Nichols*, 139 Ind. 611, 38 N. E. 526; *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885; *Forsyth v. Wilcox*, 143 Ind. 144, 41 N. E. 871.

In *Robb v. State*, 144 Ind. 569, 43 N. E. 642, complaint was made of misconduct of the prosecuting attorney in his opening statement to the jury, and this court held that it would presume that the trial court, in its instructions, withdrew any such misstatements of a prejudicial character, and directed the jury to disregard them, for the reason that all the instructions given were not in the record. The court, in that case, at page 572 of 144 Ind., at page 643 of 43 N. E., said:

"However, it is the duty of this court to indulge all reasonable presumptions in favor of the action of the trial court, and in doing so in this instance we must presume, the contrary not appearing, that the court in its charges to the jury withdrew any misstatements, of a prejudicial character, and directed the jury to ignore them."

If the presumption in such a case is that the trial court withdrew the improper statements of the prosecuting attorney and directed the jury to disregard them, it certainly follows that, if the instructions are not all

in the record, and any instruction contained therein is erroneous, it will be presumed, not only that the same was corrected, or the defect therein supplied by other instructions given, and omitted from the record, but that the same was withdrawn, and the jury directed to disregard it, if such presumption is necessary to prevent a reversal of the cause.

Applying the same reasoning to the case now before the court, the court must presume, nothing in the record affirmatively appearing to the contrary, that the court withdrew the oral instructions, claimed by appellant to have been given, and substituted therefor written instructions, and that, when objection was made to the reading of section 2240, Burns' R. S. 1914, the court copied such section into its instructions and reread it, and that the indictment was copied into its written instructions as a part thereof.

Judge Elliott, in his work on Appellate Procedure (section 709), says:

"If the appellate tribunal is compelled to resort to presumptions, it will choose that which sustains the proceedings of the trial court and reject that which would overthrow them. If the condition of the record is such as to require the higher court to act upon a presumption, it will without hesitation adopt the presumption that upholds the judgment from which the appeal is prosecuted."

In this case, the bill of exceptions failing to show affirmatively that the court did not comply with the written request of the parties that instructions be given in writing, we must presume that the trial court complied with the law in that particular. In the absence of the evidence, and the bill of exceptions containing the instructions not showing affirmatively that it contained all the instructions given, no question is presented to this court on giving or refusing instructions. *Hollon v. State*, supra; *State v. Winstandley*, supra.

[5,6] In his motion for a new trial, appellant says the verdict of the jury is contrary to law and the verdict of the jury is not sustained by the evidence; but, in the absence of the evidence, we cannot consider either of these alleged errors. Section 2165, Burns' R. S. 1914. Appellant alleges that the court erred in finding for the state on appellant's plea in abatement to the indictment, but he does not set out in his brief any copy of the alleged plea in abatement, or state the substance of it, and there is nothing in said brief to show what disposition was made of said plea. He does not disclose whether it was disposed of by demurrer, or whether an issue of fact was formed and evidence heard. Under such circumstances, nothing is presented to this court for decision concerning said plea in abatement. The burden is on the appellant to show error in the record and proceedings

of the trial court. *Malone v. State*, 179 Ind. 184, 100 N. E. 567.

[7] Appellant contends that the court erred in entering a plea of "not guilty" for defendant, Stanley Bennett, when said defendant stood mute in court, and in forcing said defendant to trial in said court without first rendering judgment upon said defendant's plea in abatement and requiring defendant to plead over to said indictment. In this contention appellant is wrong. If a defendant stand mute or refuse to plead to an indictment or affidavit, a plea of not guilty must be entered by the court, and the trial proceed. Section 2072, Burns' R. S. 1914; *Weaver v. State*, 83 Ind. 239.

No error appearing, the judgment of the trial court is affirmed.

(188 Ind. 359)

STATE v. SARLIN. (No. 23521.)

(Supreme Court of Indiana. June 24, 1919.)

1. INTOXICATING LIQUORS \S 140—KEEPING WITH INTENT TO SELL—CONSTRUCTION OF STATUTE—BONDED LIQUOR.

Burns' Ann. St. Supp. 1918, \S 8356d (Acts 1917, c. 4, \S 4), prohibiting the keeping of intoxicating liquor with intent to sell, is not intended to apply only to those having bonded liquor, but is general in its application.

2. INDICTMENT AND INFORMATION \S 111(2, 3)—PLEADING PROVISOS AND EXCEPTIONS.

Where an exception is in a proviso, or in a subsequent section of the statute, it need not be pleaded, but exceptions which are a part of the definition of the offense must be pleaded.

3. CRIMINAL LAW \S 1134(6), 1144(3) — APPEAL—MOTION TO QUASH AFFIDAVIT—PRE-SUMPTIONS IN FAVOR OF RULING.

The trial court having sustained a motion to quash the affidavit, the Supreme Court must assume, even though no valid reason was presented by appellee, that the court knew a valid reason, and, if the Supreme Court can discover one, it will be bound to sustain the action of the lower court, which will not be presumed not to have taken notice of more than was presented by the motion sustained.

4. INDICTMENT AND INFORMATION \S 125(20) CHARGING OFFENSES CONJUNCTIVELY.

Where a statute declares it unlawful "to keep intoxicating liquor with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same," it is proper to charge that one did unlawfully keep with "intent to sell, * * * furnish and otherwise dispose of the same," but not to charge disjunctively.

5. INDICTMENT AND INFORMATION \S 119—INTOXICATING LIQUORS \S 211—AFFIDAVIT—SURPLUSAGE.

An affidavit or indictment under Burns' Ann. St. Supp. 1918, \S 8356d, for unlawful keeping of intoxicating liquor with intent to

sell, etc., which ends with the words "or use," tends to show innocence and is vitiated thereby, and such words cannot be treated as surplusage, and such affidavit was properly quashed under provision of Burns' Ann. St. 1914, \S 2065, subd. 3.

Appeal from Circuit Court, Randolph County; Theo. Shockney, Judge.

Charles Sarlin was charged with unlawfully keeping whisky with intent to dispose of the same in violation of law. The trial court sustained his motion to quash the affidavit, and the State appeals. Judgment affirmed.

Ele Stansbury and Dale F. Stansbury, both of Indianapolis, for the State.

W. G. Parry, of Winchester, for appellee.

TOWNSEND, J. Appellee was charged, under section 8356d, Burns' 1918 Supplement, section 4 of chapter 4 of Acts 1917, p. 15, with unlawfully keeping six pints of whisky with the intent to dispose of the same in violation of this section.

The trial court sustained appellee's motion to quash the affidavit, and the state appeals.

[1, 2] So much of the affidavit as is necessary is as follows:

"Did then and there unlawfully keep and have in his possession intoxicating liquor, to wit, six (6) pints of whisky, with the intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same or use within the state of Indiana, etc."

The affidavit then says that appellee was not the owner on April 2, 1918, was not a licensed pharmacist, wholesale druggist, manufacturing chemist, or the owner, manager, or operator of a public hospital or any person authorized by law to have intoxicating liquor in his possession.

We are not assisted by any brief from the appellee. We gather from the brief of the state and appellee's motion to quash that the only questions presented by appellee to the trial court were: (1) That section 4, supra, had to do alone with persons having liquor in bond on the 2d day of April, 1918; (2) that the affidavit was bad because the exception in the proviso of the act was not pleaded. The section is:

"That after the 2d day of April, 1918, it shall be unlawful for any person, * * * to keep any intoxicating liquor, with the intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same, except as in this act provided. Provided, however, it shall be lawful for any person who at the time of the taking effect of this act shall then be the owner of or in possession of spirituous, vinous or malt liquors previously manufactured in this state and which liquors, * * * shall then be under government bond in any bonded warehouse in this state, * * * to have, and keep in possession all such liquors until," etc.

The first part of this section is general in its application and makes it a crime for "any person to manufacture, sell, barter, exchange, give away, furnish or otherwise dispose of any intoxicating liquor, or to keep any intoxicating liquor, with the intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same," etc.

It will be seen that it was the intention of the pleader to charge appellee with keeping intoxicating liquor with the "intent to sell, etc." This is the second offense declared in the statute. This section of the statute is not intended to apply only to those having bonded liquor, but is to be general in its application. Therefore appellee's first contention in his motion to quash is erroneous. His second contention, that the exception contained in the proviso should have been pleaded, is also erroneous. Where an exception is in a proviso, or in a subsequent section of the statute, it need not be pleaded. Exceptions which are a part of the definition of the offense must be pleaded. *Yazel v. State*, 170 Ind. 535, 84 N. E. 972; *State v. Paris*, 179 Ind. 446, 101 N. E. 497.

[3] If the lower court had overruled this motion to quash and appellee were here questioning the correctness of that ruling, it would be proper for this court to sustain the ruling of the lower court on the theory that appellee had waived all objections to the affidavit except those pointed out; but, the court having sustained the motion to quash, we must assume, even though no valid reason was presented by appellee, that the court knew a valid reason, and, if we can discover one, it will be our duty to sustain the action of the lower court. It is not to be presumed that the trial court did not take notice of more than was presented by the motion which he sustained.

[4] Appellee is charged with keeping six pints of whisky "with the intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same or use within the state of Indiana, etc." It has been decided many times that it is sufficient to charge a crime in the language of the statute, but this statement of the law should not be taken literally. This does not mean that disjunctives in the statute may be used. The meaning of the statute must be gathered and the substantive words or their equivalents used. It has been repeatedly held by this court

that, where a statute declares that it shall be unlawful for a person to do this, or that, or that, it is sufficient to charge the several acts conjunctively, but it is not sufficient to charge them disjunctively because this renders the pleading uncertain. The defendant has a right to a direct and positive charge in order that he may plead and defend. Where a statute, as here, declares it unlawful "to keep intoxicating liquor with the intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same," it is proper to charge that one did unlawfully keep with the intent to sell, barter, exchange, give away, furnish, "and" otherwise dispose of the same. That is to say, the state may charge conjunctively all of the acts following the intent. *Davis v. State*, 100 Ind. 154; *State v. Stout*, 112 Ind. 245, 13 N. E. 715; *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372; *Regadan v. State*, 171 Ind. 387, 391, 86 N. E. 449.

[5] It will therefore be seen that the court was correct in sustaining the motion to quash this affidavit because it was bad for uncertainty.

It will also be observed that the affidavit ends the charging part with "or otherwise dispose of or use." If appellee were charged with unlawfully keeping six pints of whisky with the intent to "use" the same, this would not charge a crime; unless perchance he were one who came within the provisos of this section—a question not here and not decided. It certainly is not unlawful for one outside of those having liquor in bond, so far as section 4 of this statute is concerned, to "use" the liquor. "Use" is a broad word. He might drink it; he might serve it to his guests in his home. Now, ordinarily, surplus words do not vitiate an affidavit or indictment; but they do vitiate it when they show innocence. One of the grounds for quashing an affidavit or indictment is that it contains that which is a justification or a bar. Subdivision 3, § 2065, Burns 1914. Therefore this affidavit pleaded too much, and this cannot be treated as surplusage. It is neither in apposition to that which precedes, nor explanatory of it. We assume that the trial court saw these defects in this affidavit, and that its action was because of them.

The trial court was correct in sustaining the motion to quash, and the judgment is affirmed.

(188 Ind. 554)

SOURBIER et al. v. BROWN.*
(No. 23249.)

(Supreme Court of Indiana. June 25, 1919.)

1. LIBEL AND SLANDER ¶25 — PUBLICATION.

The actionable wrong in libel is publication of the false and defamatory writing.

2. LIBEL AND SLANDER ¶74—JOINT AND SEVERAL LIABILITY.

The writer and person publishing a libel are jointly and severally liable.

3. LIBEL AND SLANDER ¶25 — "PRIMARY PUBLICATION."

Mailing a libelous circular letter constitutes a primary or original publication as to persons reading letter.

4. LIBEL AND SLANDER ¶25—"SECONDARY PUBLICATION."

Where person receiving a libelous letter exhibits it to another or remails it, there is a secondary publication.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Publication.]

5. LIBEL AND SLANDER ¶77—JOINT ACTIONS.

A joint libel action cannot be maintained against makers of primary and secondary publications for recovery of all damages resulting from primary publication.

6. LIBEL AND SLANDER ¶74—SECONDARY PUBLICATION—LIABILITY.

Defendant, who made a secondary publication of libelous matter, is not responsible for results of primary publication in which he did not participate.

7. LIBEL AND SLANDER ¶25 — PUBLICATION.

One copying a libelous article and publishing or otherwise distributing copies is guilty of publishing a new and distinct libel.

8. TRIAL ¶359(1) — VERDICT — SPECIAL INTERROGATORIES.

Answers to special interrogatories cannot prevail against general verdict unless they clearly find facts which cannot be reconciled with general verdict.

9. LIBEL AND SLANDER ¶125 — SPECIAL INTERROGATORIES.

In libel suit, answers to special interrogatories held not inconsistent with general verdict against defendant upon theory that such answers found him guilty only of secondary publication of libel, while general verdict assumed that he joined in the original publication.

10. APPEAL AND ERROR ¶830(3)—SUFFICIENCY OF EVIDENCE—ANSWERS TO INTERROGATORIES.

In determining whether evidence sustains verdict, answers to special interrogatories will be accepted as establishing facts so found un-

less there is a total want of evidence to sustain answers.

11. LIBEL AND SLANDER ¶112(1) — EVIDENCE—SUFFICIENCY.

In a libel suit indirect evidence that defendant had stated certain facts would appear regarding plaintiff, etc., held to sustain the verdict that defendant composed libelous letter and caused it to be published.

12. TORTS ¶22—LIABILITY.

A person is not liable as a joint tort-feasor unless he participated in wrongful act which caused injury.

13. LIBEL AND SLANDER ¶74—JOINT LIABILITY.

In a libel action it is sufficient if defendants both participated in unlawful act, and it is unnecessary that they acted with a common motive or design.

14. TRIAL ¶256(8) — INSTRUCTIONS — NECESSITY OF REQUESTS.

Where one of two defendants claimed he was liable only for a republication of a libel, and not for its original publication, an instruction that, if either defendant participated in publication, to find against such person or persons as had so participated, held not erroneous because failing to call the jury's attention to difference between original and secondary publications, where a more complete instruction was not requested.

15. LIBEL AND SLANDER ¶124(1) — INSTRUCTIONS.

Where one of two defendants claimed he was liable only for a secondary, and not for original, publication of libel, an instruction that, if such secondary publication was established, then both defendants were liable, is incomplete, but not erroneous.

16. LIBEL AND SLANDER ¶124(8) — INSTRUCTIONS.

Where one of two defendants claimed he was liable only for secondary, and not primary, publication of libel, an instruction that, if jury found for plaintiff, it should assess certain specified damages, including injuries produced by original publication, held reversible error, especially where another instruction authorized verdict for plaintiff based on secondary publication alone.

17. APPEAL AND ERROR ¶773(2)—DISMISSAL—BRIEFS.

Where appellant filed no brief in support of his assignments of error, the appeal will be dismissed.

Appeal from Circuit Court, Hendricks County; Geo. W. Brill, Judge.

Action by George W. Brown against Edward G. Sourbier and William Hansman. Judgment for plaintiff, and defendants appeal. Reversed, with instructions to grant a new trial as to the first-named defendant, and appeal of last-named defendant dismissed.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied.

Frank C. Groninger, Taylor E. Groninger, Ella M. Groninger, Michael A. Ryan, John C. Ruckelshaus, Russell J. Ryan, Jos. B. Kealing, and Martin M. Hugg, all of Indianapolis, for appellants.

Charles T. Hanna and Thomas A. Dally, both of Indianapolis, and Otis E. Gulley and Edgar M. Blessing, both of Danville, for appellee.

LAIRY, C. J. This is an appeal from a judgment for \$25,000 rendered in an action brought by appellee against appellant Edward G. Sourbier and William Hansman. The complaint is based on a certain circular letter set out in the complaint and alleged to be false, defamatory, and libelous. The complaint charges that Sourbier and his codefendant, Hansman, and each of them, conspired together and with their coconspirators for the purpose of defeating appellee as a candidate for election to the office of treasurer of Marion county at the election of 1914, for which office appellant Sourbier was one of the opposing candidates, and to blacken and destroy appellee's good reputation in the city of Indianapolis and Marion county, and to expose him to public disgrace, ridicule, hatred, and contempt. To that end, it is alleged, the appellant Sourbier and his codefendant, Hansman, and each of them, did compose, print, and publish the circular letter set out in the complaint. The complaint further alleges that there were at the time of such publication 72,388 registered voters in Marion county, and that appellant Sourbier and his codefendant, Hansman, and their coconspirators planned to place a copy of said circular letter in the hands of every voter just prior to the election, and to that end Hansman, who owned a printing establishment, printed 100,000 copies of said circular letter for a consideration paid him by appellant Sourbier, and that Sourbier and his codefendant, Hansman, and each of them and their coconspirators and agents, mailed and caused to be mailed and delivered by United States mail a copy of said circular letter to each and every registered voter in Marion county on the Saturday and Sunday immediately preceding the general election of 1914.

Enough of the substance of the complaint is set out to indicate how the questions presented and later discussed arise. The verdict returned by the jury was against both defendants jointly, and the judgment followed the verdict.

Appellant Sourbier asserts that the facts disclosed at the trial show that the original publication consisted in mailing, circulating, and otherwise distributing the circular letters to the voters of Marion county, and that he did not in any way advise or procure that publication to be made, and that he did not in any way act or participate in the making of that publication either directly or indirectly,

and that he had nothing to do with composing or printing the circular letter or causing it to be published in the first instance. He admits that he had two copies of the letter in his possession, one of which was handed to him on the street, and the other of which he received through the mail; and he further admits that he showed one of the copies in his possession to certain of his friends and acquaintances. Under this state of facts, which appellant claims to be disclosed by the record beyond controversy, he takes the position that he is not liable under the law for any damage caused by the original publication either jointly with his codefendant or severally. His position is that he could be held answerable under the law only for the damages occasioned by the publication which he made or participated in making, and that under the rule so stated he could be held liable for the damage only which resulted from the new publication or republication of the circular in his possession by him in exhibiting it to certain of his friends. He concedes that, as to any damage resulting from the republication made by him, the law makes him liable either individually or jointly with the original publisher at the option of the injured party.

The court is of the opinion that the position of appellant is correct as to the law when applied to a state of facts such as he claims to exist in this case.

[1, 2] The actionable wrong in libel is the publication of the false and defamatory writing. A person who composes and reduces to writing a libelous article against another does not thereby commit an actionable wrong, so long as he does not publish it or permit it to come into the hands of others; but if he publishes it, or if another get possession of it either with or without his consent, a publication by such other person makes the original composer and writer liable for all damages occasioned by the publication. The writer and the person making the publication are both jointly and severally liable in such a case. *Townsend on Slander and Libel*, §§ 115, 116; *Odgers on Libel and Slander*, p. 257; *Miller v. Butler* (1854) 60 Mass. (6 Cush.) 71, 52 Am. Dec. 768; *Indianapolis Sun Co. v. Horrell* (1876) 53 Ind. 527.

[3, 4] The sending of a libelous circular letter by mail constitutes a publication of the libelous matter therein contained to every person who reads such letters. This may be termed the original or primary publication. If a person who receives one of such letters exhibits it to another or remails it, either of such acts would constitute a republication of the libelous matter to all who learn its contents as a result of the exhibition or remailing. This may be termed a secondary publication. The person injured may sue all who participate in making the original publication either jointly or severally and recover for all resulting damages. *Belo v. Fuller*

(1892) 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75.

[5] He cannot maintain a joint action, however, against the maker of a secondary publication and those responsible for the primary publication for the recovery of all damages resulting from the primary publication. *Union Associated Press v. Heath* (1900) 49 App. Div. 247, 63 N. Y. Supp. 96.

[6, 7] The maker of a secondary publication is liable for the consequences of the publication which he makes or participates in making, but he cannot be held responsible for the results of the primary publication unless it is shown that he also made that or participated in making it. By the term "secondary publication," as here used, is meant a republication by exhibiting, re-mailing, or otherwise disseminating the original written or printed article. It does not include the dissemination of copies of the original libelous article. A person who copies the original libelous article and publishes or otherwise disseminates the copies is guilty of publishing a new and distinct libel for the consequences of which he is responsible to the exclusion of those who made the primary publication. Thus the publisher of a newspaper containing a libelous article cannot be held for damages occasioned by other newspapers copying and publishing the article. *Hays v. Perkins* (1899) 22 Tex. Civ. App. 198, 54 S. W. 1071; *Saunders v. Mills* (1829) 6 Bing. 213; *Palmer v. Publishing Co.* (1898) 31 App. Div. 210, 52 N. Y. Supp. 540.

[8, 9] As stated, the complaint seeks to recover damages against both defendants jointly and severally resulting from the primary publication of the circular letter. The case was tried on that theory and resulted in a joint verdict and a joint judgment. Appellant asserts that the answers to the interrogatories show affirmatively that appellant Sourbier had no part in the making of the primary publication. If appellant is correct in this statement, the general verdict cannot stand as against the interrogatories; but such answers cannot prevail against the general verdict unless they clearly and unequivocally find a fact or facts which cannot be reconciled with the verdict rendered.

In determining whether the answers to the interrogatories are in conflict with the general verdict, the court can consider only the issues, the general verdict, and the interrogatories and answers thereto. In passing on the question thus presented the court regards the general verdict as deciding every issue of fact in favor of the prevailing party, and so regarded the general verdict amounts to a finding in favor of the prevailing party of every fact essential to sustain and uphold the verdict and a finding against the losing party on every fact necessary to constitute an affirmative defense. Unless the answers to interrogatories clearly and unequivocally

find against the prevailing party as to a fact or facts which are indispensably necessary to sustain his right to recover, or find a fact or facts in favor of the losing party which are sufficient to constitute a defense, the general verdict must stand as against the assault made by the motion for judgment on the interrogatories.

Appellant Sourbier was sued as a joint tort-feasor with William Hansman. A verdict was returned against both defendants jointly, and a joint judgment was rendered. Appellant Sourbier asserts that facts are found by answers to the interrogatories which show clearly and unequivocally that he was not a joint tort-feasor with his codefendant either in composing or printing the alleged libelous letter or in making the original publication of such letter, and that he did not conspire with his codefendant to print and publish such letter as alleged in the complaint. Appellant does not claim that the answers to the interrogatories are otherwise in conflict with the general verdict.

Interrogatory No. 4 finds that appellant Sourbier did not at any time advise, counsel, or conspire with his codefendant to publish any libel against appellee. This finding negatives the charge of conspiracy contained in the complaint; and if the verdict rested solely on that charge it could not stand. The verdict, however, does not rest solely on that charge. If appellant Sourbier composed the letter or procured it to be printed or actively participated in its original publication, he would be a joint tort-feasor with the others who participated in bringing about the original publication of the letter and would be jointly liable with them for all damages resulting from such publication. Interrogatory No. 5 is double, and is also in the alternative. It finds that appellant Sourbier either composed the letter or that he caused it to be published, but the court cannot determine from the interrogatory and answer which of the two acts he did. On passing on the question under consideration the court regards the general verdict as finding that he did both of such acts, as charged in the complaint. It thus appears that this interrogatory is not in conflict with the general verdict. It is not required to aid it, and it does not in any manner conflict with it. This interrogatory is therefore without force or effect and cannot be considered.

The other answers relied on as being in conflict with the general verdict find that appellant Sourbier and his codefendant were not acquainted prior to the election of 1914; that Sourbier did not at any time have in his possession more than two of the circular letters concerning appellee; that he exhibited the circular received by him to certain of his friends and acquaintances; that, when he exhibited such letter, he did not know or vouch for the truthfulness of the state-

ments contained therein; and that he never did more than exhibit such circular to certain friends and acquaintances. The fact that appellant Sourbier did not know his codefendant, who is charged with printing the circular letter, prior to the time of its publication, and that he did not advise, counsel, or conspire with him to publish or circulate it, do not negative the facts that he composed it and caused it to be originally published and circulated as charged in the complaint and as found by the general verdict. If he did either, or if he actively participated with his codefendant in either, he was a joint tortfeasor with respect to the original publication. It is asserted that the answer to interrogatory 14, in which the jury found that appellant Sourbier did no more than exhibit the circular letter received by him to certain friends and acquaintances, negatives the fact that he had done, or participated in doing, anything with reference to composing it or procuring it to be printed or published in the first instance. If the answer, taken in connection with the interrogatory to which it is addressed and the other interrogatories on the same subject, conveys the meaning ascribed to it by appellant with such clearness and certainty as to preclude any other meaning consistent with the general verdict, the court would be required to adopt that meaning and give effect to it in deciding the question presented. Given that meaning, the answer under consideration would amount to a finding that appellant Sourbier did not compose the alleged libelous letter, and that he did not cause it to be printed, and that he did not in any way participate in the original publication of the article. The effect of such a finding would be to overthrow the general verdict, which is based on the joint tortious acts of appellant and his codefendant in making the original publication of the circular letter. On the other hand, if the answer, when considered in connection with the interrogatory to which it is responsive and with the interrogatories and answers relating to the same subject, is doubtful and uncertain in its meaning, and if it is susceptible of a reasonable meaning consistent with the general verdict, it is the duty of the court to adopt such meaning and uphold the general verdict. All presumptions are indulged in favor of the general verdict. *Lavene v. Friedrichs* (1917) 186 Ind. 333, 115 N. E. 324.

The answers to interrogatory 7 finds that appellant Sourbier never had more than two of the circular letters in his possession. By the answer to interrogatory 12 the jury finds that he exhibited the circular letter received by him to certain of his friends. The answer to interrogatory 13 finds that at such time he did not know or vouch for the truthfulness of the statements contained therein, and the answer to interrogatory 14 finds that he never did more than exhibit such circular

to certain friends. These interrogatories were directed to the conduct of appellant Sourbier in connection with the particular copies of the circular letter in his possession and the exhibition of such letter to certain of his friends. By the thirteenth interrogatory the attention of the jury was directed to his conduct at the time he exhibited those letters to friends, and, in response to the question therein contained, it answered that he did not know or vouch for the truth of the statements contained in the letter. In answer to the interrogatory next following the jury stated that he never did more than exhibit such circular letter to certain friends. When the answer to interrogatory 14 is considered in connection with the interrogatory and the answer immediately preceding it and the other interrogatories and answers relating to the same subject, its meaning and application is open to great doubt and uncertainty. The jury may have understood that interrogatory 14 had reference to the conduct of Sourbier in connection with the particular copy of the letter in his possession and as to what he said and did at the time he exhibited it to friends. It had stated in answer to the previous question that he did not vouch for the truthfulness of the statements, and in its answer to the fourteenth interrogatory the jury may have meant that he did not comment on the statements and that he made no use of the circular in his possession other than to exhibit it to certain friends. The attention of the jury was not directed to his conduct at the time and in connection with the original publication, and the answer probably had no reference thereto, but most likely was confined to his conduct with reference to the circular letter in his possession. The meaning of the answer is at least doubtful and uncertain, and all such doubts must be resolved in favor of the general verdict.

The general verdict finds that appellant Sourbier composed the circular letter, procured it to be printed, and participated in the original publication. If the jury meant for their answer to have the limited application indicated, it does not conflict with the general verdict. So construed, the interrogatories do not directly and affirmatively show that appellant was not a joint tortfeasor with his codefendant in making the original publication. Appellant's motion for judgment in his favor on the interrogatories was properly overruled.

Appellant Sourbier also assigns as error the action of the trial court in overruling his motion for a new trial. Under this head several questions are presented arising under different causes assigned.

[10] The first question thus presented challenges the sufficiency of the evidence to sustain the verdict. In presenting this question appellant's counsel start out with the state-

ment that the answers to the interrogatories show clearly and positively that appellant Sourbier did not participate in and that he had nothing to do with the making of the primary publication of the circular letter. It is settled by the decisions of this state that the courts, in determining whether the evidence is sufficient to sustain the verdict, will consider any facts properly found by answers to interrogatories. The material facts directly and positively found by the answers to the interrogatories will be regarded by the court as established by evidence even though there may be a conflict in the evidence as to the fact or facts so found. The jury having considered and weighed the evidence as to such facts and having based its answer thereon, the court will accept every fact so found as true unless there is a total want of evidence to sustain it. *Evansville, etc., Co. v. Spiegel* (1911) 49 Ind. App. 412, 422, 94 N. E. 718, 97 N. E. 949; *Barr v. Sumner* (1915) 183 Ind. 402, 411, 107 N. E. 675, 109 N. E. 193.

While the rule as stated may be regarded as settled, it cannot avail appellant in this case. The answers to the interrogatories on which appellant relies do not show directly, positively, and unequivocally that he did not participate and take part in making the primary publication. The general verdict finds that he composed the letter, and that he caused it to be printed and published, and the finding so made must stand unless there is a total failure of evidence to sustain it.

[11] While there is no direct evidence showing that appellant Sourbier composed the circular letter or that he procured it to be printed and circulated as charged in the complaint, there is ample evidence from which the jury could justly and reasonably infer that he did, or participated in the doing of, all of the acts so charged. It is shown that prior to the time the letter came out he held a conversation with a minister who testified as a witness at the trial in which he referred to appellee's candidacy and mentioned most of the charges which were embodied in the circular letter when issued, stating that such charges were being circulated and predicting that those things would all come out about Mr. Brown before the election. Other witnesses testified to similar statements made by appellant, and appellee testified to a conversation with appellant Sourbier at a time before the circular letter was made public in which Sourbier said, "Oh, I will show you up good and proper before the campaign is over; I will show up your consistency." From the evidence to which reference has been made and other evidence of a like nature to be found in the record the jury was justified in drawing the inference that appellant Sourbier composed the circular letter and caused it to be printed and circulated.

To sustain his contention that the verdict is contrary to law, appellant relies on the an-

swers to the interrogatories as showing a state of facts on which no verdict could be legally based fixing a liability on appellant Sourbier jointly with his codefendant. For the reasons heretofore stated this position cannot be sustained.

Other errors presented under the motion for a new trial relate to the giving of certain instructions and the refusal to give each of the instructions tendered by appellant Sourbier. By each of the instructions tendered the court was requested to charge the jury that it would not be warranted in finding the defendants jointly liable unless the preponderance of the evidence showed that they acted in concert or unity in carrying out a common design or purpose to print or publish the alleged libelous circular.

[12] It is true that a person cannot be held liable as a joint tort-feasor with others unless it appears that he participated in the wrongful act which occasioned the injury. Two persons who commit two separate wrongful acts, which result in injury to the same person, cannot be held jointly liable for the damages resulting from such wrongful acts. *West Muncie, etc., Co. v. Slack* (1904) 164 Ind. 21, 24, 72 N. E. 879; *Illinois Cent. R. Co. v. Hawkins* (App. 1917) 115 N. E. 613.

Where two or more persons at different times and places deposit rubbish and filth in a stream, the result of which is to befoul the water, they cannot be held jointly liable for the resulting damage. *Martinowsky v. Hannibal* (1889) 35 Mo. App. 70; *Miller v. Highland Ditch Co.* (1891) 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; *Willard v. Red Bank Oil Co.* (1909) 151 Ill. App. 433; *Chipman v. Palmer* (1879) 77 N. Y. 51, 33 Am. Rep. 566.

[13] While it is true that the jury would not have been warranted in holding Sourbier jointly liable with his codefendant for the damages resulting from the primary publication of the circular unless it found that he took some part in composing it or causing it to be printed or that he participated in making the original publication or causing it to be made, still, if the jury so found, it was not necessary that it should further find that he and his codefendant acted from a common motive or with a common design or purpose. It is sufficient to create a joint liability if it is found that they both participated in the commission of the same unlawful act. *Cooley on Torts* (3d Ed.) p. 247; *City of Valparaiso v. Moffitt* (1894) 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522.

[14] Instruction Number 5 given by the court, after stating the facts which must be established to show a liability against one or both of the defendants, concludes as follows:

"And in the event you find that one or both of the defendants herein participated in the publication of such statement, then your verdict should be for the plaintiff against such person or persons as a fair preponderance of

the evidence showed had participated in such publication."

Appellant finds no fault with the first part of the instruction; but he does object to the part quoted for the reason that the instruction does not define "participate" as used therein, or limit its application in such a way as to show that it referred to a participation in the original, or primary, publication of the libel, and not to a republication of the circular letter by exhibiting those which he received to certain of his friends. Under the law as stated in the former part of this opinion appellant was clearly entitled to an instruction limiting his liability to such damages only as resulted from his republication of the circular letters in his possession, in case the jury failed to find from the evidence that he composed the circular letter or caused it to be printed or that he took some part in causing its primary publication to be made. No instruction was tendered on behalf of appellant by which the court was requested to direct the attention of the jury to the original publication as distinguished from the secondary publication admittedly made by appellant Sourbier. If the case was tried below on the same theory on which it is presented in this court, it is rather remarkable that such a request was not made. It is true that the instruction does not state the law applicable to the evidence as fully as appellant was entitled to have it stated, but it states the law correctly so far as it goes. If appellant desired to have the jury more fully instructed or if he desired to have his theory of the case presented in a more favorable light, it was his duty to tender proper instructions and request the court to give them. Appellant cannot complain because the jury was not more fully instructed.

[15] The portion of the seventh instruction of which appellant complains reads as follows:

"If you find from the evidence in this case that the defendant Hansman printed the statement as alleged in the complaint with the reasonable expectation that it would be read by some third person, and suffered the same to come into the hands of the defendant Sourbier, and the same did come into the hands of the defendant Sourbier, and he, the said Sourbier, read a copy of the same and exhibited the same to various third persons so that they could see, and did see, the contents of such printed statement, and that the same tended to bring plaintiff into disrepute and to degrade and disgrace him, or to expose him to ridicule and contempt, and as a result thereof plaintiff suffered damages, then both of the defendants would be liable to the plaintiff, and if you so find your verdict should be for the plaintiff and against both of the defendants, unless you further find that the statements set forth in such printed statement were true."

This part of the instruction is directed to liability arising from the secondary publica-

tion admittedly made by appellant Sourbier. By this instruction the jury was told, in effect, that such secondary publication rendered both of the defendants liable and authorized a verdict in favor of the plaintiff against both of the defendants. There can be no doubt that, under the facts stated, there would be a liability against appellant Sourbier for the damages resulting from the secondary publication made by him. The instruction, however, does not limit the damages that could be recovered under the facts stated therein to such only as were occasioned by the secondary publication. In this request it may be said to be incomplete, but not erroneous; and as appellant requested no instruction stating the law more fully or placing a proper limitation on the damages recoverable under such state of facts, he is not in a position to complain.

[16] By the seventeenth instruction the court instructed the jury that, if from the evidence and the instructions of the court it found for the plaintiff, it was required to assess the amount of damages to be recovered and to render its verdict accordingly. The court then proceeded to state what elements of damages the jury might properly consider in arriving at the amount to be awarded; By this instruction the jury was authorized in making its award of damages to consider the injurious consequences produced by the entire circulation and publication given to the circular letter as shown by the evidence. This instruction was correct if the jury found from the evidence and under the instructions that appellant Sourbier participated in any way in the making of the primary publication; but, if it failed to so find, and, in obedience to the seventh instruction, based its verdict on the secondary publication admittedly made by Sourbier, then the instruction on the subject of damages was erroneous. It is thus seen that the jury was authorized by the instructions to find a verdict against appellant Sourbier and his codefendant on either of the two theories. If the verdict rested on the theory that appellant Sourbier participated in making the primary publication or causing it to be made, the damages should be based on the injuries resulting to appellee in consequence of the publicity given to the circular by that publication; but, if the verdict rested on the theory that he made or participated in making the secondary publication only, the damages would be properly based on the injury resulting to appellee as a consequence of the publication which appellant made or participated in making. By the seventeenth instruction only one basis for estimating damages was given to the jury, and that was applicable only to a verdict based on the primary publication. By this instruction the jury was authorized to fix its damages on the same basis in case its verdict rested on the liability of the defendant for making the sec-

ondary publication only. In considering the seventeenth instruction in connection with the other instructions given, the jury must have understood that the damages to be awarded against the defendant in case he participated in the secondary publication only should rest on the same basis and should be in the same amount as though he had participated in making the original publication. This instruction is not incomplete, but it is erroneous. By the seventh instruction the court stated to the jury the facts which it was required to find in order to justify a verdict based on the secondary publication only, and by this instruction authorized the jury to find such a verdict if the facts so stated were proven. If the court had given no instruction which authorized a verdict on that theory, it is possible that no error would have been presented in the absence of a request for proper instructions presenting that theory; but, as the instructions expressly authorize a verdict on that theory, and the instruction given on the subject of damages is erroneous as applied to that theory, the latter instruction must be held to be erroneous.

Such an instruction as applied to the evidence in this case was clearly prejudicial. The defendant Sourbier admitted that he had made the secondary publication, and, under the seventh instruction, he was clearly liable unless the charges contained in the circular letter were found to be true. He denied that he had any connection with making the primary publication, and an issue of fact was thus presented on which the evidence was conflicting. There was no direct evidence showing that he participated in making the primary publication or in causing it to be made, but circumstances were shown from which such participation could be reasonably inferred. The verdict finds against the defendant on the theory that he was responsible for one or the other of such publications, and the court has no means of knowing on which of such publications the verdict rests. The motion of appellant Sourbier for a new trial should have been sustained.

[17] The defendant Hansman filed assignments of error on the transcript, but filed no brief in support of such assignments. For failure to file a brief in support of his assignments of error as provided by the rules of this court the appeal as to Hansman is ordered dismissed.


The judgment is reversed as to appellant Sourbier, with instructions to the trial court to sustain his motion for a new trial.

The death of appellee, George W. Brown, since the submission of the appeal having been suggested to the court, it is ordered that this judgment be, and the same is hereby, rendered as of the date of submission of this cause.

(74 Ind. App. 281)

LEARY v. CLEVELAND, C., C. & ST. L. RY. CO. (No. 9896.)*

(Appellate Court of Indiana, Division No. 1. June 24, 1919.)

RAILROADS  439(3) — **DUTY TO FENCE TRACKS — VIOLATION OF STATUTE — COMPLAINT—SUFFICIENCY.**

An abutting landowner's complaint, alleging that defendant railroad company, in violation of Burns' Ann. St. 1914, § 5447, negligently failed to fence its right of way so that his bull went on and over the right of way onto the adjacent right of way of another company, where the animal was killed, fails to state a cause of action, either under the statute or at common law, though the failure to fence is negligence per se.

Appeal from Circuit Court, Hancock County; Earle Sample, Judge.

Action by Thomas B. Leary against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From judgment for defendant, plaintiff appeals. Affirmed.

Charles L. Tindall, of Greenfield, for appellant.

Frank L. Littleton, of Indianapolis, and Cook & Walker, of Greenfield, for appellee.

BATMAN, C. J. This is an action by appellant against appellee for damages on account of the killing of an animal belonging to the former. The complaint is in a single paragraph, and alleges in substance, among other things, that appellee is a corporation and the owner and operator of a railroad through Hancock county in this state; that appellant is the owner of certain farm lands abutting on the north side of its right of way in said county; that in October, 1915, appellant was lawfully pasturing a bull on his said land, so abutting on said right of way; that at said time, and for more than six months prior thereto, appellee had negligently failed and refused to maintain a fence between its said right of way and the land of appellant on which his said animal was pasturing, sufficient to restrain and turn cattle; that on October —, 1915, said bull, by reason of the failure of appellee to maintain said fence, as aforesaid, escaped from appellant's said land, through said defective fence, and entered upon and crossed over appellee's right of way onto the right of way of the Union Traction Company, lying adjacent to and running parallel with appellee's said right of way on the south, where it was struck and killed by an electric car, then and there operated by said traction company; that said traction company had, for more than a year prior thereto, controlled and operated an interurban electric railway, paralleling the right of way of appellee

 For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Transfer denied.

through said county, and had operated cars thereon at a rapid speed, as appellee well knew; that appellee on said date, and for a long time prior thereto, knew that said fence was insufficient as aforesaid, and that appellant's cattle might and could escape through the same because of its defective condition, and enter upon appellee's right of way, and that of said traction company lying adjacent thereto on the south, and that said cattle in so doing would be in danger of being killed by the trains and cars being operated on said railways; that there was no fence between the right of way of appellee and that of said traction company, and appellee well knew that, if it failed to maintain its said fence between its right of way and appellant's said land, his stock could, by reason of said defective fence, escape and readily enter upon the right of way of said traction company, where it operated electric cars at a high rate of speed, at intervals of less than one hour; that said bull was killed solely because of the negligence of appellee in failing to maintain said fence and without any fault or negligence on the part of appellant; that said animal was of the fair and reasonable value of \$100, for which judgment was demanded. To this complaint appellee filed a demurrer for want of facts, with a memorandum stating wherein it is insufficient. This demurrer was sustained, and, appellant refusing to plead further, it was adjudged that he take nothing by his complaint, and that appellee recover its costs. From this judgment appellant has appealed and has assigned the action of the court in sustaining appellee's demurrer to his complaint, as the sole error on which he relies for reversal.

It will be observed that the complaint in this action is based solely on the alleged failure of appellee to maintain a sufficient fence between its right of way and appellant's land abutting thereon. At common law railroad companies were not required to fence their tracks, and where the owner of animals permitted them to run at large in the vicinity of a railroad track, in the absence of an order from the board of commissioners permitting the same, he was guilty of such negligence as would prevent him from recovering, if any such animals strayed upon the track and were killed or injured, unless such killing or injury was willful. *Ft. Wayne, etc., R. Co. v. O'Keefe* (1891) 4 Ind. App. 249, 30 N. E. 916, and authorities there cited. In 1863 (Laws 1863, c. 25) a statute was enacted making railroad companies operating railroads into or through this state liable for stock killed or injured by the locomotives, cars, or other carriages run on such road, but providing that such act shall not apply to any railroad securely fenced in, if such fence be properly maintained by such company. Sections 5436 and 5442, Burns 1914. Under this statute, the fencing of railroad

tracks was optional with the owners and operators; but in 1885 a statute was enacted which made such fencing compulsory. This statute provides in substance, among other things, that any railroad corporation, running or operating a railroad into or through this state, shall construct and maintain fences on both sides of its railroad, except at certain designated places, sufficient and suitable to turn and prevent cattle and other stock from getting on such road; and that when such fences are not so made, or when the same are not kept in repair, such railroad corporation shall be liable for all damages which may be done by its agents, employes, engineers, or cars to any cattle or other stock thereon. Section 5447, Burns 1914. It will be observed that the complaint in this case not only fails to show that the animal in question was killed on the track or right of way of appellee, or by any of its agents, employes, engineers, locomotives, cars, or other carriages, but expressly alleges that it was killed on the right of way of the Union Traction Company by an electric car then and there operated by it over its own road. It thus appears that the complaint is clearly insufficient to state a statutory cause of action against appellee. *Hocking Valley R. Co. v. Phillips*, 81 Ohio St. 453, 91 N. E. 118, 29 L. R. A. (N. S.) 573; *Frisch v. Chicago, etc., R. Co.*, 95 Minn. 398, 104 N. W. 228; *Bear v. Chicago, etc., R. Co.*, 141 Fed. 25, 72 C. C. A. 513.

But appellant insists that the failure to maintain the fence in question being a violation of said section 5447, is negligence per se, and gives him a right of action at common law; that in such an action he is not limited by the restrictions of the statute, with reference to the recovery of damages for injury to stock, but may recover any damage thereto, resulting proximately from such violation, regardless of the manner in which, and place at which, such injury occurs. We cannot agree with this contention. The enactment of said section 5447 imposed a duty on railroads, with reference to fencing their tracks, which was wholly unknown to the common law. The Legislature had the power to determine what liability, if any, would be incurred by a railroad company that failed to discharge this new duty, and it exercised that power as indicated above. A breach of this duty is negligence per se, as appellant contends; but it is statutory negligence and not common-law negligence. In proper cases it affords an adjacent landowner a basis for a statutory liability but not for a common-law liability, as a failure on the part of the railroad company to fence its tracks is not the breach of a common-law duty, which it owes to such landowner, or the infringement of a right given him by the common law. We conclude that the complaint does not state a cause of action, either under the statute or

at common law, and hence the court did not err in sustaining a demurrer thereto.

Appellant has called our attention to the case of *Pickett v. Toledo, etc., R. Co.* (1915) 61 Ind. App. 26, 111 N. E. 434, wherein it is held that, where the right of ways of two railroad companies lie adjacent and run parallel, there is no statutory duty resting upon such companies to maintain a fence between their respective right of ways. He insists that the conclusion we have reached in this case, in view of that decision, will have the effect of depriving the owners of stock of redress, where such stock is injured under the circumstances alleged in the complaint in this case. Such a result, however, does not necessarily follow, as the question of the liability of the Union Traction Company for injury to stock, under the circumstances alleged in the complaint, is still an open one in this state, as far as we have been able to discover. Authority may be found for holding that the fence constructed by appellee, between its right of way and appellant's land, should be treated as the fence of the traction company within the provision of the statute. *Davidson v. Delaware R. Co.*, 134 App. Div. 872, 119 N. Y. Supp. 369. If so treated, it would appear that said traction company should be liable for stock, which had passed through such fence by reason of its defective condition, and was killed on the tracks of said company by its cars. However, we do not presume to pass upon that question, as it is not before us, but have been led to make the suggestion stated, in view of appellant's contention as to the effect of the decision in the case of *Pickett v. Toledo, etc., R. Co.*, *supra*.

We find no error in the record.
Judgment affirmed.

(74 Ind. App. 167)

TERRE HAUTE, I. & E. TRACTION CO. v. ELLSBURY. (No. 9639.)*

(Appellate Court of Indiana. June 27, 1919.)

1. STREET RAILROADS \S 118(4) — CROSSING ACCIDENTS—DUTY OF MOTORMAN—INSTRUCTIONS.

An instruction that it is a motorman's duty, on discovering a person's peril at a crossing, to stop his car, if possible, to avoid inflicting injury, is erroneous, since he owes only the duty of using every reasonable means to prevent the threatening injury.

2. TRIAL \S 191(8) — INSTRUCTION—ASSUMPTION AS TO FACTS.

In action for injuries sustained by plaintiff while driving across defendant's street car tracks, at a crossing, an instruction assuming that plaintiff, when near the track, was in a position of danger, was erroneous as invading the province of the jury.

3. STREET RAILROADS \S 118(15) — PERSONAL INJURY ACCIDENT—LAST CLEAR CHANCE DOCTRINE.

In an action for injuries to a driver struck by a street car at a crossing, it was error to instruct as to the last clear chance doctrine, where plaintiff's opportunity to avoid the accident and exercise caution for his own safety was later than any chance the motorman could have had in the case.

4. TRIAL \S 250—INSTRUCTIONS—APPLICABILITY TO CASE.

In an action for personal injuries sustained by plaintiff struck by defendant's street car while driving across a track at a crossing, instructions as to care required of defendant, not addressed to any theory of the complaint nor supported by evidence, are erroneous.

McMahan and Remy, JJ., dissenting.

Appeal from Circuit Court, Shelby County; Alonzo Blair, Judge.

Action by Francis M. Ellsbury against the Terre Haute, Indianapolis & Eastern Traction Company. Judgment for plaintiff, new trial denied, and defendant appeals. Reversed and remanded, with directions (superseding former opinion, 121 N. E. 299).

David E. Watson, of Martinsville, Hord & Adams, of Shelbyville, and W. H. Latta, of Indianapolis, for appellant.

Charles B. Clarke and Walter C. Clarke, both of Indianapolis, for appellee.

ENLOE, J. This was an action by appellee to recover damages for injuries sustained by being struck by one of appellant's cars at a highway crossing.

The cause was tried upon an amended complaint in one paragraph, to which the appellant answered by general denial. The trial resulted in a verdict for appellee, and appellant unsuccessfully moved for a new trial. The only assigned error relied upon in this court is action of the trial court in overruling said motion for a new trial.

Appellant in its brief, under "Points and Authorities," assails two of the instructions given by the court to the jury, as being erroneous, viz., instructions Nos. 15 and 24. The fifteenth instruction so given was as follows:

"(15) It is the duty of those in charge of an interurban car, and particularly the motorman in operating such car, approaching a frequented crossing of a highway, to exercise ordinary care and diligence to ascertain whether the track ahead is clear, and it is his duty to give the track ahead such attention as will enable him, in the exercise of ordinary care, to know its condition, and to avoid, if possible, inflicting injury to a person in a dangerous position, or in peril. If you find from the evidence that, upon the day and at the time of the accident, it was clear, and the view at the point where it occurred was unobstructed, so that the motorman could have seen plaintiff on or near the track, if he had exercised ordinary diligence, and further find that the motorman had knowledge of the conditions existing at the place of the collision, and he could have seen the plaintiff's peril

in time to have stopped the car and prevented the accident, by the exercise of reasonable care, then I instruct you that his failure to do so, thus causing the injury, would constitute negligence upon the part of the company, defendant, and you should find for the plaintiff, unless you further find that plaintiff, by his own negligence, caused, or contributed to, the injury complained of."

In the first part of this instruction the court attempts to state the law as to the duty of a motorman, as to observing and knowing condition of track ahead of car, etc., and it plainly tells the jury that it is the duty of such motorman, upon discovering danger ahead, "or a person in a dangerous position, or in peril, to stop his car, if possible," to avoid inflicting injury upon such person.

This instruction was an attempted statement of the law as applied to cases coming within the doctrine of last clear chance. In the case of Indianapolis, etc., Co. v. Croly, 54 Ind. App. 566, 579, 96 N. E. 973, 978, the court in speaking of the application of this doctrine said:

"There is a general duty resting upon a person in charge of a street car to use care to prevent injury to all persons and property with which it is liable to come in contact, and such care must be proportionate to the danger incident to its operation. This duty is a general one, and rests upon the motorman at all times and under all circumstances during the time he is operating such car; but the duty to take particular precautions to prevent injury to a particular person, who, by want of due care on his part, has exposed himself to immediate threatened danger, or is about to do so, is a special duty which arises out of the exigencies of the situation. It is the failure to discharge this particular duty, which gives room for the application of the doctrine of last clear chance, by which the company, in such a case, is held liable to a person, who by want of due care, has exposed himself or his property to the danger of receiving such injury. The particular situation of the parties, prior to the injury, must be such as to give rise to this special duty to the particular person injured, some appreciable time before the injury occurs. * * * From the time the emergency arises until the injury occurs, the motorman must use every *reasonable* means to prevent the threatened injury." (Our italics.)

[1] This instruction was therefore erroneous as to the statement of the duty of appellant's motorman, upon discovering a person in a position of peril.

The latter part of said instruction evidently was intended to relate to the supposed facts of the case, within the issues and evidence adduced. It will be noted that, as to the position or location of appellee at a time just prior to the accident, it is in the alternative; the disjunctive, "or," being used. This has the effect of making this instruction double, of combining two instructions in one; in one of which instructions the appellee would be located "on" the track, and in the

other "near" the track. It is the effect of this instruction as it relates to the latter position, "near the track," that we wish to now notice. In effect, it told the jury that—

"If you find from the evidence that upon the day and at the time of the accident it was clear, and the view at the point where it occurred was unobstructed, so that the motorman could have seen plaintiff near the track, if he had exercised ordinary diligence, and further find that the motorman had knowledge of the conditions existing at the place of the collision, and that he could have seen plaintiff's peril in time to have stopped the car and prevented the accident, by the exercise of reasonable care, then I instruct you," etc.

[2] This instruction is clearly erroneous by reason of the assumption therein contained. The jury, by this instruction, were not required to find whether the appellee, while "near the track," was or was not in a position of peril, real or apparent. Under the authority of the Croly Case, supra, and in fact under all the authorities, no special duty could arise in favor of appellee, and against the appellant, until appellee was in such position of peril and so discovered by servant of appellant. Whether the appellee, while near said track, was in a "situation of peril," was an essential fact for the determination of the jury, and the court also erred in assuming this fact, and thereby invading the province of the jury.

As said in the Croly Case, supra:

"There is a general duty resting on the motorman to observe persons and property with which his car is likely to come in contact."

But if this general duty should be extended to the point where it would become a special duty, and thereby bring all such cases as the instant one under this instruction within cases now falling within the doctrine of last clear chance, as now applied, the effect of such extension would be to entirely wipe out and destroy the doctrine of contributory negligence. This instruction not only assumes that the appellee was in a position of peril, "near the track," but would hold the company liable for the failure of the motorman to discover such peril, by the use of ordinary care, although the situation of appellee near said track, so far as this record discloses, was not such, at the time said car was approaching his said location, as to probably in any way interfere with the operation or safety of said car, or passengers thereon, whose safety was of first concern to said motorman, at said time.

The twenty-fourth instruction, also complained of by appellant, was as follows:

"(24) If you find from the evidence that plaintiff was riding on a wagon, and was on or near defendant's tracks, and that the defendant's interurban car was approaching, and that the motorman in charge of such car saw said wagon, or the horses hitched thereto, on or near the track of defendant's railroad in front of said

car, or by the exercise of due care could have seen said wagon or horses, and saw, or by the exercise of due care could have seen, said wagon or horses, and saw, or by the exercise of ordinary care could have seen, that the occupant of said wagon was in apparent peril, then it was the duty of said motorman to stop said car or slacken the speed thereof so as to avoid a collision, *if it was possible to stop said car or slacken the speed of the same.*" (Our italics.)

This instruction, like the one heretofore considered, is double. It considers the appellee as having been in either of two places, viz., on the track of appellant, or near the track of appellant. No distinction is made, as to the duty of appellant's servant, the motorman, in charge of said car, as to these positions. By this instruction the jury were told that if the said motorman in charge of said car saw said wagon, or the horses hitched thereto, near the track of appellant's railroad, in front of said car, or by the exercise of due care could have seen said wagon, or the horses, and saw, or by the exercise of ordinary care could have seen, that the occupant of said wagon was in apparent peril, then it was the duty, etc. This instruction was evidently given as being addressed to the doctrine of last clear chance. It is bad for several reasons. It assumes that appellee was in peril, when he and his team were "near the track." How near the track we are not told; neither are we, in any way, in the record before us, informed as to the character of the peril. The record shows without contradiction that on the day in question appellee was using his wagon and team assisting in hauling corn and in filling a silo, located a short distance from where he was struck and injured; that he had a "hay frame" on his wagon, upon which to load the corn, and haul same to the cutter; that he had just unloaded his load and started to the field, north of the tracks of appellant for another load; that he drove out of the barnyard gate and turned north into the highway crossing appellant's track; that it was about 4 o'clock p. m., and the time for the regular limited car of appellant, going east; that the car which struck the appellee was appellant's regular limited 4 o'clock car; that for some distance west of said crossing appellant's track going east is downgrade; that said car was running at least 35 to 40 miles per hour (the complaint charges 60 miles per hour); that said highway, approaching said crossing from the south, is comparatively level; that, from a point 33 or 34 feet south of said crossing, the rails of appellant's track could be seen for a distance of 400 to 500 feet to the west, and a person walking on said track, or a car approaching, could, from said point, be seen 500 to 600 feet.

[3] The record is absolutely silent, so far as appellee's case is concerned, as to any care whatever on his part on approaching

this crossing. No witness even intimates, in his testimony concerning the accident, that the appellee stopped, looked, listened, or gave any attention whatever to his safety in approaching said crossing, until he was practically in the act of crossing the same. One witness for the appellee, who was working near the crossing, testified that, when she heard the car whistling the danger signals, she looked up, and that appellee was standing up in his wagon, whipping his horses to get across. In this she is corroborated by two witnesses who testified for appellant, but who place the point at which he began to whip his horses as about 20 feet before he reached the track, and the car was then only about 200 feet away. Considering the speed at which this car was shown to have been running, there is no evidence even tending to show that the car could have been stopped and the collision avoided, after the motorman saw the appellee approaching said crossing. No testimony was offered upon that proposition. It was not within the case, as attempted to be made by the appellee. This was not a case where the motorman could be charged with constructive knowledge of the danger of appellee. Before actually entering upon the track, knowing the crossing as the record shows he did, he, had he been exercising due care and caution for his own safety, for aught that appears in this record, could have stopped his team and prevented the accident. His chance to avoid injury, had he been in the exercise of proper care and caution for his own personal safety, as shown upon the record, was even later than any chance the motorman could have had in the case. *Indianapolis, etc., Co. v. Davy, Adm'x, 57 Ind. App. 532, 103 N. E. 1098.*

Lastly, the jury are told in this instruction that it was the duty of the motorman to stop his car and avoid collision, *if it were possible so to do.* (Our italics.) This is not the law. Even if it should be conceded that under the facts of this case there arose the duty for the motorman to stop the car to avoid injuring appellee, yet that duty only required him to exercise reasonable care in an endeavor to accomplish that end. This instruction puts the limit at possibility, and left it to the jury to say whether or not it was possible. In cases like this, the motorman is called upon to act instantly; he has no time to weigh and consider the matter, and even though he should do what a reasonably prudent man would have done under the particular circumstances of the case, yet, if his judgment was at fault, if he made a mistake of methods or means, the master would be liable. If by error of judgment, in the emergency of an impending collision, he set the brakes a little too tight, thereby causing the wheels to lock and slide on the rails, thereby reducing the area of friction on the

wheels, whereby the car travels farther than it would have done had such wheels not been locked, such mistake of judgment on his part would fix the master's liability to one injured thereby. This cannot be the law. Corporations can only employ human agents, mortal men, to act for them in the control of such agencies, and infallibility of judgment has not been accorded to man; that is reserved to Deity, and He has not as yet taken control of such human agencies as railroads, to operate them.

The language of the complaint is, as to the charge of negligence therein contained:

"Negligently and carelessly ran and operated such car eastwardly over and along said track at a rapid and highly dangerous rate of speed, to wit, 60 miles an hour, negligently and carelessly failed and omitted to sound any gong or ring any bell, or give any warning of its approach. * * * That defendant's motorman in charge of said car saw, or could have seen by the use of due diligence, the approach of plaintiff upon defendant's said track, and said motorman could have stopped his car without colliding with plaintiff and his said wagon, if he had attempted so to do." "That plaintiff's said injuries occurred through no fault or negligence on the plaintiff's part, but the whole fault thereof are due to the negligence of defendant and its said motorman, in running said car at said point, at the rate of 60 miles per hour, without sounding any gong, or ringing any bell, or giving any warning of its approach," etc.

[4] The averment above quoted, that "defendant's motorman * * * saw, or could have seen, * * * the approach of plaintiff upon defendant's said track, and * * * could have stopped the car," etc., is without any legal force. It is not averred, even as a conclusion, that appellee, while approaching said crossing, was in a position of peril. No fact or facts are alleged showing any duty resting upon said motorman to stop said car, because of the condition or situation of appellee, while approaching said crossing. The theory of the complaint is that the appellant was running and operating its car, at the time in question, at such a high and dangerous rate of speed that it could not have been stopped and the injury avoided. This was "original negligence," and as such charged in the complaint as being the cause of appellee's injury. The foregoing instructions are not addressed to any theory of the complaint, nor is there any evidence to which they can properly be said to have been addressed, and neither of them should have been given, for this reason also.

There is some evidence in the record tending to sustain the material averments of the complaint; but, for the error in giving the above-numbered instructions, this cause is reversed and remanded, with directions to sustain appellant's motion for a new trial, and for further proceedings.

BATMAN, C. J., NICHOLS, P. J., and DAUSMAN, J., concur.

McMAHAN, J. (dissenting). I agree that the giving of instruction 24 constituted reversible error, but the majority opinion misconstrues instruction 15 and gives it a strained and technical construction, when it says:

"It plainly tells the jury that it is the duty of such motorman, upon discovering danger ahead, or a person in a dangerous position, or in peril, to stop his car, if possible, to avoid inflicting injury upon such person."

The court simply and correctly informed the jury that it was the duty of the motorman to use ordinary care to know the condition of the track, and to avoid inflicting injury to a person in a dangerous position. The jury could not have been misled by this instruction when read in connection with the twenty-third instruction, which was given to the jury at the request of appellant, where the jury was informed that, when the motorman saw a person driving toward the track, he had a right to presume that such person would not drive upon the track and into a place of danger until it became apparent to the motorman "that such person is about to or will drive upon, or in close proximity to the car; then, it is the duty of the motorman to slow up or stop his car, if it is possible in the exercise of ordinary care, and prevent a collision."

This instruction is in harmony with the holding of this court in *Citizens' Street Ry. Co. v. Lowe*, 12 Ind. App. 47, 89 N. E. 165, where the court says:

"When the motorman, or those in charge of the car, see the frightened horse and the vehicle to which he is attached in front of such car on the same track, and that the occupants of the conveyance are in apparent peril, due care requires that the car be stopped if it is possible to do so. In such a case, it is required of those in charge of the motor to slacken the speed, and if necessary, to avoid injury, to stop the car entirely."

There is no dispute or conflict in the evidence in so far as showing that the appellee was in a position of peril just before he was struck by appellant's car. The motorman admits that, when he first saw appellee, the car was from 300 to 400 feet away from the crossing, and that he at that time saw the appellee whipping his horses in an effort to get across the tracks, at which time he says appellee was about 35 feet from the track. He therefore knew the peril of appellee. There was no error in the court assuming that appellee was in a dangerous position.

REMY, J., concurs in the dissenting opinion.

(71 Ind. App. 35)

CLEVELAND, C., C. & ST. L. RY. CO. v.
LOCKE, (No. 9856.)(Appellate Court of Indiana, Division No. 2.
June 27, 1919.)**1. PLEADING ⇨237(6)—AMENDMENT TO CON-
FORM TO EVIDENCE.**

That issues are changed by amendment of the complaint to conform to the evidence is no reason why the amendment should not be made.

**2. CONTINUANCE ⇨14(2)—GROUNDS—AMEND-
MENT OF PLEADINGS.**

In action against railroad for personal injuries to passenger from derailment, where the complaint alleged that the cars were defective in particulars unknown to plaintiff, making them liable to derailment, an amendment, alleging that one car was of unusual height and size and stiff and new, and because of its construction and size liable to derailment, did not bring in a new charge of negligence, but was in fact wholly unnecessary, serving only to make the allegation of the complaint more specific; and it was therefore not error to overrule motion for continuance on account of the amendment.

**3. APPEAL AND ERROR ⇨1060(4)—TRIAL ⇨
114—MISCONDUCT OF COUNSEL—HARMLESS
ERROR.**

In personal injury case, counsel's argument, not to give plaintiff a low verdict, less than he was entitled to, with the idea defendant company would not appeal, as the case would be appealed anyhow, whatever the verdict might be, to which statement the court, in the jury's presence, overruled objections, stating the argument was proper, was error; but since appellant, although specifying in motion for new trial that the damages were excessive, failed to present the question, thereby indicating it had no objection to the amount, counsel's argument was harmless.

Appeal from Circuit Court, Henry County; Fred C. Gause, Judge.

Action by Leslie R. Locke against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Frank L. Littleton, of Indianapolis, Forkner & Forkner, of New Castle, and John L. Rupe, of Richmond, for appellant.

A. R. Feemster, of Cambridge City, and John F. Robbins, of Indianapolis, for appellee.

McMAHAN, J. This is an action by appellee against appellant to recover for personal injuries sustained by appellee while he was a passenger upon one of appellant's trains. The complaint was in two paragraphs. The first of these, after alleging that appellant owned and operated a line of railroad for the purpose of carrying passengers and freight, and that appellee became a passenger upon one of appellant's trains, alleged that while he was being car-

ried as such passenger by appellant the car in which he was riding became derailed, and that by reason thereof he was injured. It is charged and alleged that the portion of the track where the derailment occurred was defective; that the ties were rotten and unfit for use; that the rails were improperly laid and insecurely fastened to the ties, so that the rails were liable to spread and be pushed from their proper place and thereby permit the train to be thrown from the track; that appellant negligently ran and operated said train along and over said defective and unsafe portion of said track at a high and dangerous rate of speed, and that by reason of said defective and unsafe condition of the track and the operation of said train at said high rate of speed the car in which appellee was riding was derailed; and that appellee was thereby injured, without fault or negligence on his part.

The second paragraph of complaint, before being amended as hereinafter stated, was about the same as the first, save that the negligence charged in this paragraph was, in substance, that the track was improperly and insecurely placed, laid, and constructed, was defective and unfit for use in respects which plaintiff was unable to specify. That the engine and cars were defective and insufficient in certain respects to plaintiff unknown so he could not more fully specify, and by reason thereof were unfit to be run and operated over such defective track at even a moderate rate of speed, because such train was liable at all times to be derailed, and that the defendant ran its train at a dangerous rate of speed, and by reason of such defective condition of the track and of the engine and cars the cars were thereby derailed, and the plaintiff injured.

Demurrers for want of facts were filed and overruled as to each of these paragraphs. An answer of general denial being filed, the cause was submitted to a jury for trial. After appellee had introduced all his evidence, the appellant's witnesses had testified that where the derailment occurred the ties and track were in good condition; that the first car derailed was a car immediately in front of the caboose in which appellee was riding (the train being a freight train); that this car was a large, new automobile car, and empty, not belonging to appellant but being transported by it to be loaded at a station on appellant's line; that this car was in good condition, but, being new, was stiff and liable to be derailed in going around a curve.

After all the evidence had been thus introduced as to the cause of the accident, appellee asked leave to amend his complaint by inserting therein that the track was

"rough and uneven," and "that one of the cars of said train was of great and unusual height and size, and was stiff and new, and was of such construction, proportions, and dimensions as that when being run over said rough and uneven, defective, and unfit portion of said defendant's track, said car was at all times liable to be caused thereby to rock and sway violently from side to side and to be thereby derailed, and was by reason thereof unfit for use in said train," and also by alleging that said accident and injury to appellee were caused by reason of said height, size, construction, proportions, dimensions, and newness and stiffness of said one car of said train as aforesaid.

The court, over the objection and exception of appellant, permitted the amendments to be made for the purpose of making the complaint conform to the evidence given in the cause. An amended second paragraph of complaint was then filed, and appellant filed its verified motion for a continuance on the ground of surprise, and stating that, if a continuance was granted, it could and would produce evidence that it was not negligence to run said car in said train. This motion was overruled, and appellant filed a motion to strike out said amendments, which was also overruled, as was a demurrer for want of facts, an exception being saved by appellant to each adverse ruling. A general denial was filed to the amended second paragraph of complaint, and the trial proceeded, resulting in a verdict and judgment against appellant.

Appellant filed a motion for a new trial, the reasons therefor being that the verdict is not sustained by sufficient evidence; that it is contrary to law; that the damages awarded were excessive; that there was irregularity on the part of the court in allowing appellee to amend the second paragraph of complaint; the overruling of the motion for a continuance; misconduct of counsel; errors in giving and refusing to give instructions; and errors in the admission and refusal to admit evidence.

The errors assigned in this court and not waived are that the court erred in permitting appellee to amend his complaint, in overruling the motion for a continuance, and in the overruling of the motion for a new trial.

[1, 2] Appellant contends that the court erred in permitting appellee to amend his complaint to correspond with the evidence which had been introduced for the reason that such amendment changed the issues by bringing in a new charge of negligence. We do not understand that the fact that the issues were changed by the amendment is a reason why the amendment should not be made. If the issues were not changed, there would be no reason for making the amendment. Indeed, we are of the opinion that the amendment was wholly unnecessary, and

that its only effect was to make the allegations of the second paragraph of complaint more specific. It will be observed that the said second paragraph before being amended alleged that the track was—

"improperly and insecurely placed, laid, and constructed, and defective, unsafe, and unfit for use in certain respects not more definitely known to the plaintiff, and which for this reason cannot be more fully specified and set forth; that the engine and cars of said train in which plaintiff was so riding were at that time defective and insufficient in certain respects and particulars to the plaintiff unknown, and which, for that reason, cannot be more fully specified and set forth herein, and that the same by reason thereof were unfit to be run and operated over and along said defective portion of defendant's said track; that by reason of said defective and unfit condition of said engine and cars the plaintiff alleges that it was dangerous to run and operate said train rapidly, or even at a moderate rate of speed along and over said defective portion of said track, for that, as this plaintiff alleges, said train was liable at all times by reason thereof, when being so run and operated, to be caused thereby to be derailed and thrown from said track, to the injury and damage of persons riding thereon."

There was no error in overruling the motion for a continuance, as all of the evidence could have been introduced under the allegations in the complaint prior to the amendment, and a recovery had thereon, without the amendments having been made.

The first, second, and third specifications in appellant's motion for a new trial also relate to the action of the court in permitting appellee to amend the second paragraph of complaint, and in overruling appellant's motion for a continuance. Having already decided that the court committed no error in regard to these matters, we need give them no further consideration.

[3] The next contention is that appellee's attorney was guilty of misconduct while making the closing argument to the jury. It appears that during the course of his argument the attorney for appellee said to the jury, "Gentlemen, I don't want to get into your heads any idea of giving this man a low verdict, less than he is entitled to with the idea that this company will not appeal," and upon objection being made by appellant to the statement, appellee's counsel repeated:

"I repeat, I don't want you to get it into your heads to give this man a low verdict, less than he is entitled to, with the idea that this company will not appeal. This case will be appealed anyhow, whatever your verdict may be."

Whereupon appellant objected to the statements to the jury as misconduct of counsel, and moved to withdraw the case from the jury on account thereof, whereupon the court, in the presence of the jury, said, "The objections and motion will be overruled; I think the argument is proper,"—to which

ruling and action of the court appellant accepted.

These remarks of counsel were improper, and were rendered doubly so by the action of the trial court in approving them. The tendency of such statements, and doubtless the purpose in making them, was to induce the jury to return a verdict for a larger amount than they otherwise would do. One of the specifications in the motion for a new trial is that the damages awarded are excessive, but appellant has wholly failed to present that question, and we are therefore justified in assuming that the damages assessed are not excessive, and that appellant has no objection to the amount of the award. That being true, the statements of counsel were harmless. We do not want to be understood as approving the statements of counsel, or as holding that such statements, when deliberately made, as they were in this case, and approved by the trial court, do not constitute such misconduct of counsel as to be reversible error. We would not hesitate to reverse this case on account of such misconduct were it not for the fact that appellant is seemingly content with the amount of the verdict. There are other remarks of counsel which appellant contends amount to such misconduct as to be reversible error but we think otherwise. As to misconduct of counsel see: *Carter v. Carter*, 101 Ind. 450; *School Town v. Shaw*, 100 Ind. 268; *Rudolph v. Landwerlen*, 92 Ind. 34; *Holliday, etc., Co. v. O'Donnell*, 54 Ind. App. 95, 101 N. E. 642; *P. C. C. & St. L. Ry. Co. v. Campbell*, 116 Ill. App. 356, 359; *L. H., etc., Ry. Co. v. Morgan*, 110 Ky. 740, 62 S. W. 736; *Mount v. Commonwealth*, 120 Ky. 398, 86 S. W. 707, 27 Ky. Law Rep. 788; *Louisville, etc., Ry. Co. v. Pointer*, 113 Ky. 952, 69 S. W. 1108, 24 Ky. Law Rep. 772; *Olfermann v. Railroad Co.*, 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483; *Martin v. State*, 56 Am. Rep. 812, note; *McDonald v. People*, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547, note.

Complaint is made relative to the refusal of the court to give instructions Nos. 2 and 5, requested by appellant. No. 2 related to the proof required before a recovery could be had on the second paragraph of complaint, and was not applicable to such paragraph after the same was amended. No. 5 is fully covered by No. 16 given by the court.

Objection is made to instructions Nos. 2, 3, 5, and 10 as given, in that the court unduly emphasized and repeated certain rules of law, but after a careful consideration of these instructions, we do not find them open to the objection urged against them.

No. 6 is not open to the objection urged. The objection to No. 8 is that it was error to allow the amendment to be made to the

second paragraph of complaint, and that it was therefore error to give this instruction. We hold otherwise.

Complaint is made concerning certain parts of appellee's testimony, but we see no particular objection to the same. It further appears that appellant, when cross-examining appellee's wife, elicited the same facts from her.

We have examined the other contentions relative to the admission and exclusion of evidence, but find no reversible error.

Judgment affirmed.

(76 Ind. App. 268)

SPRINGER et al. v. JONES et al.*
(No. 9655.)

(Appellate Court of Indiana, Division No. 2,
June 25, 1919.)

1. DAMAGES ⇐123 — CONSTRUCTION CONTRACTS.

On breach of contract to furnish material and construct a cottage in accordance with plans and specifications prepared, the measure of damages is the reasonable cost of altering the defective parts of the house so as to make them conform to the plans and specifications, and not the difference between the value of the house as it is and what its value would be if constructed according to the plans and specifications; the defects complained of being a leaky roof, a poor cement floor in the basement, crooked steps, a mantel not level, etc.

2. APPEAL AND ERROR ⇐172(3)—OBJECTIONS BELOW—NECESSITY.

Where a surety, sued upon breach of contract by his principal to construct a house according to plans and specifications, has made no effort whatever in the trial court to protect his separate interests, he will not be permitted so to do for the first time on appeal.

Appeal from Circuit Court, Hamilton County; Ernest E. Cloe, Judge.

Action by Larkin Jones and others against Clyde E. Springer and others. Judgment for plaintiffs, a new trial was denied, and defendants appeal. Affirmed.

Noble H. Wible, of Indianapolis, and Shirts & Fertig, of Noblesville, for appellants.

Charles B. Clarke and Walter O. Clarke, both of Indianapolis, for appellees.

DAUSMAN, J. This action was instituted by appellees against appellants to recover damages for breach of contract. It is averred in the complaint that Springer by a contract in writing agreed to furnish the material and construct a cottage for Larkin Jones and his wife, in accordance with certain plans and specifications prepared by an archi-

test; that to secure the faithful performance of the contract Springer gave a bond with Thomas E. Moon as surety; that Springer failed and refused to construct the cottage as agreed; and that in various respects the construction was not in accordance with the plans and specifications.

Each appellant filed answer in general denial. Verdict and judgment against both appellants for \$375. The only alleged error presented is the overruling the motion for a new trial.

There are but two questions for our consideration: (1) Did the trial court adopt an erroneous theory of the measure of damages? (2) Did the court err in rendering judgment against the surety?

[1] The cause was tried on the theory that the measure of damages is the reasonable cost of altering the defective parts of the house so as to make them conform to the plans and specifications. Appellants contend that the correct measure of damages is the difference between the value of the house as it is and what its value would be if constructed according to the plans and specifications. It is averred in the complaint that the house was defective in that the roof leaked, the cement floor of the basement was of such poor quality that it had no strength and was easily broken, the steps were crooked, the mantel was not level, etc. Under the facts of this case, the court did not err as to the measure of damages. 6 Cyc. 62, 110; 9 C. J. 810. See, also, McKinney v. Springer, 8 Ind. 60, 54 Am. Dec. 470.

[2] The undisputed evidence discloses that, to induce the appellees to pay the contract price, Springer promised that he would repair the house. Appellants contend that, if Springer is liable at all, his liability arises out of this promise, and that the surety on the bond is in no manner liable on the new promise. The evidence on this point was competent for the purpose of showing that appellees did not accept the house as being fully and properly constructed, and it may have had no other effect. In view of all the circumstances, it was for the jury to determine whether that promise was a new and independent one, or whether it was merely Springer's assurance that he would complete the house according to the terms of the original contract, if appellees would hand over to him the money which they desired to withhold until the house was properly constructed. But if it were possible for us to determine from the record that the verdict rests upon this promise rather than upon the written agreement, even then we could not reverse the judgment as to Moon. He made no effort whatsoever in the trial court to protect his separate interests, and he cannot be permitted to do so for the first time on appeal.

We perceive no reason why we should dis-

cuss the instructions given and refused. We have given them careful consideration, and in our opinion there is no error in that respect. Judgment affirmed.

(70 Ind. App. 671)

PRICE v. MITCHELL. (No. 9926.)

(Appellate Court of Indiana, Division No. 2.
June 25, 1919.)

1. APPEAL AND ERROR ⇐714(4)—RECORD ON APPEAL — ADMISSIONS OR STATEMENTS OF COUNSEL.

Admissions or statements of counsel as to matters which do not otherwise appear in the record will not be considered by the Appellate Court.

2. EVIDENCE ⇐371—DOCUMENTS—PROOF OF EXECUTION.

In an action for possession of and damages for detention of land, where defendant relied upon an instrument purporting to give him the right of occupancy, rent free, but no pleading was founded thereon, and it was not introduced in evidence, Burns' Ann. St. 1914, § 370, relating to proof of execution of instruments, did not apply.

Appeal from Circuit Court, Hamilton County; Ernest E. Cloe, Judge.

Action by Mary B. Mitchell against Albert W. Price. Judgment for plaintiff, a new trial was denied, and defendant appeals. Affirmed.

William P. Henderson and William E. Henderson, both of Indianapolis, for appellant.

Denny & Miller, of Indianapolis, and Shirts & Fertig, of Noblesville, for appellee.

NICHOLS, P. J. This was an action commenced in the Marion superior court, and on change of venue tried in the Hamilton circuit court, for the possession of, and damages for the detention of, certain real estate described in the complaint, and located in Marion county, Ind. The appellant filed an answer in general denial to the complaint, and the cause being at issue was submitted to the court for trial. There was a finding for the appellee, and that she was entitled to the immediate possession of the real estate described in the complaint and damages for the detention thereof in the sum of \$264. After a motion for a new trial which was overruled, appellant prosecutes this appeal.

The only error relied upon for reversal is the action of the court in overruling appellant's motion for a new trial. The errors there assigned can only be presented to this court by a bill, or bills, of exceptions. The only reference to such an instrument is found

in the following language taken from appellant's brief:

"Subsequent to the filing of said bond, appellant failed to file his transcript and bill of exceptions within 60 days after giving said bond."

[1] While the appellant makes some statements of what purports to be evidence, there is no proper showing of any kind whatever that there was any evidence in the cause. Without the evidence and proceedings at the trial the case must be affirmed. Notwithstanding this condition of the record on appeal, appellee's attorneys, four in number, with an appearance of magnanimity that is beyond our comprehension, plainly inform the court that "the evidence is in the record," and then proceed to supplement the purported evidence contained in appellant's brief with additional statements thereof. It is a general rule of law that admissions or statements of counsel, as to matters which do not otherwise appear in the record, will not be considered by the Appellate Court. 4 Corpus Juris, 557. Without considering the applicability of the principle to the case at bar, we have examined the purported evidence as presented by counsel, both for appellant and appellee, and conclude that it is sufficient to sustain the finding of the court. The deciding question involved is as to the right of appellant to occupy the premises involved, and free of rent, which he undertook to establish by the following instrument.

Exhibit No. 3.

I agree with Mattie Price if she and her husband will build two rooms for me so I will be to myself, when the two rooms are completed they can have the front part of the house without rent as long as I live if they will help me to build two rooms I will put in one hundred forty dollars and Mattie Price and her husband to furnish the balance of the money.

Witness

Mary B. Mitchell.
Mattie Price.
A. W. Price.
Lucy Porter.
Wm. Cook.

[2] The appellee strenuously insists that she did not sign this instrument, and that it is a forgery, and so testified, as she had a right to do. No pleading was founded upon it, and therefore section 370, Burns' R. S. 1914, does not apply. It does not appear by the record that such instrument was ever introduced in evidence. The trial court may have refused to consider it upon either of these grounds, and this court would not be justified in disturbing such trial court's conclusion. The finding of the court is sustained by sufficient evidence. There are no reasons discussed as to why the decision of the court is contrary to law, nor is the question of excessive damages presented.

The judgment is affirmed.

(71 Ind. App. 69)

HASKELL & BARKER CAR CO. v. LOGER-MANN et al. (No. 9915.)

(Appellate Court of Indiana, Division No. 1.
June 27, 1919.)

1. APPEAL AND ERROR ¶1039(8)—MOTION TO MAKE COMPLAINT SPECIFIC — INJURIES TO SERVANT—HARMLESS ERROR.

Where each paragraph of an injured servant's complaint, when considered as an entirety, so definitely pleaded the facts constituting defendant employer's negligence that the precise nature of the charge could not be misunderstood, there was no reversible error in overruling the employer's motion to make the complaint more specific.

2. MASTER AND SERVANT ¶259(4) — INJURIES TO SERVANT — SUFFICIENCY OF COMPLAINT.

A complaint, under Employers' Liability Act, for the death of a factory hand struck by a piece of timber thrown from a cutting machine negligently operated by other employees without fastening the timber with set screws provided, held sufficient to state a good cause of action.

3. DEATH ¶11—WRONGFUL ACT—RECOVERY AT COMMON LAW—STATUTE.

At common law there could be no recovery for death by wrongful act, but Burns' Ann. St. 1914, § 285, authorizes such an action.

4. DEATH ¶25—DEATH BY WRONGFUL ACT — RELEASE FROM DECEDENT.

An action by a personal representative under Burns' Ann. St. 1914, § 285, for the wrongful death of his decedent, will be barred if such decedent in his lifetime made a valid settlement for the injuries which resulted in his death.

5. INSANE PERSONS ¶73 — VALIDITY OF CONTRACT—ABSENCE OF JUDICIAL DETERMINATION.

A contract of settlement for personal injuries made by an employer with his servant of unsound mind, who has not been judicially so determined, is voidable only.

6. DEATH ¶31(3) — ACTIONS — SETTLEMENT BY INJURED INSANE PERSON—PERSONAL REPRESENTATIVE'S RIGHT TO SUE.

Where an injured servant when he settled with his employer was of unsound mind, at the time of his death he had a right of action for his injuries through his guardian on account of the voidability of the settlement, and after his death his legal representative could prosecute an action under Burns' Ann. St. 1914, § 285.

7. TENDER ¶6 — ADMINISTRATOR'S RIGHT ON DISAFFIRMANCE OF CONTRACT.

A valid tender may be made by an administrator of a decedent's estate if necessary to disaffirm a contract made with decedent in his lifetime.

8. DEATH ⇨25 — **DISAFFIRMANCE OF SETTLEMENT BY DECEDENT—TENDER.**

It will be presumed, in the absence of contrary showing, that an administratrix making a tender on disaffirming a settlement of injuries to a deceased employé acted in compliance with an order of the court, and if without an order that as the legal representative in the settlement of the estate she has given sufficient bond to protect the estate's interest, the employer in no event being in a position to complain.

9. EVIDENCE ⇨123(11) — **DEATH OF SERVANT.**

In an action under the Employers' Liability Act of 1911 and the wrongful death statute (Burns' Ann. St. 1914, § 285), for injuries and death of a servant, testimony of one of the employer's two servants who had charge of the machine which injured decedent, detailing a conversation between himself and his coemployé and assistant, after the accident, was not part of the res gestæ and was inadmissible.

10. TRIAL ⇨260(1)—**HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.**

The refusal of requested instructions fairly covered by other instructions given by the court on its own motion was not reversible error.

Appeal from Circuit Court, La Porte County; James F. Gallaher, Judge.

Action by Emma Logermann, administratrix, and others, against the Haskell & Barker Car Company. From judgment for plaintiffs, defendant appeals. Reversed, with instructions to grant new trial.

Wm. A. McVey and Howard B. McLane, both of La Porte, and Jeremiah B. Collins and Cornelius R. Collins, both of Michigan City, for appellant.

Andrew J. Hickey and Norman F. Wolfe, both of La Porte, and Robert H. Moore, of Michigan City, for appellees.

REMY, J. This is an action for damages for the death of appellee's decedent caused by the alleged negligence of appellant company, and is brought under the Employers' Liability Act of 1911 (Laws 1911, c. 88). The complaint is in two paragraphs. The allegations of the first paragraph, in so far as is necessary to a proper determination of the questions raised in reference thereto, are, in substance as follows: On June 8, 1913, plaintiff's decedent, John Logermann, was in the employ of defendant company, a corporation, in its freight car factory as a laborer; that, at the time, defendant had in its employ in its said factory about 3,000 men; that located in its said factory building was a machine used for cutting tenons in pieces of wood to be used for rafters in making roofs for cars; that attached to said machine were revolving knives which cut such tenons; that said knives were turned by electric power, and could be, and were, raised and lowered

by the operator of the machine as it became necessary in doing the work; that said knives when in motion moved with such great force that pieces of timber which were being cut by the revolving knives had to be placed into the machine and fastened with set screws to prevent them from being caught and thrown from the machine by the movement of the revolving knives; that it was the duty of defendant's employes operating the machine so to fasten the pieces of timber; that at said time plaintiff's decedent was in the course of his employment, and pursuant to immediate orders of the foreman of defendant company to whose orders he was bound to conform, and did conform, carrying boards to said machine, there to be worked up; that while he was so carrying said boards, and without any fault or negligence on his part, a piece of timber was caught by the revolving knives and thrown with great force against said decedent, striking him between the hips and shoulders and severely injuring him, all because and as a result of the negligence of defendant's employes who in the line of their employment had charge of and were operating said machine, in this, that they had negligently sought to cut tenons in the piece of timber without first securely fastening the same with the setscrews provided for that purpose; that as a result of his injuries the nervous system of plaintiff's decedent was completely shattered, his spine injured, his mind affected, etc., resulting in his death; that decedent left surviving him his widow and four children. The second paragraph is identical with the first, excepting that the second paragraph charges that, through the negligence of defendant's said employes who were operating the machine, a large pile of wood was permitted to accumulate around the machine, thus preventing the said setscrews, which, as aforesaid, were provided to hold said pieces of timber in place, from serving the purpose for which they were intended, and as a result the piece of timber was not securely fastened, was caught by the revolving knives, and thrown with great force, etc.

[1] The first error assigned and presented by appellant is that the court erred in overruling appellant's motion to make each paragraph of the complaint more specific. When each paragraph is read as an entirety, it is clear that the facts constituting appellant's negligence are so definitely pleaded in each paragraph that the precise nature of the charge cannot be misunderstood. There was no reversible error in overruling appellant's motion to make the complaint more specific. *Jackson Hill Coal & Coke Co. v. Van Hentenyck*, 120 N. E. 664; *Federal Casualty Co. v. Chatman*, 121 N. E. 296; *Board v. State ex rel.*, 179 Ind. 644, 102 N. E. 97.

[2] It is urged that neither paragraph of complaint states facts sufficient to state a cause of action, and, in its memorandum filed, appellant set forth many reasons therefor. Under the rule laid down in the case of *Domestic Block Coal Co. v. De Armev*, 179 Ind. 592, 100 N. E. 675, 102 N. E. 99, and which has since been followed by the courts of appeal in this state, we are of the opinion that each paragraph of complaint stated a good cause of action. Each paragraph was sufficient to apprise a person of ordinary understanding of what he would be required to meet. *Kahle v. Crown Oil Co.*, 180 Ind. 131, 100 N. E. 681; *Shirley Hill Coal Co. v. Moore*, 181 Ind. 513, 103 N. E. 802; *Inland Steele Co. v. Gillespie*, 181 Ind. 633, 104 N. E. 76.

[3-8] In addition to its answer in denial, appellant company filed two affirmative answers, each setting forth that appellee's decedent in his lifetime had, in consideration of \$10 paid to him by appellant, released appellant company from all claims growing out of his injuries which in the complaint it is alleged caused his death. To these affirmative answers, appellee filed a reply in denial; also, what is denominated her amended second paragraph of reply, alleging that, at the time her decedent executed said release and made settlement of his claim, he was, and at all times thereafter until his death continued to be, a person of unsound mind and incapable of transacting ordinary business affairs; and that after her appointment as administratrix of the estate of said decedent, and immediately upon learning of said pretended contract, she as such administratrix, on December 9, 1915, on behalf of said estate notified appellant company of the disaffirmance of said contract and release, and tendered to appellant \$10 in gold, the total amount alleged in appellant's said reply to have been received by her decedent. A demurrer to this reply for want of sufficient facts was overruled, and this action of the court is assigned as error. Appellant contends that the demurrer to said reply should have been sustained: (1) Because the pleading shows that decedent in his lifetime had settled the claim growing out of the accident, and that there was therefore no right of action and no warrant in law or in fact to make said tender; and (2) because the facts set forth in the reply show that the tender was made by appellee as administratrix, and not as the representative of the dependents under the statute. At common law there could be no recovery for death by wrongful act. The statute of this state authorizing an action of this character (section 285, Burns 1914) is as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action, had he

or she (as the case may be) lived, against the latter for an injury for the same act or omission. The action shall be commenced within two years. The damages cannot exceed ten thousand dollars; and must inure to the exclusive benefit of the widow, or widower (as the case may be), and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

An action by a personal representative for the wrongful death of his decedent will be barred, if such decedent in his lifetime made a valid settlement for the injuries which resulted in his death. *Miller v. Kelly Coal Co.*, 239 Ill. 626, 88 N. E. 196, 130 Am. St. Rep. 245; *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084. See, also, *Hecht v. Ohio, etc., R. Co.*, 132 Ind. 507, 32 N. E. 302; *Golding v. Town of Knox*, 56 Ind. App. 149, 104 N. E. 978. However, such a contract of settlement made with a person of unsound mind, but who had not been judicially so determined, is voidable only. See *Missouri, etc., R. Co. v. Brantley*, 26 Tex. Civ. App. 11, 62 S. W. 94; *British Columbia Co. v. Turner*, 49 Can. S. C. 470. Appellee's decedent, therefore, at the time of his death, if the allegations of the reply are true, had a right of action which through a guardian could have been maintained. It follows that after decedent's death his legal representative could prosecute an action under the above statute. That a valid tender may be made by an administrator of a decedent's estate has frequently been decided by the courts. *Sharp v. Garesche*, 90 Mo. App. 233, 238. If it was necessary to disaffirm the contract made with decedent in his lifetime, the personal representative was the only one who, under the law, could have made the required tender. If the administratrix took money belonging to the assets of the estate, and on behalf of the estate made the tender, it will be presumed, in the absence of a showing to the contrary, that she acted in compliance of an order of the court. However, if she had made the tender without an order of the court, it will be presumed that as the legal representative in the settlement of said decedent's estate she had given a sufficient bond to protect the estate's interests. In no event is appellant in a position to complain. It could make no difference to it whether the money came from the administratrix as trustee for decedent's widow and children, or from the personal estate.

[9] The remaining error for our consideration is the court's action in overruling the motion for a new trial, the cause having been tried by a jury resulting in a verdict for appellee in the sum of \$3,000. Chief among the reasons urged for a new trial is the alleged error of the court in admitting certain evidence. Witness Werdin, after testifying that he was one of the two employees of appellant who had charge of the machine described in the complaint at the time decedent

was alleged to have been injured, was permitted, over appellant's objection, to detail a conversation between himself and his co-employé who was at the time assisting in the operation of the machine, which conversation tended to prove that appellee's decedent was severely injured, and also tended to prove that the machine was operated in a negligent manner. The conversation admitted in evidence took place after the accident, and was not a part of the *res gestæ*. It is argued by appellee's counsel that since the act of 1911, under which this action is brought, made the employer liable for the injuries caused by the negligence of the witness and his coemployé with whom the conversation was had, therefore the statements by them were competent. Such is not the law. The conversations or declarations of employés which were not a part of the *res gestæ* are not competent evidence, and the admission of the testimony complained of was reversible error.

[10] Error is predicated upon the refusal of the court to give certain instructions tendered by appellant. The instructions tendered which were competent were fairly covered by other instructions given by the court on its own motion. There was no reversible error in the court's refusal to give the instructions or any of them.

Other alleged errors are presented; but, since the cause must be reversed, it is not necessary to consider them. We have carefully examined the evidence, and from such examination we cannot say that the correct result was reached, and that the admission of the testimony above referred to was harmless.

Judgment reversed, with instructions to grant a new trial.

(70 Ind. App. 625)

BREHM v. HENNINGS. (No. 9939.)

(Appellate Court of Indiana, Division No. 2
June 24, 1919.)

1. NEW TRIAL \S 116(3)—MOTION—TIME FOR FILING.

Where verdict was returned April 22d and motion for venire de novo which was filed May 2d was overruled June 6th, motion for new trial filed June 27th was not filed within the time fixed by statute, and there was no error in overruling the motion.

2. APPEAL AND ERROR \S 761—BRIEFS—PROPOSITIONS.

Propositions in an appellant's brief under the heading "Points and Authorities," where so worded and grouped that court can readily understand that they relate to assignment of errors relative to overruling of motion for a venire de novo, held sufficient to require Appellate Court to pass on question.

3. COURTS \S 107 — BROAD AND SWEEPING LANGUAGE IN OPINION—LIMITATIONS.

A broad and sweeping statement of the court should be considered in the light of the record then under consideration.

4. COURTS \S 92 — STARE DECISIS—QUESTION NOT DETERMINED.

An opinion cannot be held to be authority on a question which it expressly states that it does not decide.

5. TRIAL \S 341—VENIRE DE NOVO—INCOMPLETE VERDICT.

Where jury by general verdict failed to find upon all the issues, the motion for a venire de novo should have been sustained.

Appeal from Superior Court, Madison County; Willis S. Ellis, Judge.

Action by Philip Brehm against Joseph E. Hennings. Verdict for plaintiff for a nominal amount, motions for a venire de novo and for new trial overruled, and plaintiff appeals. Reversed, with directions.

Frank P. Foster and Byron McMahan, both of Anderson, for appellant.

Phillip B. O'Neill, of Anderson, and Frederick Van Nuys, of Indianapolis, for appellee.

McMAHAN, J. The appellant brought this action against the appellee to recover damages for an alleged breach of contract in failing to restore leased property at the expiration of the lease to the condition it was in at the time the lease was executed, and for a wrongful holding of the leased premises beyond the time for which they were leased.

The complaint was in four paragraphs. The first and second paragraphs sought to recover damages for the failure to restore the property to the condition it was in when the lease was executed, and the third and fourth paragraphs were for damages for holding over after the expiration of the lease. An answer of general denial being filed, the cause was tried by a jury, and a general verdict was returned, which, omitting the caption and signature, was as follows:

"We, the jury, find for the plaintiff upon the first paragraph of complaint and assess his damages at \$1.00."

This verdict was returned April 22d, and on May 2d appellant filed a motion for a venire de novo on the ground that the verdict was incomplete, and that no verdict was returned as to the second, third, and fourth paragraphs of complaint. This motion was overruled June 6th, and on June 27th appellant filed a motion for a new trial, which was also overruled.

The errors assigned are that the court erred: (1) In overruling the motion for a venire de novo; and (2) in overruling the motion for a new trial.

[1] There was no error in overruling the

motion for a new trial as it was not filed within the time fixed by statute.

Appellant contends that his motion for a venire de novo should have been sustained because the jury found only upon one paragraph of complaint and ignored the other three paragraphs.

[2] Appellee insists that no question is presented on account of the failure of appellant to comply with the rules of this court in the preparation of his brief. The first four propositions in appellant's brief under the heading "Points and Authorities" are so worded and grouped that we can readily understand that they all relate to the assignment of errors relative to the overruling of the motion for a venire de novo, and are sufficient to require us to pass upon that question.

Appellee also insists that a verdict for the plaintiff on one of several paragraphs of complaint, without noticing the other paragraphs, is equivalent to a finding against the plaintiff on such other paragraphs.

There is some confusion among the decisions in this state concerning the office of a venire de novo, the result of a careless use of language in making general statements concerning a venire de novo and a failure to make any distinction between general and special verdicts.

For many years the rule of the common law, as stated in 2 Tidd's Prac. 992, and affirmed and followed in *Bosseker v. Cramer*, 18 Ind. 44, and affirmed in many later cases, was the recognized rule in this state relative to the office of a venire de novo. The rule, as there stated, is this:

"A venire de novo is granted when the verdict, whether general or special, is imperfect by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages."

This rule remained unchanged until 1879, when the Supreme Court, in *Graham v. State ex rel.*, 66 Ind. 386, after having its attention called to our Practice Code, held that the failure of the court to find upon all the issues in a special verdict was no cause for a venire de novo, if such verdict had substance enough to form the basis of a judgment for either party. The court, on page 395, of 66 Ind., said:

"The special verdict or finding is confined to the facts proved. * * * The issues concerning which no facts are found should be regarded as not proved by the party on whom the burden of the issue or issues lies. * * * And if the facts proved and found do not determine some of the issues, those issues must be regarded as not proved by the party having the burden of proof resting upon him."

In *Glantz v. City of South Bend*, 106 Ind. 305, 6 N. E. 632, where the court was again discussing the effect of a special verdict in which all the issues were not passed upon

on, the *Graham Case* was approved, the court saying:

"Approving and following, as we think we must, the more recent rule or practice in relation to special verdicts, we must hold, in the case under consideration, that the trial court did not err in overruling appellant's motion for a venire de novo. * * * The burden was on her to establish this fact [want of care] by a fair preponderance of the evidence, and as the special verdict is entirely silent as to this fact, in the absence of the evidence, we would be bound to conclude that she had failed to prove such fact. In determining whether or not it was error to overrule the motion for a venire de novo, we can look to the evidence, where it is in the record."

In *Bartley v. Phillips*, 114 Ind. 189, 16 N. E. 508, where the facts were found specially, the Supreme Court, in sustaining the action of the trial court in overruling the motion for a venire de novo, said:

"That the court failed to find and state in its special findings any facts that may have been proven, or failed to find and state therein the force and effect of a certain cause in the mortgage are questions not properly raised by a motion for a venire de novo. If all the facts were not found, or if facts are stated in the special findings of facts which the proof did not warrant, the remedy, and the only remedy, was by a motion for a new trial."

In *Board of Com'rs v. Pearson*, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325, the court said:

"There is no imperfection in the verdict, for sufficient facts are stated to enable the court to pronounce judgment, and, under the rule which prevails in this state, the failure to find upon all the issues does not entitle a party to a venire de novo. *Wilson v. Hamilton*, 75 Ind. 71; *Jones v. Baird*, 76 Ind. 164; *Glantz v. City of South Bend*, 106 Ind. 305 [6 N. E. 632]; 1 Works' Pr. § 971, and cases cited. This has been the rule since the decision in *Graham v. State ex rel.*, 66 Ind. 386, although the earlier cases declared a different rule. *Quill v. Gallivan*, 108 Ind. 235 [9 N. E. 99], and cases cited; *Bartley v. Phillips*, 114 Ind. 189 [16 N. E. 508]; *Indiana, etc., R. W. Co. v. Fennell*, 116 Ind. 414 [19 N. E. 204]. In the case of *Glantz v. City of South Bend*, supra, the court referred to *Bosseker v. Cramer*, 18 Ind. 44, and some other cases, and after showing that the doctrine of those cases had been denied in *Graham v. State ex rel.*, supra, and that the later cases approved the doctrine of that case, declared in effect that the rule as stated in *Graham v. State ex rel.*, supra, must be considered as established. The effect of the decisions has been to overrule *Bosseker v. Cramer*, supra, although the express statement that it was overruled has probably not been made. We feel bound to adhere to what has so long been the rule, and to hold, as has been so often held in recent cases, that where the verdict is perfect on its face and so fully finds the facts as to enable the court to pronounce judgment upon it, a motion for a venire de novo will be denied, although the verdict may not find upon all of the issues."

[3] This statement of the court is broad and sweeping in its effect, but we think it should be considered in the light of the record then under consideration. The opinion in this case does not disclose whether the verdict was general or special, but on examination of the record we find that there was a special verdict, so that what the court said in relation to *Bosseker v. Cramer*, *supra*, being overruled, should be understood as referring only to special verdicts.

In *Central, etc., Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64, the appellee's complaint was in two paragraphs to recover a statutory penalty for failure and refusal on the part of appellant to supply appellee with telephone facilities without discrimination or partiality. The case was tried by a jury which returned the following verdict:

"We, the jury, find for the plaintiff and assess his damages at \$100.00."

The statute provided a penalty of \$100 for each violation. Both paragraphs were the same, except the offense was alleged as on different days. Appellant contended that, the jury having assessed the appellee's damages at \$100, it was evident that the jury had only found for appellee on one paragraph of complaint, and that the verdict was defective because it did not cover all the issues. The court held that, if there was any error in not assessing the damages at \$200, it was in appellant's favor, and that it was in no position to complain. In referring to the motion for a venire de novo, the court, on page 193 of 146 Ind., on page 66 of 45 N. E., said:

"The rule in this state is that a motion for a venire de novo will not be sustained unless the verdict, whether general or special, is so defective and uncertain upon its face that no judgment can be rendered upon it. *Bartley v. Phillips*, 114 Ind. 189 [16 N. E. 506], and cases cited on page 192; *Board, etc., v. Pearson*, 120 Ind. 426 [22 N. E. 134] 16 Am. St. Rep. 325. A verdict, however informal, is good if the court can understand it. *Daniels v. McGinnis, Adm'r*, 97 Ind. 549. The verdict in this case is not informal or defective, even if appellant's contention that it only finds for appellee on one paragraph is correct, for the reason that a finding in favor of appellee upon one paragraph of his complaint, without noticing the other, would be equivalent to a finding against him on such other paragraph"—citing *Shaw v. Barnhart*, 17 Ind. 183.

[4] The *Shaw* Case, however, cannot be held to be authority on the point to which it is cited, as the court expressly stated that it did not decide the question. In *Bartley v. Phillips* there was a special finding of facts, and in *Board v. Pearson* there was a special verdict, and neither of them supports the statement relative to a general verdict.

In *Pennsylvania Co. v. Reesor*, 80 Ind. App. 636, 106 N. E. 983, the cause was tried on

two paragraphs of complaint, the third and fourth, the third charging willful killing, while the fourth charged negligence. The jury returned a general verdict for appellee on the fourth paragraph of complaint, and answered a number of interrogatories. The verdict was silent as to the third paragraph. The appellant filed a motion for judgment on the interrogatories. The jury, in answer to the interrogatories, found that there was a willful killing. Appellant insisted that the general verdict, being based on the fourth paragraph, in which it was alleged that the killing was brought about by negligence, was equivalent to a finding against appellee on the third paragraph of complaint, which charged willfulness, and that the answers to the interrogatories were antagonistic and incapable of being reconciled with the general verdict. The court, in passing upon this question, said:

"The trial court submitted forms of verdict to the jury, which returned a general verdict, finding for appellee on his fourth paragraph of complaint. No objection is presented as to the form of the verdict. It is correctly argued by appellant that this finding of the jury was in effect a finding against appellee on the third paragraph of complaint. This is fully sustained by the following authorities: *Central Union Tel. Co. v. Fehring* (1896) 146 Ind. 189, 193, 45 N. E. 64, *Union Central Life Ins. Co. v. Huck* (1892) 5 Ind. App. 474, 32 N. E. 580."

In *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266, the jury returned a verdict in favor of plaintiff, appellee, on the second paragraph of complaint, nothing being said about the first paragraph. The court in discussing the question said:

"The appellant insists that his motion for a venire de novo should have been sustained because the jury found only upon one paragraph of the complaint, ignoring the other. It was formerly held that a failure to find upon all the issues was a good cause for a venire de novo, but the later cases decide that if the verdict does not cover all the issues, that is not a defect appearing on the face. *Works' Fr. 971*; *Board, etc., v. Pearson*, 120 Ind. 426 [22 N. E. 134, 16 Am. St. Rep. 325]; *Alexandria, etc., Co. v. Painter*, 1 Ind. App. 587 [28 N. E. 113].

"The appellant should have moved to require the jury to perfect their verdict if he desired the finding to cover both paragraphs. He was not harmed, however, by the form of the verdict. The finding of the jury upon one paragraph of the complaint, where there is evidence tending to support both, precluded the appellee from ever bringing another action against the appellant on the cause averred in the paragraph as to which no finding was made. *Shaw v. Barnhart*, 17 Ind. 183.

"The cases cited by appellant on this point proceed upon the theory that a venire de novo will be granted where the jury fails to find upon all the issues, but this doctrine, as we have seen, has been overturned by the more recent decisions."

In *Alexandria, etc., Co. v. Painter*, 1 Ind. App. 587, 28 N. E. 113, the jury returned a general verdict against one of several defendants, no verdict being returned as to the other defendants. The court there said:

"The omission to find in favor of or against the other defendants is not a ground for a venire de novo. Such a motion will not be sustained simply because there was an omission to find upon some of the issues"—citing *Board v. Pearson*, supra.

Many other cases might be cited wherein the courts failed to make any distinction between general and special verdicts, incorrectly stating that the rule in the *Graham* Case applied to general verdicts as well as to special verdicts.

The Supreme Court, in *Maxwell v. Wright*, 160 Ind. 515, 67 N. E. 267, in reviewing the cases and applying the law relative to a venire de novo to a general verdict, said:

"The reasons that called for a modification of the old rule as to special verdicts and findings do not apply to general verdicts. In the former it is not the province of the jury to determine which party shall prevail in the action. That is left to the court; while in the general verdict the jury is required, under the instructions of the court as to the law of the case, to find generally from the facts, proved and unproved, whether the plaintiff or the defendant has succeeded on the issues made by the pleadings. *Hence when the jury fails to find for the plaintiff or defendant on an issue between the parties, it is apparent from the verdict that the jury has stopped short of a full determination of the case, and the verdict is therefore ill and defective, and subject to a venire de novo*"—citing with approval *Bosseker v. Cramer*, supra. (The italics are ours.)

In order to appreciate the full force and effect of the *Maxwell* Case it is necessary to have the history of that case in mind. The case was appealed to this court, where the action of the trial court was affirmed, and in the course of its opinion this court said:

"The principal contention of counsel for appellant is that the court erred in overruling appellant's motion for a venire de novo as to the appellee Henry Wright. Counsel say in their brief, 'The motion for a venire de novo was based upon the failure of the jury to find on all the issues made.' In support of this the cases of *Bosseker v. Cramer*, 18 Ind. 44, and *Whitworth v. Ballard*, 56 Ind. 279, and cases cited, are relied upon to sustain the proposition. The cases cited and other cases following them sustain the appellant's position, but it appears that the Supreme Court in later cases overruled the doctrine announced in *Bosseker v. Cramer*, supra, by implication, and in still later cases expressly overruled the last-named case. In *Board v. Pearson*, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325, the Supreme Court, by Elliott, C. J., reviewed the cases in this state upon this point, and expressly overruled the case of *Bosseker v. Cramer*, supra, and squarely held that the motion for a venire de novo must be denied, although

the verdict does not find upon all the issues. See, also, *Zimmerman v. Gaumer*, 152 Ind. 552, 53 N. E. 829; *Exploring Co. v. Painter*, 1 Ind. App. 597, 28 N. E. 113; *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266. We think the rule announced in the later cases the better one, and it is certainly the only rule that could in good reason be adopted so long as the law remains that a venire de novo reaches matter of form only, and is effective only when the finding and verdict are so defective that no judgment can be rendered. In the case at bar the verdict is not defective in the matter of form." *Maxwell v. Wright*, 64 N. E. 893.

The cause was transferred to the Supreme Court on the ground that the opinion of the Appellate Court as quoted contravened a ruling precedent of the Supreme Court, and the cause was reversed, the court, after quoting 1 *Graham* and *Waterman*, New Trials, 40, as follows:

"If the jury find only a part of the issues, judgment cannot be entered on the verdict. It is void for the whole, and a venire de novo will be awarded"—said:

"While there is no real conflict among our many cases upon this subject, there is apparently some confusion, manifestly the result of a careless use of language employed in making general statements concerning the office of a venire de novo. In all the cases we have examined, decided since the case of *Graham v. State ex rel.*, 66 Ind. 386, which rests upon a special verdict or special finding, this case has been uniformly followed in all decisions involving a special verdict or special finding, and, in effect, holding that, if the special verdict or finding leaves some issue or material fact undetermined, such issue or fact will be regarded as not proved by the party having the burden of the proof, and, if such verdict or finding contains substance enough to support a judgment one way or the other, it will not be objectionable because it does not pass upon all the issues, and the remedy for mistakes and errors not appearing upon the face of the verdict * * * is by motion for a new trial, and not by a venire de novo"—citing several cases.

"And in all cases since the *Graham* Case brought to our attention, involving a general verdict or finding which showed upon its face that less than the whole issue was covered, or was so ambiguous and uncertain as to afford no foundation for a judgment, a venire de novo has been held to be the proper remedy—citing several cases.

"So it must be held that the rule springing from *Graham v. State ex rel.*, which must now be considered as firmly established in this state, modifies the common-law rule with respect to the writ of venire de novo only in its application to special verdicts and special findings as ruled by our Civil Code."

[5] Thus it would appear that while *Bosseker v. Cramer*, supra, has been overruled in so far as special verdicts are concerned, the common-law rule with respect to the office of the writ of venire de novo as therein stated is still in force in this state in so far

as general verdicts are concerned. The jury having failed to find upon all the issues, the motion for a venire de novo should have been sustained.

Judgment reversed, with direction for further proceedings not inconsistent herewith.

(71 Ind. App. 43)

ALDRIDGE et al. v. CLASMEYER.
(No. 9914.)

(Appellate Court of Indiana, Division No. 1.
June 27, 1919.)

1. HUSBAND AND WIFE ⇨229(3)—COVERTURE—PLEADING.

The defense arising from coverture is personal, and, when pleaded to an action on contract against a married woman, the plaintiff must reply facts which show that the contract sued on is one on which she is bound.

2. HUSBAND AND WIFE ⇨229(3)—WIFE AS SURETY—PLEADING.

In action on notes and to foreclose mortgage securing them, paragraph of plaintiff's reply held to sufficiently show that defendant wife acquired a beneficial interest in merchandise by purchase, so that she would be a principal and not a surety on the notes given for the purchase price.

3. APPEAL AND ERROR ⇨1040(15) — OVERRULING OF DEMURRER—HARMLESS ERROR.

Any error in overruling demurrer to reply seeking to estop defendants from asserting that defendant wife is surety on notes in suit would be harmless, the court having determined that wife was in fact a principal.

4. APPEAL AND ERROR ⇨761—BRIEFS—ABSTRACT PROPOSITIONS.

The statement of a number of abstract propositions of law, without making any specific application of the same to the instant case in support of contention that court erred in each conclusion of law stated on the special finding of facts, is not a compliance with rules governing preparation of briefs.

5. HUSBAND AND WIFE ⇨171(4) — WIFE AS SURETY—BURDEN OF PROOF.

Where the obligation sued upon is that of husband and wife and is secured by a mortgage on real estate held by them as tenants by entireties, there is no presumption that the wife is surety, or that the consideration was not used for the benefit of her joint estate, and the burden is upon her to allege and prove that she executed such obligation as surety, and not as principal.

6. HUSBAND AND WIFE ⇨171(4)—JOINT OBLIGATIONS—PRESUMPTION.

That notes in suit were the joint obligations of defendants, husband and wife, and that the title to the real estate in question was held by them as tenants by entireties at the time they executed the mortgage in suit to secure the notes, would, standing alone, create a presumption that wife is a principal on the notes, and

not a surety; and, where the other facts found tend to support this presumption rather than to rebut it, the presumption stands.

7. SALES ⇨197, 199—EXECUTORY CONTRACT—TITLE.

In an executory contract of sale the goods remain the property of the seller until the contract has been executed, and whether in a particular case there is an actual sale or only an executory contract of sale depends upon the intention of the parties.

8. SALES ⇨218½ — EXECUTORY CONTRACT—EVIDENCE.

Evidence held to warrant inference that contract of sale of stock of merchandise remained executory until execution of bill of sale.

9. APPEAL AND ERROR ⇨931(1) — REVIEW — PRESUMPTIONS.

In determining whether the finding of facts is sustained by sufficient facts, the Appellate Court must not only consider the direct evidence most favorable to appellee, but must also consider all reasonable inferences that trial court was warranted in drawing therefrom; this being true although other and contrary inferences may be reasonably drawn from such evidence.

10. APPEAL AND ERROR ⇨203(½)—RULINGS ON EVIDENCE—EXCEPTIONS.

Where no exceptions were saved to rulings with reference to admission and exclusion of evidence, no question in that regard is presented for determination of Appellate Court.

11. TRIAL ⇨341—VENIRE DE NOVO.

As there was a special finding of facts and conclusions of law thereon, and the facts found are sufficient to sustain the conclusions of law in favor of plaintiff, the motion for a venire de novo was properly overruled.

Appeal from Superior Court, Delaware County; Everett Warner, Special Judge.

Action by Fred W. Clasmeyer against Bert E. Aldridge and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Frederick F. McClellan, Donald D. Hensel, and Leonidas A. Guthrie, all of Muncie, for appellants.

Pickens, Cox & Conder, of Indianapolis, and Silverburg, Bracken & Gray, of Muncie, for appellee.

BATMAN, C. J. This is an action by appellee against appellants, who are husband and wife, to recover a judgment on certain promissory notes, executed by each of them, and to foreclose a mortgage, executed by appellants on certain real estate held by them as tenants by entireties, given to secure said notes. Appellant Mary J. Aldridge filed her separate answer to appellee's complaint in four paragraphs. The first is a general denial. The second alleges that she is the wife of her coappellant, and was such at the time of the execution of the mortgage mentioned

in appellee's complaint; that at the time of the execution thereof she and her said husband owned the real estate described therein as tenants by entireties; and that she executed the same, and the notes secured thereby, as surety only. The third paragraph is a plea of want of consideration. The fourth paragraph alleges that at the time of the execution of the notes and mortgage in suit she was, and still is, the wife of her coappellant; that said instruments were executed in consideration of a debt owing by her coappellant to appellee; that she received no part of the consideration thereof, and executed the same only as surety for her said coappellant. Appellee filed a reply to the second, third, and fourth paragraphs of said answer of appellant Mary J. Aldridge in two paragraphs. The first is a general denial, and the second alleges, in substance, that the notes in suit were given for the balance of the purchase price of a grocery store, purchased jointly by appellants, and that the mortgage in suit was given to secure the same. Appellant Mary J. Aldridge filed a demurrer to said second paragraph of reply, which was overruled. Appellant Bert E. Aldridge filed an answer to appellee's complaint in two paragraphs. The first is a general denial. The second is an answer to so much of appellee's complaint as seeks to foreclose the mortgage mentioned therein. It alleges, in substance, that at the time of the execution of said mortgage, appellants were, and now are, husband and wife, and were on said date, and have been continuously since, the owners of the real estate described therein as tenants by entireties; that the only consideration for the notes described in said mortgage was a grocery store, which he alone purchased of appellee, and in which his coappellant had no interest; that the indebtedness evidenced by said notes is his debt; that no part of the consideration for said notes passed to his coappellant in any form; that at most she is only surety for said indebtedness, and that by reason of such facts, the mortgage in suit is not subject to foreclosure. Appellants filed a joint paragraph of answer to appellee's complaint, which is the same, in substance, as the second paragraph of the separate answer of appellant Bert E. Aldridge. Appellee filed a reply to the second paragraph of the separate answer of appellant Bert E. Aldridge and the joint answer of appellants. The first paragraph is a general denial. The second alleges, in substance, that appellee sold a grocery store to appellants; and that the notes and mortgage in suit were executed by them in connection with, and as part of, the consideration for their joint business. The third paragraph alleges facts by which appellee seeks to estop appellants from asserting that appellant Mary J. Aldridge is surety on the notes in suit, and from denying the validity of the mortgage given to secure the same.

Appellants demurred jointly, and appellant Mary J. Aldridge demurred separately, to appellee's said third paragraph of reply, which demurrers were each overruled. Appellants filed a cross-complaint against appellee, seeking to quiet their title to the real estate in question, to which the latter filed an answer in general denial. On the issues thus formed the cause was submitted to the court for trial. On request the court made a special finding of facts, and stated its conclusions of law thereon.

The facts essential to the determination of the questions hereinafter considered are as follows: That on and prior to April 1, 1915, appellee was the owner of a grocery store and meat market in Indianapolis; that appellants were husband and wife, and were living together as such on said date, and at all times hereinafter mentioned, of which fact appellee had knowledge; that on and prior to said date each of appellants was earning wages and contributing the same to their family expenses; that on said date negotiations were begun between appellee and appellant Bert E. Aldridge for the sale of said store and market, in which appellee agreed to sell the same and accept as security for the deferred payments therefor a mortgage on certain lots in Muncie, Ind., which appellants were purchasing, together with a chattel mortgage on the property sold; that said appellant talked to his wife about the purchase of said store and market, and informed her about the arrangements for the payment of the purchase price thereof; that on April 3, 1915, appellant Bert E. Aldridge gave appellee a check for \$200 as the first payment on said store and market, and that it was then agreed that an inventory thereof should be taken on the next day, which was Sunday, and that the deal should be closed as soon as appellants received a deed for the Muncie lots; that appellee and appellant Bert E. Aldridge assisted by others, made an inventory of the stock in said store and market on the following day, at which time the former delivered to the latter the keys to the room in which the same were located, and it was then agreed that the deal should be closed as soon as appellants received a deed for said Muncie lots; that on April 5, 1915, appellee arranged for a transfer of the insurance policy on the stock and fixtures, and for an assignment of the lease on the room in which the same were located, to appellant Bert E. Aldridge; that thereafter appellants received deeds for said Muncie lots, in which both were named as grantees; that thereupon appellant Bert E. Aldridge called appellee by phone, and informed him that the deeds had been received; that it was then agreed that appellee and appellant should meet at the law office of Pickens, Cox & Conder during the noon hour of that day, to close up the transaction; that shortly after noon on April 7, 1915, the parties met at the

office of said attorneys as agreed; that one of said attorneys, Mr. Conder, at appellee's request, had theretofore prepared a bill of sale from appellee to appellants for said stock and fixtures; also the notes and mortgages in suit; also certain other notes, covering the balance of the purchase price of said stock and fixtures, and a chattel mortgage thereon, to be given by appellants to appellee to secure said last-named notes, also an affidavit to be signed by appellee to comply with the Bulk Sales Law; that upon the arrival of appellants, Mr. Conder stated to them in the presence of appellee that he understood from what had been told him that Mrs. Aldridge was entering into the purchase of a grocery store with her husband, and that the bill of sale was to be made to them jointly; that he then read the bill of sale, real estate and chattel mortgages, to appellant Mary J. Aldridge; that she stated that she did not know anything about the grocery business, and did not know how the matter would come out; that the appellants then signed the notes and mortgage in suit, the notes and chattel mortgage mentioned above, and acknowledged the execution of said mortgages before Mr. Conder as a notary public; that said notes and mortgages were thereupon delivered to appellee, who signed the bill of sale, and delivered the same to appellant Bert E. Aldridge; that said mortgages were duly recorded, and the notes secured by said chattel mortgage were paid, and said chattel mortgage duly released; that appellant Bert E. Aldridge operated said store and market for seven or eight months after April 7, 1915, during which time the money derived therefrom was deposited in his name, and used exclusively in paying the notes secured by said chattel mortgage thereon, and in paying bills incurred in operating said business, and no part thereof was used in paying the individual obligations of either of appellants; that on April 1, 1915, appellant Mary J. Aldridge was employed by the Indianapolis Corrugating Company at a salary of \$18 per week, and prior to said date she had held a commission as notary public, and had acted as such in taking acknowledgments to various instruments; that during the time in which appellants operated said store and market they lived together as husband and wife, kept house as such, each contributing to the living expenses of said household, and during said time groceries, meats, and provisions were taken from said store and market and consumed by appellants in their home; that about seven or eight months after April 1, 1915, appellant Bert E. Aldridge exchanged said store and market for certain real estate, the title to which was taken in the names of both appellants; that the consideration for the notes and mortgage in suit was a part of the purchase price of said store and market; that said notes are wholly unpaid; that ap-

pellee has been compelled to employ attorneys to collect said notes and foreclose said mortgage, and that a reasonable fee therefor is \$100; that appellants are indebted to appellee on the notes sued on in the sum of \$959.15, including interest and attorney's fees, and that the same is secured by the mortgage in suit, which is a lien on the real estate therein described.

On the facts specially found the court stated conclusions of law, which are in effect as follows: (1) The law of the case is with appellee. (2) The appellant Mary J. Aldridge executed the promissory notes and mortgage in suit, as principal and not as surety. (3) Appellee is entitled to recover of appellants the sum of \$959.15, without relief from valuation or appraisal laws, together with the costs of this action. (4) Appellee is entitled to foreclose the mortgage in suit, and to a sale of the real estate described therein to pay and satisfy his judgment herein. (5) Appellants are not entitled to recover on their cross-complaint. Appellants jointly and separately and severally, excepted to each of said conclusions of law. They afterwards filed a joint motion for a new trial, and also a separate and several motion for the same purpose. These motions are, in substance, the same, and were each overruled. Appellants then filed their joint and several motion for a venire de novo, which was overruled. They now prosecute this appeal, and have assigned errors which require a consideration of the questions hereinafter determined.

[1] It is contended that the court erred in overruling the demurrer of appellant Mary J. Aldridge to the second paragraph of appellee's reply, addressed to the second and fourth paragraphs of said appellant's separate answer. This contention is based on a claim that said paragraph of reply fails to allege that the consideration mentioned therein was received by her, or was intended to be used by her, for her benefit, or for her separate or joint estate. It has been held that the defense arising from coverture is a personal defense, and that when pleaded to an action on contract against a married woman the plaintiff must reply facts which show that the contract sued on is one on which she is bound. *Arnold v. Engleman* (1885) 103 Ind. 512, 3 N. E. 238; *Dickey v. Kalfsbeck* (1898) 20 Ind. App. 290, 50 N. E. 590. It has also been held that where a married woman acquires a beneficial ownership in land purchased she receives a consideration for her contract, and is a principal therein, and not a surety; that where land is conveyed to a wife and her husband jointly the contract cannot be split into fragments to the prejudice of the vendor, but as to him all the purchasers are principals, and the promise to pay indivisible. *Kedy v. Kramer* (1891) 129 Ind. 478, 28 N. E. 1121. No reason occurs to us why this principle should not be applied

to contracts involving the purchase of personal property by a husband and wife.

[2] An examination of the paragraph of reply under consideration discloses that it is alleged therein, in substance, that the stock of merchandise in question was purchased by appellants jointly; that they executed the notes and mortgage in suit to evidence and secure the balance due on the purchase price thereof; that said stock of merchandise was sold and delivered by appellee to appellants jointly, and not to appellant Bert E. Aldridge individually; and that said notes and mortgage were executed by appellants in connection with, and as part of, the consideration for their joint business. True, the pleader in one or two instances uses the inapt expression "tenants by the entirety" in describing the title which appellants acquired in said personal property by the purchase thereof. *Abshire v. State* (1876) 53 Ind. 64. However, we believe that, notwithstanding such fact, the fair import of said paragraph of reply is as stated above. We therefore conclude that it alleges facts which show that appellee Mary J. Aldridge acquired a beneficial interest in said stock of merchandise by purchase. Under these circumstances she would be a principal, and not a surety, on the notes given for the purchase price thereof, in accordance with the rule stated above. We conclude that the court did not err in overruling the demurrer in question.

[3] It is further contended that the court erred in overruling the joint demurrer of appellants to appellee's third paragraph of reply, to their joint answer to the complaint. It will be observed that said third paragraph of reply alleges facts by which appellee seeks to estop appellants from asserting that appellant Mary J. Aldridge is surety on the notes in suit, and from denying the validity of the mortgage given to secure the same. Inasmuch as the court determined that said appellant was in fact a principal on said notes, any error in ruling on appellants' demurrer to said third paragraph of reply would be harmless. For the same reason any error in overruling the separate demurrer of appellant Mary J. Aldridge to appellee's third paragraph of reply, to her second and fourth paragraphs of answer to the complaint, would be harmless.

[4] Appellants contend that the court erred in each conclusion of law stated on the special finding of facts. In support of this contention they state a number of abstract propositions of law without making any specific application of the same to the instant case. This is not a compliance with the rules governing the preparation of briefs. However, we gather from the general tenor of the propositions stated that appellants base their contention in this regard on a claim that the special finding of facts fails to show that appellant Mary J. Aldridge received all or a part of the consideration of the notes in suit,

either in person or to the betterment of her joint or separate estate.

[5] The recognized rule in this state is that where the obligation sued upon is that of husband and wife, and is secured by a mortgage on the real estate held by them as tenants by entirety, there is no presumption that the wife is surety on such obligation, or that the consideration obtained was not used for the benefit of her joint estate, and the burden is upon her to allege and prove that she executed such obligation as surety and not as principal. *The Security Co. v. Arbuckle* (1888) 119 Ind. 69, 21 N. E. 469; *Jenne v. Burt* (1889) 121 Ind. 275, 22 N. E. 256; *Miller v. Shields* (1890) 124 Ind. 166, 24 N. E. 670, 8 L. R. A. 406; *Cook v. Buhrlage* (1902) 159 Ind. 162, 64 N. E. 603.

[6] In the instant case the special finding of facts shows that the notes in suit were the joint obligations of appellants, and that the title to the real estate in question was held by them as tenants by entirety at the time they executed the mortgage in suit to secure the same. These facts, standing alone, under the rule stated above, would create a presumption that she is a principal on said notes, and not a surety. The other facts found tend to support this presumption rather than to rebut it, and hence the presumption stands.

Appellants predicate error on the action of the court in overruling their motion for a new trial. Among the reasons assigned therefor are, that the decision of the court is not sustained by sufficient evidence, and is contrary to law. This requires us to consider whether the special finding of facts is sustained by sufficient evidence, and whether it is contrary to law. *Wolverton v. Wolverton* (1904) 163 Ind. 26, 71 N. E. 123. In support of this contention appellants urge with much vigor, among other things, that the evidence shows that the sale of the store and market was made to appellant Bert E. Aldridge, and fully consummated by delivery, prior to the time at which the parties met in the office of Pickens, Cox & Conder, where appellant Mary J. Aldridge executed the notes and mortgages given to evidence and secure the balance of the purchase price of said store and market; that by reason of such fact she could not have purchased an interest therein of appellee at such time, and therefore must have executed the notes and mortgage in suit as surety. In support of this contention they cite the facts that the inventory had been made, the purchase price had been determined, the keys to the store room had been turned over to appellant Bert E. Aldridge, and he had been operating the business prior to such meeting. While these facts were proper for the court to consider in reaching its decision, they were not conclusive against appellee.

[7] In this connection we note that it has been held that in an executory contract of

sale, the goods remain the property of the seller until the contract has been executed, and whether, in a particular case, there is an actual sale, or only an executory contract of sale, depends upon the intention of the parties. *Warner v. Warner* (1908) 30 Ind. App. 578, 66 N. E. 760.

[8] It will be observed that the evidence tends to prove, as the court found, that when it was agreed to take an inventory of the stock on Sunday, and when appellee delivered the keys to appellant Bert E. Aldridge, after taking such inventory, it was agreed that the deal would be closed as soon as appellants received the deeds to the Muncie lots; that when said deeds had come appellant Bert E. Aldridge called appellee by phone, and informed him of that fact, and it was then agreed that appellants should meet appellee at noon on that day to close up the transaction. These facts, when considered in connection with other facts proven and the surrounding circumstances, are sufficient to warrant an inference that the contract of sale remained executory until the execution of the bill of sale, notes, and mortgages at the office of Pickens, Cox & Conder on April 7, 1915. Moreover, the court may have drawn the inference from the facts and circumstances in evidence that in negotiating for the purchase of the store and market, appellant Bert E. Aldridge was not only acting for himself, but also as agent for his wife, in which event it would be immaterial whether the contract of sale had been executed, or was executory, at the time the notes and mortgages were executed.

[9] In determining whether the finding of facts is sustained by sufficient evidence we must not only consider the direct evidence most favorable to appellee, but must also consider all reasonable inferences that the trial court was warranted in drawing therefrom. *Moerscke v. Bryan* (1915) 183 Ind. 591, 108 N. E. 948. And this is true although other and contrary inferences may be reasonably drawn from such evidence. *Toledo, etc., R. Co. v. Milner* (1916) 62 Ind. App. 208, 110 N. E. 756; *National Life Ins. Co. v. Headrick* (1916) 63 Ind. App. 54, 112 N. E. 559. Guided by these rules, we are unable to say that the decision of the court is not sustained by sufficient evidence. No sufficient reason has been presented for holding that the decision of the court is contrary to law.

[10] Appellants, in support of their motions for a new trial, finally contend that the court erred in the admission and rejection of certain evidence. However, a careful examination of their original brief, and the subsequent amendment thereto, fails to disclose that any exceptions were saved to the rulings of the court with reference to such evidence. Under these circumstances no question in that regard is presented for our de-

termination. This is in accord with the settled rule governing the preparation of briefs on appeal, as disclosed by many decisions. *American, etc., Co. v. Indianapolis, etc., Co.* (1912) 178 Ind. 133, 98 N. E. 709; *Cleveland, etc., R. Co. v. Beard* (1912) 52 Ind. App. 105, 100 N. E. 392; *Smith v. Cleveland, etc., R. Co.*, 117 N. E. 534; *Decker v. Mahoney*, 116 N. E. 57; *Chastain v. Frost*, 119 N. E. 1007. Other alleged errors are either expressly or impliedly waived. We conclude that the court did not err in overruling appellants' motions for a new trial.

[11] Appellants also contend that the court erred in overruling their joint and several motion for a venire de novo. As there was a special finding of facts in this case and conclusions of law thereon, and the facts found are sufficient to sustain the conclusions of law in favor of appellee, the motion for a venire de novo was properly overruled. *Brehm v. Hemmings* (1919) 123 N. E. 821. All other errors properly assigned have been waived by a failure of appellants to make any specific reference thereto in their propositions or points. *Buffkin v. State* (1914) 182 Ind. 204, 106 N. E. 362. Appellants have failed to point out any reversible error in the record, and the judgment is therefore affirmed.

(71 Ind. App. 81)

**FIRST NAT. BANK OF SOUTH BEND v.
MAYR et al. (No. 9913.)***

(Appellate Court of Indiana, Division No. 1.
June 27, 1919.)

**1. PRINCIPAL AND SURETY — 116 — RELEASE —
COMMON-LAW RULE.**

At common law the rule is that a release of one surety releases all, but that the instrument relied upon to have this effect must have been under seal.

**2. COURTS — 91(1) — INTERMEDIATE COURT —
FOLLOWING DECISION OF SUPREME COURT.**

Decision of Supreme Court with reference to parol or simple release of surety is binding upon the Appellate Court until overruled.

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Action by the First National Bank of South Bend against Frank Mayr, Jr., and others. Judgment for defendants, and plaintiff appeals. Transferred to Supreme Court.

Arthur L. Hubbard and Samuel B. Pettengill, both of South Bend, for appellant.
Graham & Crane and Cyrus E. Pattee, all of South Bend, for appellees.

ENLOE, J. This was an action begun by appellant against the appellees, Frank Mayr, Jr., John D. Beifner, Cyrus E. Pattee, E. E.

Ash, and Frank L. Krug, based upon a certain "letter of credit" agreement, executed February 24, 1914, signed by the appellees, and also signed by G. W. Blair, R. G. Page, F. G. Eberhart, J. Winter, George H. Mayr, and C. C. Tiedeman.

The said agreement was as follows:

"Memorandum of agreement between the First National Bank of South Bend, Indiana, of the first part, and the other persons who shall sign this agreement.

"The Modern Specialties Manufacturing Company of South Bend, Indiana, desires to borrow not to exceed fifteen thousand dollars (\$15,000.00) of the First National Bank of South Bend, Indiana, and to execute its note or notes therefor at such times and rates as may be agreed upon. Now, in consideration of any such loan or loans, the undersigned agree with said bank and each other to pay all such loans as shall be evidenced by the promissory note or notes of the Modern Specialties Manufacturing Company executed by its president or treasurer, and the undersigned as sureties for said Modern Specialties Manufacturing Company do hereby jointly and severally agree to and with said First National Bank to pay all such notes for loans when the same shall become due according to the terms thereof, without relief from valuation or appraisal laws and with all attorney's fees incurred in the enforcement of this contract, and waive presentment for payment, protest and notice of protest and nonpayment of such notes, and that the receipt of interest in advance shall not discharge any of such sureties.

"This shall be a continuing agreement to secure to said bank the repayment of not to exceed the total loan of \$15,000 whenever and in whatever sums made, and all renewals thereof until fully paid.

"Witness our hands this 24th day of February, 1914.

"C. E. Pattee.	E. E. Ash.
"G. W. Blair.	Frank L. Krug.
"J. D. Beitner.	J. Winter.
"Frank Mayr, Jr.	F. G. Eberhart.
"George H. Mayr.	R. G. Page."
"O. C. Tiedeman.	

The questions involved in this appeal relate to the action of the court in sustaining separate and several demurrers of appellees to the fourth paragraph of appellant's complaint; the first, second, and third paragraphs of complaint having been dismissed before judgment.

This paragraph of complaint, omitting formal parts, was as follows:

"Plaintiff for a fourth and further paragraph of complaint alleges and says:

"That plaintiff is a corporation chartered and organized under the laws of the United States of America, and is engaged in the business of a national bank in the city of South Bend, Ind.

"That defendant Modern Specialties Manufacturing Company is a corporation organized under the laws of the state of Indiana.

"That heretofore on the 24th day of February, 1914, plaintiff entered into a written contract with defendants, Frank Mayr, Jr., John D. Beitner, Cyrus E. Pattee, E. E. Ash, Frank

L. Krug, together with F. G. Eberhart, George W. Blair, R. G. Page, and others, whereby in consideration of loans to be made by plaintiff to defendant company, not exceeding in the aggregate \$15,000, said individual defendants promised and agreed, jointly and severally, to pay plaintiff said loans when the same should become due, a copy of which contract is filed herewith, marked Exhibit A, and made a part of this complaint. That on said day and ever since, each of said individual defendants was and is a stockholder, but were not the only stockholders in defendant Modern Specialties Manufacturing Company.

"That thereafter, and at various times, in pursuance with and in consideration of the covenants and agreements in said contract contained, plaintiff loaned defendant company divers sums of money, not, however, exceeding \$15,000.00, in evidence of which said loans defendant company executed, by and through its president or treasurer, its certain promissory notes and renewals thereof, payable to plaintiff.

"That on May 20, 1916, there was due and owing to plaintiff from the defendant company, as evidenced by its said promissory notes, the sum of \$12,480.77. That on said day E. G. Eberhart, for and in behalf of himself and R. G. Page and George W. Blair, paid plaintiff the sum of \$10,154.41 to apply on, and which plaintiff did apply and receipt on the indebtedness of \$12,480.77 then due plaintiff from defendant company. That in consideration of said payment plaintiff executed and delivered to said E. G. Eberhart a certain written instrument in writing, a copy of which is filed herewith, marked Exhibit E, and made part of this complaint.

"That since May 20, 1916, plaintiff has not loaned defendant company any further sums of money.

"That on May 20, 1916, defendant company was, and now is, insolvent.

"That on May 20, 1916, each of said individual defendants was and now is a resident of the state of Indiana.

"That on said day each of said individual defendants was, and now is, solvent, and has assets in this state subject to execution under the laws of this state, over and above his liabilities, in a sum sufficient to pay the balance of — on said day remaining due and owing by defendant company to plaintiff, together with attorney's fees and interest to date.

"That there is now due and owing plaintiff by defendant company the sum of \$2,269.02, together with interest and attorney's fees, as evidenced by the promissory notes of the defendant company and indorsements thereon, copies of which said notes and indorsements are filed herewith, marked Exhibits B, C and D, and made a part of this complaint.

"That on the — day of —, 1916, plaintiff demanded of each of said defendants the payment of said notes and of the full amount thereon due, and that each of said defendants failed and refused to pay the same.

"That a reasonable fee for plaintiff's attorneys herein of \$250.

"Wherefore plaintiff sues, etc."

To this complaint the above agreement sued on was attached as Exhibit A. Copies of said notes mentioned in said complaint were also

attached as exhibits to said complaint, and marked Exhibits B, C, and D.

Exhibit E to said complaint was as follows:

"Re: Modern Specialties Mfg. Co.

"South Bend, Ind., May 17, 1916.

"Mr. F. G. Eberhart, Mishawaka, Ind.—Dear Sir: For and in consideration of the sum of \$10,000.00, ten thousand dollars, paid to us, and of the acquiescence therein of those of your creditors for whose benefit substantially all your remaining assets are being transferred to the Continental and Commercial Trust & Savings Bank, as trustees—

"We hereby consent to such transfer and agree that neither we nor any assignee of any of our claims against you, will take any action which will have the effect of setting aside or invalidating the transfer to said trustee.

"In consideration of the above payment we also release and discharge you, R. G. Page and G. W. Blair, from any and all liabilities in connection with the indebtedness of the Modern Specialties Mfg. Co.

"Very truly yours,

"First National Bank of South Bend,

"By Chas. L. Zigler, Cashier.

"South Bend National Bank,

"By Myron Campbell, Cashier."

To this paragraph of complaint the appellees separately and severally demurred, and separately and severally filed with said demurrer memorandum, as required by statute, the substance of which said memorandum is as follows:

"Each defendant says that the said written instrument set forth in said paragraph of complaint as Exhibit E is a release and discharge, and, by the terms of said written instrument as set forth as Exhibit E, said plaintiff released and discharged the said F. G. Eberhart and R. G. Page and George W. Blair, and each of them, from any and all liability in connection with the said indebtedness of the Modern Specialties Manufacturing Company and released and discharged the said F. G. Eberhart and R. G. Page and George W. Blair, and each of them, from any and all liability on the said contract of suretyship as sued upon in said fourth paragraph of complaint and set forth as Exhibit A.

"Each defendant further says that, by the terms of said suretyship contract set forth in said paragraph as Exhibit A, the said F. G. Eberhart and R. G. Page and George W. Blair, and each of them, were cosureties of each of these defendants and equally bound with each of these defendants to pay to plaintiff the said principal obligation of the Modern Specialties Manufacturing Company.

"That the execution and delivery of said written instrument, set forth in said paragraph of complaint as Exhibit E, to the said Eberhart, and the said release and discharge of said F. G. Eberhart, R. G. Page and George W. Blair, from any and all liability in connection with the indebtedness of the defendant Modern Specialties Manufacturing Company, and from any and all liability on said contract of suretyship, released and discharged each of these defendants from any and all liability on said contract

of suretyship as sued upon in said paragraph of plaintiff's complaint.

"That by reason of the premises each of these defendants is not now liable to plaintiff by reason of said contract of suretyship as sued upon in said paragraph of complaint as Exhibit A."

The demurrer being sustained, appellant refused to plead further, and judgment was rendered against it—that it take nothing by its complaint, and that appellees recover their costs. From this judgment, this appeal is prosecuted.

The only error assigned is the action of the court in sustaining said demurrers of appellees to said paragraph of complaint.

The question, and the only question, presented for our consideration on this record is as to Exhibit E; what is its legal force and effect—a "release," or a covenant "not to sue"?

[1] It was and is the rule at common law that a "release" of one surety released all the sureties, but the instrument relied upon to have this effect must have been of the kind spoken of in the books as a "technical release"—an instrument under seal. *Dean v. Newhall*, 8 T. R. 168; *Walker v. McCulloch*, 4 Greenl. (Me.) 421; *McAllester et al. v. Sprague et al.*, 84 Me. 296; *Rowley v. Stoddard et al.*, 7 Johns. (N. Y.) 207; *Shaw v. Pratt*, 22 Pick. (Mass.) 305; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 18 Am. Dec. 514; *Tharpe v. Tharpe*, 1 Ld. Raymond, 235.

This because the seal affixed to the release furnishes a conclusive presumption that the releasor has been fully satisfied, and the inevitable conclusion drawn from that proposition is that the releasor, having received full satisfaction, could have no further right of action against anybody. *L. R. A.* 1915E, p. 307, note. And if the instrument relied upon as such release was not under seal, then it was construed as a "covenant not to sue," which was personal to the parties thereto, and, to avoid circuity of action, operated as a release of the party to whom given, but did not operate as a release of a cosurety or cosureties. *Parmelee v. Lawrence*, 44 Ill. 405, and authorities supra.

The rights of the parties in cases such as the instant one has been well stated by the Supreme Court of Arkansas in the case of *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606, where the court said:

"As to Moore, all were principals from the beginning, inasmuch as he had the right to collect the debt of all or either. He was only required to take cognizance of their relation to the extent of avoiding any act which would prejudice the rights of the sureties to obtain exoneration from the principal, or contribution among themselves. * * * Sureties inter sese are joint obligors; all secondarily liable together. Their mutual rights and obligations were first determined in the courts of chancery, and enforceable there alone. It is still the more ap-

propriate forum, from its more flexible means of adjustment; but courts of law have long assumed a concurrent cognizance of these rights and will enforce them as defenses. * * * The right of a surety, compelled to pay a debt, as against his cosurety, is not exoneration of the burden. It is his as much as his fellow's. It is the right of contribution, the right to recover from his cosurety just so much as will make both equal in the loss. It is obvious that by the discharge of one surety the others are injured (or would be) just to the extent of their right to contribution. * * * This mode of adjustment injures no one. Its plain, common sense equity commends itself to every man's sense of right, and is harmonious with the well-settled rule that the release of the principal discharges the surety altogether, because it takes away the right to exoneration. When the relief goes beyond the injury, it becomes technical and arbitrary."

The doctrine that, where one or more of several cosureties have paid his or their full proportion of the debt in question and were given a simple release from all further liability to pay said debt, such instrument shall be construed only as a covenant not to sue, and does not release the cosureties, is recognized and declared to be the law in many jurisdictions. See Cyc. vol. 34, p. 1084, for authorities.

In *Parmelee v. Lawrence*, 44 Ill. 405, the instrument was as follows:

"Received, Boston, August 10th, 1884, twenty-two thousand five hundred and fifty-seven dollars of Liberty Biglow, in full payment of his portion of all money due me on articles of agreement between myself, him (said B.), F. Parmelee, D. A. Gage and W. S. Johnson, dated September 15, 1856, and recorded in the recorder's office of Cook county, Illinois, October 17th, same year, in Book 171, of Deeds, page 71; And I release and discharge said Biglow, his property and estate, from all claims on account of same.

"If the property mentioned in the above articles has to be sold under any order of the court at Chicago, the interest of said Biglow in it is to be protected according to this settlement. Nothing herein contained shall in any wise affect my rights or demand against said Parmelee, Gage or Johnson, or their interest in said property.

"[U. S. Revenue Stamp.]

"Daniel Lawrence. [Seal.]"

The court in declaring the legal effect of the foregoing instrument said:

"The weight of the modern authorities is * * * in favor of the more reasonable rule that when the release of one of several obligors shows upon its face, and in connection with the surrounding circumstances, that it was the intention of the parties not to release the co-obligors, such intention, as in the case of the written contracts, shall be carried out, and to that end the instrument shall be construed as a covenant not to sue."

This case is followed and approved in subsequent decisions of that court, and has also

been cited as authority by the Supreme Courts of both Maine and New Hampshire.

In the case of *Dean v. Newhall*, 8 T. R. 168, the instrument sued on was a joint and several bond by one Taylor and Newhall to pay plaintiff Dean £200 on a day certain.

Taylor became insolvent and assigned all his effects to F. & B. in trust for themselves and all other creditors who should execute the deed. Plaintiff, one of the creditors, executed the deed and received a dividend under it of £48. In the deed was contained a covenant that—

"They would not sue, arrest, implead or prosecute Taylor, his executors, or administrators, or his or their goods, etc., for or on account of any debt, etc., and in case any of said creditors should sue, etc., these presents should be a sufficient release and discharge to all intents and purposes, both of law and in equity, to and for the said Taylor, his executors, etc., and he and they should be and were thereby acquitted, released, and discharged against them, the said creditors, etc., and as such should and might be pleaded in bar by him, the said Taylor, etc."

The defense was that, as Taylor was released, Newhall was also released.

Lord Kenyon held the above to operate as a covenant not to sue, and that plaintiff was entitled to judgment against Newhall.

In the case of *Rowley v. Stoddard et al.*, 7 Johns. (N. Y.) 207, the Stoddards were indebted to Rowley on a note for \$200. The elder Stoddard paid \$100 and took a receipt from Rowley, "in full of all demands" against him, the elder Stoddard. The receipt having been pleaded, as a release, the court said:

"The settlement made in the case before us is somewhat in the nature of an agreement not to prosecute the elder Stoddard. But a technical release under seal is necessary to be given to one of several debtors, in order that the others may avail themselves of it as a discharge."

In *Shaw v. Pratt*, 22 Pick. (Mass.) 305, it was said that at common law the instrument relied upon as a release of one, to effect the release of all sureties, or joint and several makers, must have been a technical release under seal, citing authorities.

In this case, which was an action upon a promissory note, signed by John, and John B. Pratt, the holder, executed an instrument as follows:

"In consideration * * * I hereby agree and bind myself and my heirs to discharge the note, being a joint and several one, signed by John Pratt and John B. Pratt, and held by me, so far as John B. Pratt is or may be liable to pay the same, except that this agreement shall not operate in any way to discharge or affect the suit already begun by me against John Pratt, and for which a farm on New Ashford has been attached on said note."

In the case of *Couch v. Mills et al.*, 21 Wend. (N. Y.) 424, and which was an action

upon promissory notes made by the defendants, the plea interposed by defendant Mills was as follows, in substance, that the plaintiff by a certain writing under seal, in consideration of \$500 paid to him by Henry Talmage, one of the defendants in said action, covenanted and agreed with said Henry Talmage that neither he, the plaintiff, nor his executors, etc., should at any time or times thereafter, sue the said Henry Talmage, or levy upon his goods or chattels for or by reason or in consequence of the promises and undertakings in this declaration in this case mentioned; and in case any proceeding, either at law or in equity, should be had, continued, or prosecuted, then that the said writing should be deemed to all intents and purposes a release to him, the said Henry Talmage, from and against the same; that the plaintiff continued and prosecuted his suit against said Henry Talmage, contrary to said covenants in said writing contained, whereby the said writing became and was and is an absolute release and discharge to the said Henry Talmage, and the other defendants in this suit.

To this plea, in sustaining the demurrer thereto the court said:

"The language of the instrument, as set forth, is undoubtedly very particular; but it is manifest, from the whole scope of it, that it was not intended to have the operation and effect of a technical release upon the subject-matter of the suit, but only to protect the rights of the covenantee. * * * To construe it into a technical release of all would be carrying the obligation beyond the obvious intent of the parties. If it had been intended to be so understood, more direct and pertinent language would have been used."

In *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514, Thurman and Stackhouse had executed a bond. Upon this bond was the following indorsement:

"I, Nicholas Roosevelt do hereby fully release and discharge the within named obligor, James L. Thurman, from all liability on the within bond, and rely on the mortgage given with the bond, as my security for the payment of the money mentioned in the bond. Dated, January 21st, 1916. Nicholas Roosevelt."

The court in passing upon the matter said:

"The indorsement on the bond by Roosevelt was intended to discharge Thurman from personal liability only, and that the mortgage should remain a lien on the land. It may be questioned whether the writing can have any effect. A release, not by deed, and without consideration, is void. * * * No consideration is stated, and it is not under seal; if it had been, it would be construed as a covenant not to sue Thurman, and operate as a release to avoid a circuitry of action."

The case of *Walker v. McCulloch*, 4 Greenl. (Me.) 421, was an action upon a promissory note, executed by McCulloch, Jonas Clark,

and Henry Clark. The note bore the following indorsement:

"April 2d, 1821. Received of Jonas Clark one-third of the amount of the within note, and interest; and he is hereby discharged from the same."

It was insisted that this was a release, and that thereby all parties to said note were released. In passing upon the question the court said:

"It is not under seal, and therefore is not a technical release. It might have been explained by parole evidence as other receipts are explainable. * * * The receipt in question cannot amount to more than a perpetual covenant for the benefit of Jonas Clark. * * * Nothing short of full payment by one of several joint debtors, or a release under seal, can operate to discharge the other debtors from the contract."

The case of *McAllester et al. v. Sprague et al.*, 34 Me. 296, was an action in assumpsit against joint debtors. The instrument relied upon as a release was as follows:

"Received of Jotham L. Sprague one red horse (described), in full for his half of our account against him and E. L. Murphy. * * * To be his discharge in full for debt and cost, but no discharge for Murphy."

It was contended that this instrument should be given the effect of a formal release, but the court said:

"But the receipt in this case was not a technical release; it was not under seal, and, if it had been, it could not fairly be understood to mean that the whole debt should be discharged by the present release of Sprague. Its language does not imply an intention to cancel the whole debt, although the consideration might be adequate to that purpose, and also to release Sprague, without its being under seal. Such effect might have been given to it, if it had been so intended."

The receipt was declared to be in effect a covenant not to sue Sprague, and that Murphy was not thereby released.

In Indiana, the leading case upon the question now under consideration is *Stockton v. Stockton, Jr., et al.*, 40 Ind. 225, and Alabama seems to be the only state whose decisions are in harmony with those of Indiana.

The *Stockton Case* was a suit upon a note for \$2,400 and due in 12 months. Lawrence B. Stockton was principal; one Moore and Wm. and Martin Stockton were sureties thereon for said Lawrence. Before maturity, Moore paid, by giving an order for the amount, \$500; the holder agreeing, in consideration thereof, to release him from all further liability thereon. Held, the release of Moore released the other sureties, citing *Aylesworth v. Brown*, 31 Ind. 270.

In the *Aylesworth Case*, supra, Barbee, Brown & Co. held a judgment against Frederick Geiger and James Fallis for \$6,115.68.

Geiger paid one-half thereof, and an instrument was executed which the court construed as a covenant by Barbee, Brown & Co. not to pursue Geiger further, in the collection of the judgment. The court, in speaking of the contention of the respective parties, says:

"The general proposition is familiar that the release of one of several joint debtors is a release of all the others, and the appellant contends that that proposition is applicable in this case. This is not technically a release."

The Aylesworth Case we next find cited in the case of *Paul v. Logansport Nat. Bank*, 60 Ind. 199.

In this last case one Orton had executed his promissory note for the sum of \$2,000, with Paul and Reynolds as sureties thereon, payable to one Murdock, 90 days after date. Eight days after this note became due, said Reynolds made an assignment of all his property for the benefit of creditors. The deed of assignment stipulated that the trustee complete the execution of the trust within three years. Afterwards Paul, the other surety, died, and the said note was filed by the bank, as a claim against his estate. The appellant administrator urged two propositions for a reversal of the case, viz.:

"(1) That the assent [of the holder of the note] to the assignment of Reynolds operated as a covenant not to sue him for three years, and the rights of the cosurety, Paul, were injuriously affected thereby; and,

"(2) That said assent operated as a release of said Reynolds, one of the makers of a joint note, and that that release was, in law, a release of all the makers of said note."

In passing upon the question, the court said:

"If the act of the bank, in assenting to the assignment, operated as an agreement not to sue for three years, as to which we express no opinion, that agreement was no bar to a suit within that * * * time." Citing authorities. "As to the second point, it is true that a release of one of the makers of a joint obligation may release all." Citing 1 *Parsons, Contracts*, 27, and the *Stockton Case*, supra. "But this principle has no application to the case before us."

The Aylesworth Case is next cited in the case of *Walls et al. v. Baird*, 91 Ind. 429. In this last case there was a note for \$1,868.50 executed by Lane and Walls, partners, to Baird. They dissolved their partnership business, and later Baird, in consideration of \$381.38 paid to him by said Lane and the surrender of a certain other note, released Lane "of any further obligation of security to said note." Afterward Baird sued Walls for the balance due on said note and to foreclose the mortgage executed by Walls and wife to secure the payment thereof, in which mortgage they had expressly

agreed to pay said note, and the court said, citing the Aylesworth Case:

"The law is well settled that the unconditional release of one or more joint obligors releases all the joint obligors, * * * but we do not see that these questions are well presented."

The case of *Tyner v. Hamilton et al.*, 51 Ind. 259, is another case in which the doctrine as to the release of one surety releasing the other sureties is announced. In this case it appears that one Margaret Hamilton had been the guardian of one John W. Hamilton; that, as such guardian, she sold lands belonging to her ward and received a promissory note in payment therefor; that she afterwards purchased lands in her own name, and used the note so received in payment for lands of her ward, so sold by her, in part payment for lands so purchased by her; that after the said ward became of full age, for a valuable consideration he did "ratify and confirm the said act of my said guardian in so investing said money, and release any and all right of action I may have against said Parkinson or Pace, or either of them, on account of said act of my said guardian, as sureties on my said guardian's bond, or otherwise. But nothing herein contained is to be construed as a release of John J. Phillips on said bond." The suit was brought against Margaret Hamilton, the former guardian, and against one Tyner to recover the value of the note belonging to said ward, and used by her in part payment of the lands so purchased by her; she having turned said note over to one Phillips, and he to said Tyner. Tyner was not a surety on said guardian's bond. There was a judgment against Tyner, and he appealed. The question presented to the court was the legal effect of the ratification by said ward of the use of said note so made by his said guardian. The court held that the said ratification by said ward, after he became of full age, with full knowledge of all the facts, was a bar to the action. This was the only question in issue. On petition for a rehearing the court said:

"A release of one or more of the joint obligors on a bond is a release of all."

Clearly this was pure dicta.

The *Stockton Case* is also cited in the case of *Erwin v. Scotten*, 40 Ind. 389. This last was an action by Scotten as administrator, upon a joint promissory note, signed by William P. Erwin, William Comer, and Edwin Erwin. Process had been served upon William P. Erwin and William Comer, but not on Edwin Erwin. Judgment was rendered against the two defendants served, and afterwards the plaintiff filed his petition asking that said Edwin Erwin be served with process, etc., and that he be made a party to said judgment theretofore obtained. The action was brought, and was then

pending in the Wayne county court of common pleas, and the defendant, after being served with process entered his special appearance and filed answer in which he alleged that he was and had been, etc., a resident of Huntington county; that the note was a joint note, and plaintiff had already taken a joint judgment against the other two makers thereof, etc.; and that the court was without jurisdiction over him. A demurrer to this answer was sustained, and this was the only question presented by the record on appeal. In the opinion of the court (40 Ind. 399), in discussing the effect of a statutory provision, the court said:

"We have, in the case of *Stockton v. Stockton*, ante p. 225, applied the principles of the common law to a joint obligation by holding that the release of one joint obligor was a release of all the other joint obligors."

An examination of the authorities reveals the fact that at common law the only release, given by the creditor to one or more sureties, upon a written obligation to pay money, as such which had the effect of discharging all the sureties thereon, was a "formal" release, a "technical" release, to wit, an instrument under seal and it was given that effect for the reason hereinbefore stated. The confusion seems to have arisen from a loose use of the word "release"—not confining it to its original meaning of having reference to sealed instruments only.

It has been argued by counsel that the release of one surety by an instrument such as the one involved in this case, discharges the other sureties, because such a release changes their contract. With this statement we cannot agree. So far as the sureties are concerned, they have first a contract with the holder of the instrument by which they and each of them agree to pay such holder the entire amount of said contract indebtedness; it remaining unpaid. As between them and each of them, and their principal debtor, the law implies on his part a promise to exonerate them and each of them for, and to the amount of, any money that they or either of them may be called upon to pay to such holder, in discharge of such obligation, while, as between such sureties, the law implies on the part of each of them a promise to contribute his proportional part of such indebtedness based upon the number of solvent sureties as any of his cosureties is called upon to pay. But this promise the law only implies, or raises, as against him, after there has been a payment by his cosurety or cosureties of more than their full proportionate part or parts of such indebtedness, determined as aforesaid. The first above-mentioned contract is express. The other two agreements are implied in law. If one of such sureties pays to the holder of such instrument his full propor-

tionate part thereof, clearly his cosurety, or cosureties, cannot call upon him for contribution, upon their paying the balance, for he has already fully discharged his obligation, and under the circumstances the law will not imply a promise on his part to contribute to his cosureties, and, if there is no such promise we fail to see wherein the alleged contract has been changed, and if such contract has not been changed as to such surety, we see no legal or valid reason for holding the cosurety in such case discharged.

Blackstone, book 1, p. 70, says:

"And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; they tell us that the law is the perfection of reason, and that it always intends to conform thereto, and that what is not reason is not law."

[2] We are of the opinion that the demurrer in this case should have been overruled; that the complaint herein states a cause of action; but as the ruling of the court herein seems to be in harmony with *Stockton v. Stockton*, supra, and that case being now binding upon us, we are without power to reverse this case. We therefore transfer it to the Supreme Court for their consideration, and respectfully recommend that the said *Stockton Case* be overruled, so far as it may be held to be applicable to parol or simple releases.

(73 Ind. App. 69)

LOUISVILLE & SOUTHERN INDIANA
TRACTION CO. et al. v. JENNINGS.*
(No. 9890.)

(Appellate Court of Indiana, Division No. 2.
June 25, 1919.)

1. MUNICIPAL CORPORATIONS §724—GOVERNMENTAL POWERS—LIABILITY FOR EXERCISE OR FAILURE TO EXERCISE.

A municipal corporation is a government possessing, to a limited extent, sovereign powers, which may be denominated governmental or public; and, such powers being public and sovereign in their nature, such municipal corporation is not liable for a failure to exercise them or for errors committed in their exercise.

2. MUNICIPAL CORPORATIONS §739(2)—LIABILITY FOR PERSONAL INJURIES—ACTS IN GOVERNMENTAL CAPACITY—EXTINGUISHMENT OF FIRES.

In the extinguishment of fires and in making arrangements therefor, the municipality acts in its governmental capacity and is not liable for damages caused by the negligence of its fire department.

3. DAMAGES §226—APPORTIONMENT—CONCURRENT NEGLIGENCE OF SERVANT—DEFENDANTS.

Where a passenger of a street car was injured in a collision between the street car and

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Transfer denied.

municipal fire apparatus through the alleged negligence of both, the jury could not apportion the amount of damages; and, the city not being liable because acting governmentally, the company alone was liable for any damage.

4. NEGLIGENCE — 1—DEFINITION.

"Negligence" which renders one liable to another who is injured thereby is the doing of some act or thing which it is his duty to refrain from doing, or in failing to do some act or thing which it is his duty to do.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

Appeal from Circuit Court, Clark County; James W. Fortune, Judge.

Action by Fred Jennings against the Louisville & Southern Indiana Traction Company and the City of New Albany. Judgment for plaintiff, and defendants appeal. Reversed, with instructions.

Charles L. Jewett, Walter V. Bullett, and Henry C. Jewett, all of New Albany, George H. Voigt, of Jeffersonville, and George H. Hester, of New Albany, for appellants.

Evan B. Stotsenburg and John H. Weathers, both of New Albany, for appellee.

NICHOLS, P. J. This was an action commenced in the Floyd circuit court and on change of venue tried in the Clark circuit court.

It is averred in the amended complaint in substance that:

The appellant Louisville & Southern Indiana Traction Company (hereinafter mentioned as company) owned and operated a line of street railway over Vincennes street in the city of New Albany (hereinafter mentioned as the city). Said city operated a fire department for the extinguishment of fires, using therefor a number of hose reels for the carriage of hose to and from the fire; the same being propelled by horses driven by men employed by the city. One of said reels was known as No. 5, and was located in a fire engine house on Culbertson avenue, which runs east and west and intersects said Vincennes street at right angles; said engine house being about 1,000 feet east of said Vincennes street.

On May 8, 1914, appellee took passage upon one of the cars of said company, paying the customary fare, and was accepted as a passenger to be carried along said Vincennes street over said Culbertson avenue. Shortly before said car reached said avenue, there was an alarm of fire in said city, to which alarm said hose reel No. 5, in charge of a servant of the city, responded. In so responding the horses attached to said reel were driven at a high and dangerous rate of speed westward on said avenue to the intersection of said Vincennes street. At said

time said street car on which appellee was riding was traveling northward on said Vincennes street and approaching the intersection of said Culbertson avenue. The said city's servant as he approached said Vincennes street was unable to see approaching vehicles or car on said Vincennes street on account of buildings and other obstructions. Notwithstanding said fact, said servant negligently and carelessly failed to check the speed of his horses and failed to give any notice or sound any warning of the approach of said reel to said Vincennes street, and negligently and carelessly drove the same toward and onto said intersection at a high and dangerous rate of speed of 15 miles an hour, and he was thereby unable to stop the same in order to avoid a collision with any car that might be approaching said intersection. When said car and reel reached said intersection, through the carelessness and negligence of the agents and servants of said company, and through the carelessness and negligence of the servants of said city, they were caused to collide with each other, thereby throwing the appellee against the sides and seats of the car, causing him to be struck in the back and head and bruising and injuring his body, spine, head, and limbs, and causing him to suffer great bodily pain and mental anguish, to lose much time from his avocation (vocation), to incur large expenses for medical and surgical attention, to have his power to make money permanently diminished, and to be permanently injured and crippled to his damage in the sum of \$5,000. That said collision and resultant injuries were caused by the negligence of the servants and agents of the company in charge of the said car, and by the negligence of the servants of said city, in charge of said reel and horses propelling the same. There was a demand for damages in the sum of \$5,000.

The appellant city filed its separate demurrer to appellee's amended complaint, with memorandum, alleging that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, to which ruling said appellant excepted.

Said city filed its answer and thereafter its amended answer in two paragraphs; the first being a general denial, and the second severing its defense, averring that the wrongs and injuries complained of in appellee's amended complaint, if committed at all, were committed by said city in the exercise and discharge of the governmental duty incumbent upon it as a city of the state, and for which wrongs and injuries said city is not liable, for the reason that said city is a municipal corporation organized and existing under the laws of the state and as a city of the third class, and as such is required to and for many years has maintained a paid

fire department for the extinguishment of fires occurring within the corporate limits.

On the day of the alleged injuries, the alarm of fire was sounded, and the city's hose reel No. 5, was being driven in response to said alarm of fire to a point within the corporate limits of the city where said fire then was, and while being so driven, the wrongs and injuries complained of were inflicted without any fault or negligence on the part of the city.

Appellee filed his demurrer to the said second paragraph of answer for want of facts to constitute a defense, which demurrer was sustained, to which ruling the said appellant city excepted.

The appellant company, severing its defense, after demurrer to the complaint which was overruled, filed its answer in general denial.

The cause was submitted to the jury for trial, which returned the following verdict:

"We, the jury, find for the plaintiff and assess his damages at \$1,500.00. \$1,000.00 against city of New Albany, \$500.00 against Louisville & Southern Indiana Traction Company. James D. Applegate, Foreman."

Appellant company filed its motion for a venire facias de novo, assigning as grounds therefor:

- (1) The verdict does not assess the damages against appellant as required by law.
- (2) Such verdict assesses damages against appellant company separately at \$500 and against appellant city at \$1,000.
- (3) Such verdict did not assess appellee's damages against both of the appellants jointly.
- (4) Such verdict is so defective, uncertain and ambiguous that no judgment can be rendered thereon.

This motion was overruled.

Appellant company filed its motion for a new trial, which was overruled, and thereafter its motion in arrest of judgment, which was overruled, and thereupon the court rendered judgment in favor of the appellee and against the appellants for \$1,500 and costs. The appellant company filed its motion to modify such judgment by striking out \$1,500 as the amount and inserting in lieu thereof \$1,000, which was overruled by the court, and appellants now prosecute this appeal.

The only error assigned by the appellant city that we need to consider is the action of the court in overruling the demurrer to the amended complaint.

The question thus presented is as to whether a city of the state is liable in damages to one injured by the negligence of a member of its city fire department while he is attempting to extinguish a fire.

[1, 2] It is the settled law of this state, as well as elsewhere, that a municipal corporation, such as the appellant city in this case,

is a government, possessing to a limited extent sovereign powers, which are either legislative or judicial, and which may be denominated governmental or public, and, such powers being public and sovereign in their nature, such city is not liable for a failure to exercise them, or for errors committed in their exercise. In the extinguishment of fires and in making arrangements therefor, the municipality acts in its governmental capacity, and is not liable for damages caused by the negligence of its fire department.

This is a substantial statement of the holding in the case of *Aschoff v. City of Evansville*, 34 Ind. App. 31, 32, 72 N. E. 279, which case cites a large number of authorities to the same effect. See, also, *City of Kokomo v. Loy*, 185 Ind. 18, 112 N. E. 995; *Long v. City of Birmingham*, 161 Ala. 427, 49 South. 881, 18 Ann. Cas. 507; *Wild v. City of Paterson*, 47 N. J. Law, 406, 1 Atl. 490; *Shanewerk v. City of Ft. Worth*, 11 Tex. Civ. App. 271, 32 S. W. 918; *Peterson v. City of Wilmington*, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959.

The appellant city's demurrer to the amended complaint should have been sustained. The city has presented and discussed other alleged errors, but with this ruling we do not need to consider them. Reaching this conclusion, we have thereby said to the appellant city that it go hence without the payment of damages.

Appellant company's assignment of errors Nos. 2, 3, 4, and 5 all complain of the action of the trial court in rendering judgment on the verdict.

[3] The question thus presented is as to the liability of the appellant company for damages by the verdict of the jury, and, if so, in what amount. The jury, by its verdict, has said that the appellee has been damaged in the sum of \$1,500. He has suffered an injury for which he is entitled to satisfaction, if a party responsible therefor in law can be found. In the case of *Westfield Gas & Milling Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399, cited by appellants as well as by appellee, it is said that where the separate and independent acts of negligence of two parties are the direct causes of a single injury, and it is not possible to determine in what proportion each contributed thereto, either is responsible for the injury. In this case, the appellant city is not liable for the reason that its negligent act was done while it was exercising a governmental function. It follows that any damages suffered must be paid by the appellant company, for the jury could not apportion the amount that each should pay. These principles are fully discussed in the case last above cited, and we do not need further to discuss them.

Appellant company complains earnestly of the following instruction:

"No. 6. 'Negligence' which renders one liable to another who is injured thereby is the doing

of some act or thing which it is his duty to refrain from doing, or in failing to do some act or thing which it is his duty to do. Or to put it in other words, where a person does something, which a reasonably careful and prudent person would not do under the same or like circumstances, or the failing to do something which a reasonably careful and prudent person would have done under the same or like circumstances, constitutes negligence; and where such negligent act is done or omitted, and by reason of it another suffers injury therefrom, such negligent person is liable to the injured person, he being without fault."

[4] We are unable to see any objection to this instruction. It is a clear definition of "negligence" of general application, and is in harmony with *Faris v. Hoberg*, 134 Ind. 269, 274, 33 N. E. 1028, 39 Am. St. Rep. 261. The authorities cited by appellant, to wit, *Louisville, etc., Traction Co. v. Korbe*, 175 Ind. 450, 93 N. E. 5, 94 N. E. 768, *Caughell v. Indianapolis Traction Co.*, 50 Ind. App. 5, 97 N. E. 1028, *Indiana, etc., Traction Co. v. Bales*, 58 Ind. App. 92, 107 N. E. 682, discuss specific instructions applicable to the cases respectively under consideration, and are not out of harmony with the instruction here challenged. The record discloses that the jury was in some confusion as to its duty, and we conclude that the ends of justice will be best subserved by granting the company a new trial.

The judgment is reversed, with instructions to sustain the appellant city's demurrer to the amended complaint, and to grant the appellant company a new trial.

(70 Ind. App. 618)

CLEVELAND, C. & ST. L. RY. CO. v. PARTLOW. (No. 9813.)

(Appellate Court of Indiana. June 24, 1919.)

1. PLEADING ⇨142—REVIEW—ATTACK ON PLEADINGS.

Where the trial court overruled a demurrer to defendant's so-called set-off, it is the duty of the Appellate Court to sustain the ruling of the trial court if the pleading is a proper one as a counterclaim, though the pleader may have called it a set-off.

2. SET-OFF AND COUNTERCLAIM ⇨29(1)—"COUNTERCLAIM"—ACTION FOR DEMURRAGE.

Under *Burns' Ann. St. 1914*, §§ 353, 355, 356, respectively defining set-offs, declaring a "counterclaim" to be a matter arising out of or connected with the cause of action, and providing that, if any defendant omit to set up a cause of action, arising out of the contract or transaction, etc., he cannot afterward maintain an action therefor except at his own costs, a claim by the consignee of coal cars for damages for failure of the railroad company to transport them with the promptness required by section 5205 may be set up as a

counterclaim in an action by the company for demurrage.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, Counterclaim.]

3. PLEADING ⇨201—DEMURRER—FORM—SET-OFF AND COUNTERCLAIM.

A demurrer to a set-off or counterclaim should be in the same form as a demurrer to a complaint, and as the statutory form for a demurrer to a complaint for insufficient facts is, under *Burns' Ann. St. 1914*, § 344, that it does not state facts sufficient to constitute a cause of action, a demurrer that a set-off does not state facts sufficient to constitute a cause of action by way of set-off, is insufficient and was properly overruled, where the pleading, though called a set-off, set up a proper counterclaim.

4. CARRIERS ⇨76—TITLE TO GOODS—CONSIGNEES—PRESUMPTION.

There being no evidence to the contrary, there is a presumption that title to coal vested in a consignee.

5. CARRIERS ⇨76—CONSIGNEES—RECONSIGNMENT.

Where a consignee of coal reconsigned the same while in transit, and the carrier acceded to the request of the original consignee to reconsign and to forward the coal to defendant, defendant must be treated as the consignee and entitled to recover for the carrier's failure to transport the coal with the promptness prescribed by *Burns' Ann. St. 1914*, § 5205, and hence defendant may counterclaim for damages for delay in an action for demurrage.

6. APPEAL AND ERROR ⇨1010(1)—REVIEW—FINDINGS.

In an action tried to the court, a finding of fact supported by evidence will not be disturbed on appeal.

Appeal from Superior Court, Marion County; W. W. Thornton, Judge.

Action by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company against John L. Partlow, doing business as the J. L. Partlow Coal Company, who counterclaimed. The action was begun in the justice court, and defendant appealed to the superior court. From a judgment there for defendant, plaintiff appeals. Affirmed.

Frank L. Littleton and Forrest Chenoweth, both of Indianapolis, and Charles P. Stewart, of Cincinnati, Ohio, for appellant.

Born, Ritchey & Cronk, of Indianapolis, for appellee.

BATMAN, C. J. Appellant filed a complaint before a justice of the peace to recover of appellee the sum of \$77 on account of demurrage charges, arising out of the alleged detention and use of 32 cars, delivered to appellee on its private side track at Indianapolis, Ind., beyond the free time allowed consignees by the rules on file with the Pub-

lic Service Commission of Indiana for loading and unloading cars. An exhibit accompanied this complaint as a part thereof, which gave the initials and numbers of the cars in question, with the dates of their delivery to appellee and the dates of their release by him. Before such justice of the peace appellee filed an answer in general denial and what he termed a set-off. In the latter he alleged, in substance, among other things, that he had purchased large quantities of coal in carload lots in Indiana, which had been delivered to appellant at Terre Haute for the purpose of being transported to him at Indianapolis, a distance of 72 miles; that nine of said cars, while in the possession of appellant, were withheld by it in transportation for an unreasonable length of time; that by section 5205, Burns' R. S. 1914, appellant was required to transport said cars of coal at a rate of speed equal to 50 miles each 24 hours, with an additional 24 hours at point of origin and junction points to perform necessary switching; that said cars ordered by and shipped to appellee were not shipped at the rate of speed required by said statute; that appellee was the owner of the coal contained in said cars, and was the consignee thereof. An exhibit accompanied the alleged set-off as a part thereof, which gave the initials and numbers of the cars, the dates of shipment, and the dates of their delivery at Indianapolis. After the justice of the peace had sustained a demurrer to the alleged set-off, he heard the evidence and rendered a judgment in favor of appellant for \$77 and costs. From this judgment appellee appealed to the Marion superior court, where appellant filed a motion to strike out the alleged set-off of appellee, which was overruled. Appellant's demurrer thereto, sustained by the justice of the peace, was then overruled. The cause was afterwards submitted to the court for trial, which resulted in a judgment in favor of appellee for \$33 and costs. Appellant filed a motion for a new trial, which was overruled, and now prosecutes this appeal.

[1, 2] Appellant contends that the court erred in overruling its motion to strike out appellee's alleged set-off. It bases this contention on the ground that a set-off "must consist of matters arising out of debt, duty, or contract," as provided in section 353, Burns 1914, and that any liability which may have accrued to appellee under said section 5205 did not arise out of any such obligation. It is our duty to sustain the ruling of the trial court, if the pleading in question is a proper one regardless of what the pleader may have called it. *Mills v. Rosenbaum* (1885) 103 Ind. 152, 2 N. E. 318. The statute defines a counterclaim to be "any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim

* * * for damages." Section 355, Burns 1914. It is also provided that, "if any defendant personally served with notice omit to set up a counterclaim arising out of the contract, or transaction set forth in the complaint as the ground of the plaintiff's claims, or any of them, he cannot afterward maintain an action against the plaintiff therefor, except at his own costs." Section 356, Burns, 1914. It has been held that these two sections should be construed together in determining what matters may be pleaded by way of counterclaim, and that the word "transaction" should be construed as meaning something different from and additional to the preceding word "contract" to which it is joined by the disjunctive "or"; that a transaction is not confined to what is done in one day or at a single time and place, but the logical relation of the facts involved determines whether they together constitute a single transaction. *Excelsior Clay Works v. De Camp* (1906), 40 Ind. App. 26, 80 N. E. 981. The Supreme Court of this state has said:

"A counterclaim is that which might have arisen out of, or could have some connection with, the original transaction, in view of the parties, and which, at the time the contract was made, they could have intended might, in some event, give one party a claim against the other for compliance or noncompliance with its provisions." *Conner v. Winton* (1856) 7 Ind. 523.

This definition has been quoted with approval in the later cases of *Standley v. Northwestern, etc., Co.* (1883) 95 Ind. 254, and *Blue v. Capital National Bank* (1896) 145 Ind. 518, 43 N. E. 655. It has also been more recently approved by the Supreme Court of Oregon in a decision in which the case of *Conner v. Winton*, supra, was cited, *Krausse v. Greenfield*, 61 Or. 502, 123 Pac. 392, Ann. Cas. 1914B, 115. A comparison of the exhibits filed with the complaint and the pleading under consideration discloses that the 9 cars named in the alleged set-off are among the 32 cars on which demurrage charges are claimed, and involved the same shipments. It thus becomes apparent that the respective claims of appellant and appellee arise out of the same transactions. It is alleged that appellee was the owner of the coal shipped in said cars and the consignee thereof. The contracts of shipment therefore were made for his benefit, and he thereby became a party to such transactions. 4 R. C. L. 94; *Tebbs v. Cleveland, etc., Ry. Co.* (1897) 20 Ind. App. 192, 50 N. E. 486. It must be assumed that the parties thereto knew of the existence of the rules with reference to demurrage charges, and therefore knew that such charges would accrue against appellee in favor of appellant, if there was delay in unloading such cars beyond the free time allowed for that purpose. They must be held to have known of the existence of said section 5205, and that a liability might accrue in favor of appellee against appellant in case

the shipments were not made at the rate of speed therein provided. Thus the liability which each is claiming against the other clearly arises out of the original transactions, and is such that the parties must have intended, at the time the contracts of shipment were made, might in some event give one party a claim against the other by reason of the existence of said rule and statute. *Miller v. Mansfield*, 112 Mass. 260. We therefore conclude that the alleged set-off is in fact a counterclaim, and that the court did not err in overruling appellant's motion to strike it out.

[3] Appellant also contends that the court erred in overruling its demurrer to appellee's cross-action, which was denominated a set-off. We observe that the ground for demurrer as stated therein is as follows: "That said set-off does not state facts sufficient to constitute a cause of action *by way of set-off*." (Our italics.) It has been repeatedly held that a demurrer to a set-off or counterclaim should be in the same form as a demurrer to a complaint. *Duffy v. England* (1911) 176 Ind. 575, 96 N. E. 704. The statutory form for a demurrer to a complaint for insufficient facts is that it does not state facts sufficient to constitute a cause of action. Section 344, Burns 1914. Appellant in the preparation of his demurrer was not content to attack the pleading generally, as not stating facts sufficient to constitute a cause of action, but expressly limited the same to the defects therein as a set-off, thereby leaving it unchallenged as a cross-complaint or a counterclaim. The fact that appellee designated such pleading as a set-off cannot affect the situation, as the court, in determining the sufficiency of a pleading, will be controlled by its substance rather than by its formal parts, or by the name which has been given it by the pleader. *Drebing v. Zahrt* (1913) 55 Ind. App. 492, 104 N. E. 46. In view of the fact that we have held that the pleading under consideration contains facts sufficient to constitute a cause of action as a counterclaim, it is unnecessary to give further consideration to the action of the court in overruling a demurrer thereto as a set-off.

[4-6] Appellant contends that the decision of the court is not sustained by sufficient evidence and is contrary to law. In support of this contention it asserts, among other things, that said section 5205, Burns 1914, only gives a right of action for delay in the shipment of freight to the consignee thereof; that the evidence fails to show that appellee was the consignee of the coal in question when the alleged delay occurred, and hence one of the essential elements of appellee's right of recovery is absent. An examination of the record discloses evidence which tends to show that the nine cars of coal described in the exhibit filed with appellee's counterclaim were originally consigned to the Power Coal Company at the mines from which they were

shipped. There being no evidence to the contrary, the presumption prevails that the title to such coal thereby vested in said consignee. *The Pennsylvania Co. v. Holderman* (1879), 69 Ind. 18; *Cleveland, etc., Ry. Co. v. Moline Plow Co.* (1895), 13 Ind. App. 225, 41 N. E. 480; *Butler v. Pittsburgh, etc., R. Co.* (1897) 18 Ind. App. 656, 46 N. E. 92; *F. W. McNeely & Co. v. Lake Shore, etc., R. Co.* (1917) 115 N. E. 954. Under these circumstances the Power Coal Company, as such consignees, had the right to reconsign such coal in transit. *Tebbs v. Cleveland, etc., Ry. Co.*, supra. The evidence tends to show that, in pursuance of such right, said company, on or before the days on which the cars of coal in question were received by appellant at Terre Haute from its connecting line, made written requests of appellant to reconsign and forward said coal to appellee at Indianapolis, and to show said company as consignor in the billing; that appellant received and accepted such written requests, and in pursuance thereof transported said cars of coal from Terre Haute to Indianapolis, and delivered the same to appellee. The effect of such written requests, when accepted by appellant, was to create new contracts of shipment in which the original consignee became the consignor, and appellee became the consignee. There is evidence which tends to show that this new contract was in effect during the entire time the coal was in transit on appellant's line of road, where it is alleged the delay occurred. Hence appellee, as the new consignee of said coal, would be entitled to recover whatever may have accrued under the provisions of said section 5205 by reason of such delay.

It is also contended that the evidence does not show what shipping instructions, if any, were given appellant for the transportation of said coal, or that appellee was named as consignee therein. An examination of the written requests for the reconsignment of said coal, which the evidence tends to show were received, accepted, and acted upon by appellant, disclose instructions for its shipment to appellee at Indianapolis, Ind. Appellant's contention, therefore, is not well taken. It is further contended that the number of hours the coal was in transit is not shown, but we are of the opinion that the evidence furnished sufficient data in that regard to sustain the decision of the court as to the amount found due appellee by reason of the alleged delay in shipment.

Appellant asserts that appellee was not entitled to recover anything on account of the alleged delay in shipment, because any such delay was due to his own fault in failing to pay the freight charges. The trial court found to the contrary, and, as the evidence tends to sustain such finding, we are bound thereby. Appellant finally contends that the court erred in rendering judgment in favor of appellee on the alleged set-off. It bases

this contention on grounds which are not applicable to a cross-action by way of counterclaim, and hence there is no necessity for giving it consideration.

We find no error in the record.
Judgment affirmed.

NICHOLS, P. J., and DAUSMAN, McMAHAN, and REMY, JJ., concur.
ENLOW, J., not participating.

(70 Ind. App. 646)

CHALMERS & WILLIAMS v. SURPRISE.
(No. 9820.)

(Appellate Court of Indiana, Division No. 1.
June 25, 1919.)

1. CONTRACTS — 2—WHAT LAW GOVERNS.

A contract is governed by the law with a view to which it is made, and when intention of parties in that regard is made to appear it will be given effect, except where actuated by fraud.

2. EVIDENCE — 461(1)—PLEADING — 246(2)—PAROL EVIDENCE — CONTRACTS — WHAT LAW GOVERNS—AMENDMENT OF PLEADING.

Where a contract for sale of machinery by Illinois seller to Indiana buyer f. o. b. Chicago provided that contract shall be deemed consummated at Chicago, but did not provide to whom or to what destination machinery was to be shipped, parol evidence would be admissible to show intention of party as to what law governs, and hence amendment of petition, seeking to recover property from receiver of buyer to show that machinery was shipped to Indiana, and at all times remained there, should have been granted.

3. SALES — 52(1)—WHAT LAW GOVERNS — PRESUMPTIONS.

Where contract for sale of machinery by Illinois seller to Indiana buyer f. o. b. Chicago provided that on acceptance of proposal the contract shall be deemed consummated at Chicago, a presumption arises that contract is governed by law of Illinois, but such presumption may be rebutted.

4. EVIDENCE — 80(2)—PRESUMPTIONS—COMMON LAW.

In absence of averments in pleading an Illinois contract as to what the law of Illinois is, it would be presumed that common law as applied in Indiana prevails there.

5. EVIDENCE — 80(1)—PRESUMPTIONS.

Where law of another state is not pleaded, it is presumed to be same as law of forum.

6. RECEIVERS — 69 — TITLE OF RECEIVER—CONDITIONAL SALES — "BONA FIDE PURCHASER."

Under the law of Illinois that conditional sale contract of personalty is void as to bona fide purchasers of buyer in possession, a receiver of a corporation buyer, its stockholders,

or the creditors he represents are not "bona fide purchasers."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bona Fide Purchaser.]

7. SALES — 474(1) — CONDITIONAL SALES—"EXECUTION CREDITOR" — "CREDITOR"—"JUDGMENT CREDITOR."

Under the law of Illinois that conditional sales contract of personalty is void as to execution creditors of purchaser, receiver of corporation purchaser, its stockholders and creditors, are not execution creditors, on theory that seizure of property by receiver was an equitable levy by the court, and fixed a lien in favor of general creditors; a creditor being one who has a legal right to damages or debt enforceable by judicial process, a judgment creditor being one whose claim has been merged in judgment, and execution creditor being one who, having recovered a judgment, has caused execution to issue thereon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Creditor; Judgment Creditor.]

Appeal from Superior Court, Lake County;
Walter T. Hardy, Judge.

Intervening petition in receivership proceedings by Chalmers & Williams, a corporation, against Charles L. Surprise, receiver of the Midland Recoveries Company. Judgment for the receiver, motion for new trial denied, and petitioner appeals. Reversed, with instructions.

Tenney, Harding & Sherman, of Chicago, Ill., and L. V. Cravens, of Hammond, for appellant.

Bomberger, Peters & Morthland, of Hammond, for appellee.

BATMAN, C. J. The record in this case discloses that the Midland Recoveries Company, a corporation, was engaged in business at Hammond, Ind.; that, having become insolvent, the appellee, Charles L. Surprise, was appointed a receiver thereof by the Lake superior court; that said receiver duly qualified, and assumed the duties of his trust, by taking into his possession the assets of said company; that among said assets was certain machinery which appellant claimed was its property, and, after making demand therefor, filed its intervening petition, in which it asked the court to require said receiver to deliver said machinery to it; that said petition alleged, in substance, among other things, that it had theretofore entered into two separate contracts with the Midland Recoveries Company for the sale of certain machinery (describing it and naming the price thereof); that said machinery had been delivered to said company in accordance with the terms of said contracts; that

each of said contracts contained the following provision:

"The title and right of possession to the machinery herein specified remains in the company until all payments hereunder (including deferred payments and any notes or renewals thereof, if any), shall have been made in cash, and it is agreed that said machinery shall remain the personal property of the company whatever may be the mode of its attachment to realty or otherwise, until fully paid for in cash. Upon failure to make payments, or any of them, as herein specified, the company may retain any and all partial payments which have been made, as liquidated damages, and shall be entitled to take immediate possession of said property, and be free to enter the premises where said machinery may be located, and to remove same as its property without prejudice to any further claims on account of damage which the company may suffer from any cause."

It is further alleged that the title to said machinery always has been and still is in appellant. Copies of said contracts were filed with said petition, and made parts thereof as exhibits. Each of said contracts is dated at Chicago Heights, Ill., and is addressed to William Wilkie, Jr., Hammond, Ind., who it is alleged was the agent of said company. They are each in the form of proposals by appellant, duly accepted by said company, in which it is provided that the former should furnish the latter certain machinery therein described, f. o. b. cars at point of shipment, Chicago Heights, Ill. Each contains the provision quoted above, and in addition thereto the following:

"All the terms and provisions of the contract between the parties hereto are fully set out herein, and no agent, salesman or other party is authorized to bind the company by any agreement, warranty, statement, promise or understanding not herein expressed, and no modification of the contract shall be binding on either party unless the same are in writing, accepted by the purchaser and approved in writing by one of the company's executive officers, and it is expressly agreed and understood that there are no promises, agreements, or understandings, verbal or otherwise, outside of this contract. This proposal is made for immediate acceptance of the purchaser, and upon acceptance thereof the contract shall be deemed consummated at Chicago, Illinois, but only upon the written approval of an executive officer of the company, and shall not be binding upon the company until so approved."

Appellant filed its motion for leave to amend said petition by inserting the following:

"That after the execution and consummation of said contract, the said Chalmers & Williams shipped said machinery from Chicago Heights, Illinois, to Midland Recoveries Company, at Osborn Station, Hammond, Indiana, and said machinery ever since said time has been located at the factory of said Midland Recoveries Company at Osborn, Indiana."

This motion was overruled, and appellee filed an answer to said petition in two paragraphs. The first was a general denial, and the second alleged, in substance, among other things, that he was duly appointed a receiver of said Midland Recoveries Company; that at the time of his appointment said company was insolvent, and that it was necessary, in order to preserve the assets thereof, that a receiver be appointed to take charge of the same, and to operate its plant; that in pursuance of his appointment, and an order of court, he went into possession of the assets of said company, took charge of its said plant, and proceeded to operate the same; that among the matters and things turned over to him by said company was the machinery described in appellant's said petition; that said company was and is indebted to various creditors in a sum approximating \$20,000; that he believes that credit was advanced by the various persons holding claims against said company upon the faith and strength that it owned its plant and equipment, of which the machinery described in said intervening petition formed a considerable part; that none of said creditors knew, or had reason to believe, that said company was not the owner thereof; that the contracts mentioned in said petition show on their face that they were executed at Chicago Heights, in the state of Illinois; that said machinery was delivered to said company at said place, and that said contracts were to be performed within said state of Illinois, and not within the state of Indiana; that it is the law of the state of Illinois that:

"If a person agrees to sell to another a chattel on condition that the price should be paid within a certain time, retaining title in himself in the meantime, and delivers the chattel to the vendee, so as to clothe him with an apparent ownership, a bona fide purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor. * * *

"The party in possession of personal property is presumed to be the owner of it, possession being one of the strongest evidences of title to personal property. To suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons."

It is further alleged in said paragraph of answer that said law was in force in the state of Illinois at the time of the execution of said contracts; that by reason of said rule of law the claim of the intervener herein would be and is fraudulent and void, as against the creditors of said company. To this paragraph of answer appellant filed a demurrer, which was overruled, and thereupon it filed a reply thereto in two paragraphs. The first was a general denial, and the second alleged, in substance, among

other things, that the contracts in question were signed at Chicago Heights in the state of Illinois, in pursuance of invitations on the part of the Midland Recoveries Company to appellant to present to it proposals for the installation of the machinery described in its intervening petition, which was to be constructed for, and delivered to, the plant of said company in that part of Hammond, Ind., known as Osborn; that it was the intention of all the parties to said contract, at the time of signing the same that said machinery was to be shipped to, and installed in, the factory of said company at Osborn, Ind.; that shipping directions were given by said company to appellant at the latter's office at Chicago Heights, Ill.; that said machinery should be shipped to Osborn, Ind., and should be placed on the cars of said Chicago Heights by appellant for that purpose; that the railroad depot at said Chicago Heights was to be the point from which said shipments were to be made; that it was thoroughly understood and agreed to between the parties at the time of entering into said contracts that as soon as said machinery could be made ready for shipment, it was to be shipped out of the state of Illinois, and into the state of Indiana, and that the contracts themselves were to be performed within the state of Indiana; that at no time was it ever contemplated between the parties that said machinery should remain in the state of Illinois, or should be governed by the laws of said state; that at the time of entering into said contracts, at the time the shipments were made, at the time of delivering said machinery at Osborn, Ind., and at the time of its installation in the plant of said company, the said company was not indebted to many of its present creditors; that as between said company and appellant said contracts were valid, even under the laws of the state of Illinois; that at the time said machinery was taken out of the state of Illinois the title to the same under said contracts, as between the parties thereto, remained in appellant; that it was understood and agreed between the parties that said title was to continue and remain in appellant after the same had been taken into the state of Indiana; that all of the rights of the present creditors of said company which have attached did not attach until after the machinery had been installed in its plant at Osborn, Ind. Appellant filed a demurrer to this paragraph of reply, which was sustained. A trial was had by the court, resulting in an allowance in favor of appellant for the amount found due it on said contracts as a general claim, to be paid by the receiver in the due course of the settlement of his trust, and a judgment that appellant is not entitled to, and should not recover from the receiver, the property described in its intervening petition, but that

the receiver should sell the same, as the property of said company, under a former order of the court. From this judgment appellant has appealed, and has assigned errors requiring a consideration of the questions hereinafter determined.

[1-3] Appellant contends that the court erred in overruling its motion for leave to amend its intervening petition. The evident purpose of appellant in seeking to make the proposed amendment was to lay a proper foundation for the introduction of evidence, bearing on the question of what law the parties intended should govern the conditional sales contracts. The motion appears to be formal and timely, but appellee contends that said contracts are unambiguous; that they indicate by their terms the law by which they are to be construed, and hence extraneous proof in that regard was inadmissible; that, this being true, it was not error to overrule appellant's motion, as a refusal to allow matter to be added to the petition by way of amendment, which could not be properly proven, was not an abuse of discretion. It may be stated as a principle of universal law that "in every forum a contract is governed by the law with a view to which it is made." When the intention of the parties in that regard is made to appear, it will be given effect, except where they are actuated by fraud. *Cable Co. v. McElhroe* (1914) 58 Ind. App. 637, 108 N. E. 790. It thus appears that the intention of the parties, as to what law should govern the contracts in question, was a material fact for the court's determination. It will be observed that each of the contracts provides that upon acceptance of the proposal, which forms a part thereof, the contract "shall be deemed consummated at Chicago, Ill." In other words, the contracts were to be deemed executed at Chicago, Ill. This fact, when considered in connection with the provision that the machinery was to be furnished f. o. b. cars at Chicago Heights, Ill., may be said to give rise to a presumption that each of said contracts was to be governed by the laws of that state. This presumption, however, may be rebutted, and parol evidence is admissible for that purpose, where such evidence does not contradict or vary the terms of such contract. *Cable Co. v. McElhroe*, supra. It will be observed that the amendment, which appellant sought to make to its intervening petition, relates to the shipment of the machinery in question into this state, by appellant, after the execution of the contracts, and as to its continued location in this state, at the factory of the said Midland Recoveries Company, ever since said time. These facts were proper to be considered as bearing on the intention of the parties with reference to the location of the machinery while said contracts of conditional sale were in force, and in determining what laws

should govern the same. It will be observed that the contracts in question do not provide by whom, to whom, or to what destination the machinery was to be shipped, after it was furnished on the cars at Chicago Heights, Ill., in conformity with the contracts, or where it was to be located thereafter. Therefore any extraneous evidence in that regard would not tend to contradict or vary the terms of such contracts, and the proposed amendment was not objectionable on that ground. We are of the opinion that the amendment in question should have been allowed, and that the court erred in overruling appellant's motion for leave to make the same.

[4-7] We next direct our attention to the alleged error in overruling the demurrer to appellee's second paragraph of answer. It will be observed that said paragraph of answer proceeds upon the theory that appellant's conditional sale contracts are governed by the law of Illinois, and that under the law of that state such contracts are fraudulent and void, as against the creditors of the Midland Recoveries Company. In the absence of any averments as to what the law of Illinois is, relating to such contracts, it would be presumed that the common law, in that regard, as interpreted and applied in this state, prevails there. By such law the sale of personal property, under the circumstances shown, on condition that the title shall remain in the seller until the purchase price is paid, is valid, and the seller retains ownership though he delivers possession to the purchaser. *Swain v. Schild* (1917) 117 N. E. 933. To meet this presumption, appellee has alleged that it is the law of Illinois that bona fide purchasers and execution creditors of a vendee in possession of a chattel, under a conditional sale contract, are entitled to protection, as against the claim of the original vendor. We may assume therefore that, except as otherwise alleged, the common law, as stated above, governs conditional sale contracts in the state of Illinois. Under these circumstances, we are only required to consider whether the allegations of the paragraph of answer in question show that appellee, or those he represents, occupy the relation of bona fide purchasers or execution creditors toward the machinery described in the intervening petition, in determining the sufficiency of the paragraph of answer in question. It is apparent that neither appellee, as the receiver of the Midland Recoveries Company, nor the stockholders thereof, whom he represents, occupy such relationship, under the facts alleged. But can the same be said of the creditors of said company, whom the receiver also represents? There is no basis for a claim that they are bona fide purchasers, and appellee does not so contend. He does assert, however, that the seizure of the ma-

chinery in question by the receiver was in the nature of an equitable levy by the court, and fixed thereon a lien in favor of the general creditors of the Midland Recoveries Company, and that this fact entitled them to protection under the law of Illinois relating to conditional sale contracts, as execution creditors of said company. We cannot concur in this contention. *Smith v. Hotel Ritz Co.*, 74 N. J. Eq. 616, 70 Atl. 137. It should be noted that the terms, "creditor," "judgment creditor," and "execution creditor," each have their special meaning. A creditor has been defined to be one who had a legal right to damages or a debt, capable of enforcement by judicial process. *Bishop v. Redmund* (1882) 83 Ind. 157. A judgment creditor may be said to be one whose claim has been merged into a judgment against his debtor and under which, generally, execution may be had. *Anderson's Dictionary of Law*, p. 292. An execution creditor is one, who having recovered a judgment against the debtor for his debt, has also caused an execution to be issued thereon. *Black's Law Dictionary* (2d Ed.) p. 297. Thus it will be seen that the kind of a creditor to whom the law of Illinois affords protection, as disclosed by the paragraph of answer under consideration, is not merely a general creditor, nor one who had reduced his claim to judgment and rested there, but one who had gone further, and after obtaining a judgment has armed himself with that process of the law known as an execution. The paragraph of answer under consideration, not only fails to show that there was any creditor of the Midland Recoveries Company who had an execution against it, but also fails to show that any of its creditors had obtained a judgment on their claims, which is a condition precedent to the issuance of an execution. We therefore conclude that said paragraph of answer fails to show that any creditor of said company belongs to that class which the law of Illinois designates as entitled to protection against the vendor in a conditional sale contract. It follows that the court erred in overruling appellant's demurrer thereto, even if it could be said that the conditional sale contracts are governed by the law of Illinois under the facts alleged. Having reached the conclusion announced with reference to appellee's second paragraph of answer, we deem it unnecessary to consider the alleged error of the court in sustaining the demurrer to the second paragraph of appellant's reply addressed thereto, and especially in view of what we have said heretofore in considering the action of the court in overruling appellant's motion for leave to amend its intervening petition.

Appellant contends that the court erred in overruling its motion for a new trial. An examination of the record discloses that this

contention is well taken, on the ground that the decision of the court is not sustained by sufficient evidence. The contracts, made a part of appellant's intervening petition, were introduced in evidence, and they show that appellant, as vendor of the machinery in question, reserved title thereto until the purchase price thereof was paid. Other evidence introduced, and admissions made, tend to show that the purchase price of said machinery had not been fully paid, and that appellee held possession of the same solely by virtue of his appointment as receiver of the vendee named in said conditional sale contracts. Under these facts, the law of this state would protect appellant's title, as such vendor, as against any claim of the receiver of the Midland Recoveries Company, or any one whom he represents. Its title would likewise be protected under the law of Illinois as pleaded, since the evidence fails to disclose that the right of any bona fide purchaser, or execution creditor, had intervened. The evidence, therefore, is insufficient to sustain the decision of the court, whether the law of this state or the law of Illinois governs the conditional sale contracts in question.

Appellant also predicates error on the action of the court in refusing to admit certain evidence offered by it with reference to the shipment of the machinery covered by said contracts, after it was delivered on the cars at Chicago Heights, Ill., in conformity therewith. In view of what we have said relating to the action of the court in refusing to permit appellant to amend its intervening petition, these or like questions will probably not arise on another trial, and we, therefore, deem it unnecessary to prolong this opinion by a discussion of the questions thus presented.

The judgment is reversed, with instructions to sustain appellant's motion for a new trial, to sustain its motion for leave to amend its intervening petition, and to sustain its demurrer to appellee's second paragraph of answer thereto, and for further proceedings consistent with this opinion.

(233 Mass. 287)

FREEMAN'S CASE. In re AUTOMATIC TIME STAMP CO. In re AMERICAN MUT. LIABILITY INS. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. June 25, 1919.)

1. MASTER AND SERVANT §388—WORKMEN'S COMPENSATION ACT—TIME FOR DETERMINATION OF DEPENDENCY.

Under Workmen's Compensation Act, pt. 2, §§ 6, 7, and pt. 5, § 2, the question of dependency on the earnings of a deceased employé is

to be determined in accordance with the fact as the fact may be at the time of injury.

2. MASTER AND SERVANT §388—WORKMEN'S COMPENSATION ACT—PARTIAL DEPENDENCY.

Partial dependency may be found even though the dependent might have subsisted without the aid.

3. PARENT AND CHILD §5(1)—RIGHT TO RECEIVE EARNINGS.

A duty rests upon a minor son employed to turn his wages over to the parent entitled thereto, and the correlative right to receive such wages vests in the parent.

4. MASTER AND SERVANT §388—WORKMEN'S COMPENSATION ACT—PARTIAL DEPENDENCY.

A finding of partial dependency by claimant, mother of the deceased employé, a boy of 16, cannot be pronounced erroneous in law, where the boy, after leaving home, promised to send her all his earnings except what he needed for board and clothes, and he was killed in employment before his first pay day, so that he had no opportunity to remit money.

5. MASTER AND SERVANT §404—WORKMEN'S COMPENSATION ACT—EVIDENCE.

In proceedings by a mother for compensation for the death of her son, evidence respecting his intent to send her the part of his wages which remained after paying his board held admissible in view of the relevancy of the point on the question of dependency.

6. MASTER AND SERVANT §386(1)—WORKMEN'S COMPENSATION ACT—BASIS OF COMPENSATION.

The "annual earnings of the deceased at the time of his injury," specified in Workmen's Compensation Act, pt. 2, § 6, are to be ascertained by reference to the same factors as are "average weekly wages" in part 5, § 2, unless inapplicable under all the circumstances.

7. MASTER AND SERVANT §386(1)—WORKMEN'S COMPENSATION ACT—ASCEERTAINMENT OF "ANNUAL EARNINGS."

Where a boy of 16, having a partially dependent mother, was killed during the first week of his last employment, his "annual earnings," within Workmen's Compensation Act, pt. 2, § 6, are to be ascertained by the wages received by him during the 12 calendar months immediately preceding the injury.

8. MASTER AND SERVANT §417(7)—WORKMEN'S COMPENSATION ACT—AMOUNT OF CONTRIBUTION TO DEPENDENT—QUESTION OF FACT.

The amount of money contributed by the deceased minor employé to his partially dependent mother during the 12 calendar months before his injury and death held a pure question of fact, on which the finding of the Industrial Accident Board is final.

9. MASTER AND SERVANT §386(2)—WORKMEN'S COMPENSATION ACT—EVIDENCE OF DEPENDENCY—EXPENSES OF PARENT.

Expenses incurred by the parent on account of the deceased minor son are pertinent in determining the fact of the parent's dependency on such son within the Workmen's Compensation Act.

tion Act, but irrelevant in ascertaining the amount of compensation to be paid after dependency has been established.

Appeal from Superior Court, Suffolk County.

Proceedings for compensation under the Workmen's Compensation Act by Gertrude Freeman for the death of Clarence E. Freeman, employé; opposed by the Automatic Time Stamp Company, employer, and the American Mutual Liability Insurance Company, insurer. Compensation was awarded by the Industrial Accident Board, the award affirmed by the superior court, and from its decree the insurer appeals. Decree affirmed.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

John J. Scott, of Boston, for appellee.

RUGG, C. J. The deceased employé, a boy sixteen years of age, came to Boston early in September, 1918. He began going to high school, but when he found that tuition was charged him he went to work and on the twenty-sixth of the same month received fatal injuries arising out of and in the course of his employment. This was the second day of his employment.

[1-4] 1. There was evidence sufficient to support a finding of partial dependency by his mother on the earnings of the deceased. Before coming to Boston he had lived at home and had paid to his mother his wages which were substantial in amount. His father was not in good health and testified that he was not able to support his family, consisting of his wife and five children. The mother testified that she depended upon the wages of the deceased for support; that—

"Prior to leaving home, Clarence talked with her relative to sending her money for her support. He said that when he went to work he would send all his money home except his board and money for his clothes. * * * He told her he would send it for her support."

He went to Boston to go to school and to work out of school hours. The mother did not know that the deceased had begun to work until she received word of his death, and he had sent her no money since he came to Boston. The question of dependency upon the earnings of a deceased employé under the workmen's compensation act is to be "determined in accordance with the fact, as the fact may be at the time of the injury." St. 1911, c. 751, pt. 2, §§ 6, 7; part 5, § 2; Bott's Case, 230 Mass. 152, 119 N. E. 755. The fact was that at the time of his injury the deceased was at work for wages, which it was his declared purpose as well as his filial duty to send home. The circumstance that the mother did not know that the son was working and that his intent was to send her the proceeds

of that particular employment as fast as earned is not by itself decisive. A simple expression of purpose to contribute to support, unaccompanied by any actual contribution after reasonable opportunity, would not constitute dependency. The case at bar, however, in substance and effect discloses injury to the employé before his first pay day and before any opportunity had arisen to make contribution to the support of the dependent out of the wages of the particular service, and substantial contributions from the earnings of earlier work. Partial dependency may be found even though the dependent might have subsisted without the aid. McMahon's Case, 229 Mass. 48, 118 N. E. 189. The deceased was a minor; hence a duty rested upon him to turn his wages over to the parent entitled thereto, and a correlative right to receive such wages vested in the parent. Tornroos v. Autocar Co., 220 Mass. 336, 107 N. E. 1015. The finding of partial dependency by the mother cannot be pronounced erroneous in law. Kenney's Case, 222 Mass. 401, 111 N. E. 47.

[5] 2. There was no error, under the circumstances here disclosed, in the admission of the evidence respecting the intent of the deceased to send to his mother the part of his wages which remained after paying his board. Carriere v. Merrick Lumber Co., 203 Mass. 322, 327, 89 N. E. 544; Marcy v. Shelburne Falls & Colrain St. Ry., 210 Mass. 197, 199, 96 N. E. 130.

[6, 7] 3. The "annual earnings of the deceased at the time of his injury," in part 2, § 6, are to be ascertained by reference to the same factors as are "average weekly wages" in part 5, § 2, unless inapplicable under all the circumstances. It would be a strained construction to interpret "annual earnings" with reference only to the wages earned at the moment of injury and to calculate other payments under the act upon the footing of "earnings of the injured employé during the period of twelve calendar months immediately preceding the injury." The facts at bar presented a case for the ascertainment of "annual earnings" by reference to the wages received during the twelve calendar months immediately preceding the injury. See Gillen's Case, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371.

4. No question was saved on this record to the point whether the wages earned by the deceased in the year before his death were affected by the fact that for a part of the time he received his board as well as money compensation. Hence no decision of that matter is required.

[8] 5. The amount of money contributed by the deceased to his mother during the twelve calendar months before his injury was on this record a pure question of fact, on which the finding of the board is final. Pass' Case, 232 Mass. 515, 122 N. E. 642.

[9] 6. Expenses incurred by the parent on account of the son are pertinent in determining the fact of dependency, but irrelevant in ascertaining the amount of compensation to be paid after the fact of dependency has been established. *Dembrinski's Case*, 231 Mass. 261, 120 N. E. 856. No error is apparent in this particular.

Decree affirmed.

(233 Mass. 292)

SANDON v. KENDALL.

(Supreme Judicial Court of Massachusetts.
Worcester, June 25, 1919.)

1. MASTER AND SERVANT \S 288(1), 289(1)—CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK—QUESTIONS FOR JURY.

In an action for the death of plaintiff's intestate while assisting in the moving of a car for his temporary employer by invitation, questions of the intestate's due care and his assumption of risk held for the jury.

2. MASTER AND SERVANT \S 285(13, 14)—CONTRIBUTORY NEGLIGENCE — ASSUMPTION OF RISK—BURDEN OF PROOF—STATUTE.

In an action for death of a temporary servant by invitation to assist in the work, the burden of proof on the issues of the intestate's due care and his assumption of risk was on defendant under St. 1914, c. 558.

3. MASTER AND SERVANT \S 279(5)—IMPLIED AUTHORITY OF FELLOW SERVANT—SUFFICIENCY OF EVIDENCE.

In an action for the death of defendant's temporary servant by invitation, while helping in moving a car, evidence held to warrant finding that defendant's only representative on the job had at least implied authority to attend to the moving of the car, in which plaintiff's intestate was asked to help.

4. MASTER AND SERVANT \S 177 — WORKMEN'S COMPENSATION ACT—FELLOW SERVANTS.

At common law, though not under the Workmen's Compensation Act, that the injuries were caused by the negligence of a fellow servant is a defense to the employer.

5. MASTER AND SERVANT \S 192(1)—FELLOW SERVANTS—TEMPORARY SERVICE.

If decedent undertook to assist a servant in performing services which it was the servant's duty to perform under the orders of the defendant's representative, the jury could find that decedent stood in the relation of a fellow servant to the servant while engaged in such service, and that he did not become a temporary servant of defendant.

6. MASTER AND SERVANT \S 192(1)—FELLOW SERVANT—RENDITION OF ASSISTANCE.

The mere fact that a servant acting under the general instruction of his employer rendered assistance to the representative of defendant did not constitute him a fellow servant of the representative.

7. MASTER AND SERVANT \S 88(4)—TEMPORARY SERVICE—VOLUNTEER OR LICENSEE.

In responding to the request of a servant for assistance in doing his work, decedent, not an employé of any of the contractors, was not a mere volunteer or licensee.

Exceptions from Superior Court, Worcester County; Jabez Fox, Judge.

Action by Sadie Bergeron Sandon, administratrix, against Minott K. Kendall. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

The requests asked for by defendant and referred to in the opinion were as follows:

Given:

(5) There is no evidence to warrant a finding that Lee had authority to bind the defendant in the matter of securing the aid of plaintiff's intestate in moving the car. Given.

Not given:

(1) That defendant is not entitled to recover on the evidence.

(4) If jury finds that plaintiff's intestate was asked by a servant of Newell to aid in moving the car, and was killed by helping move the car in response solely to that invitation, plaintiff cannot recover.

(7) Plaintiff's intestate cannot recover except under circumstances whereby an employé of defendant might recover.

(9) Defendant owes plaintiff's intestate no greater duty than he owed his employé Lee.

(10) One who without protecting or promoting any interest of his own assists in the service of another cannot recover for injury while so acting, nor can there be recovery for his death while so acting, unless the injury or death was the result of wanton or willful misconduct.

(11) A master owes no duty, except to prevent wanton or willful injury to one who without protecting or promoting any interest of his own assists in the master's service.

George R. Farnum, Edward E. Ginsburg, and John G. Walsh, all of Boston, for plaintiff.

Meehan & Donahue and William E. Waterhouse, all of Boston, for defendant.

DE COURCY, J. The plaintiff seeks damages for the death of her intestate, Joseph E. Bergeron, who was struck by a falling "gin pole," receiving injuries from which he died without conscious suffering. There was evidence to warrant the finding of the following facts:

The defendant had a contract to erect poles and wires for an electric line from Uxbridge to Milford. He engaged one Newell, who was in the teaming business, to unload the poles from the cars in the railroad yard at Uxbridge, and to carry them to designated locations. A gin pole was used for lifting the poles from the car and putting them upon a wagon or "reach." This pole was like a single mast derrick without guys; it was twenty-five to twenty-eight feet in length,

was set in a hole in the ground eighteen inches to two feet deep, and was fastened by chains to the railroad track and to the car. In the process of the work of unloading it became necessary to move the partially unloaded car. The defendant was not there at the time, but one Lee, his only employé on the job, gave orders to have the car moved, and told Newell's men to hitch on the horses to the front of the car. Two of Newell's men were there at the time, Paine and Gray. The chains were taken off, and the gin pole was prised away from the car about two inches, to enable them to move the car by the pole. Bergeron, who was not in the employ of either party, came along, and Gray asked him "to give us a hand." Bergeron put his shoulder to the car, and was pushing it with the other men when the pole fell and struck him, fatally injuring him.

[1-3] The questions of the intestate's due care, and his assumption of the risk plainly were for the jury, and the burden of proof was on the defendant. St. 1914, c. 553. There was evidence to warrant a finding that the accident was due to Lee's negligence. He gave the orders to move the car, without taking down the unsupported gin pole, as was customary, and without taking any precautions to prevent its fall, although it showed signs of being unsteady. The jury could find also that Lee was acting within the scope of his employment in giving directions to move the car. Newell, who was an independent contractor, testified "we had nothing to do with moving the cars; we simply unloaded the poles;" and Smith, the representative of the defendant who engaged Newell, testified that he "asked . . . where he [Newell] wanted the car left to be convenient for unloading and said he would have it placed wherever Newell wished." Lee was the only representative of the defendant on the job. The jury could infer that he had at least implied authority to attend to the moving of the car. They were not obliged to accept the testimony that his only duty was to show Newell's men where to place the poles. In fact Newell testified that Lee was "in charge of this team," that "he [Newell] told his men when they left the stable to do what the man in charge told them," and that he heard Lee give orders to these men.

[4-7] As the defendant argues, the case did not go to the jury on the theory of the Work-

men's Compensation Act (Laws 1911, c. 751, amended by Laws 1912, c. 571) with the defences removed; and if Bergeron became in fact the fellow servant of Lee the defendant would not be liable, under the present declaration; as the negligence relied on would be that of a fellow servant. In this connection the judge gave the defendant's fifth request, and called to the jury's attention the theory on which the plaintiff was proceeding in the case, "that it was not Lee who called for Bergeron but that it was Gray, one of Newell's employés, who called him for help, and that then Bergeron, having been called on the job by Gray, stands in the same position with regard to the employer of Lee that Gray would himself have stood in if he had been hurt." We cannot say as matter of law that there was no evidence to warrant this contention of the plaintiff. If Bergeron undertook to assist Gray in performing service which it was Gray's duty to perform under Lee's orders, then the jury could find that he (Bergeron) stood in the relation of a fellow servant of Gray while engaged in such service, and that he did not become a temporary servant of the defendant. *Barstow v. Old Colony Railroad*, 143 Mass. 535, 10 N. E. 255; *Flynn v. Boston & Maine Railroad*, 204 Mass. 141, 144, 90 N. E. 521. See *Berry v. New York Central & Hudson River Railroad*, 202 Mass. 197, 202, 88 N. E. 588. The mere fact that Gray, acting under the general instruction of his employer Newell, rendered assistance to Lee, did not constitute him a fellow servant of Lee. *Sprague v. General Electric Co.*, 213 Mass. 375, 378, 100 N. E. 628, 45 L. R. A. (N. S.) 962. And the jury could find that Gray had implied authority to procure the temporary assistance of Bergeron in the necessary act of moving the car, which the three men present were unable to move, and when no other employés of the defendant or of Newell were available. *Hollidge v. Duncan*, 199 Mass. 121, 123, 85 N. E. 186, 17 L. R. A. (N. S.) 982. See L. R. A. 1915F, 1125, note. In responding to the request of Gray Bergeron was not a mere volunteer or licensee.

The defendant's first, fourth, seventh, ninth, tenth and eleventh requests were denied rightly. The others, so far as applicable to the plaintiff's case as submitted to the jury, were properly covered by the charge.

Exceptions overruled.

(226 N. Y. 421)

OSBORNE v. INTERNATIONAL R. CO.

(Court of Appeals of New York. May 20, 1919.)

1. CARRIERS \Leftrightarrow 20(1)—RIGHT TO TRANSFER—
"REFUSAL"—PENALTY.

Under Public Service Commission Law, § 49, subd. 7, providing for a \$50 forfeiture for every refusal of a street railroad corporation to comply with the transfer law, that a street car conductor gave a passenger a transfer by mistake punched an hour late did not constitute a "refusal"; to refuse being to deny a request or demand.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Refusal.]

2. STATUTES \Leftrightarrow 181(1)—CONSTRUCTION—LEGISLATIVE INTENTION.

Statutes must be so interpreted as to give effect to the intention of the legislative body which enacted them; such intention primarily to be ascertained from the language used giving thereto its ordinary meaning.

3. STATUTES \Leftrightarrow 182—CONSTRUCTION—LEGISLATIVE INTENTION.

A reasonable construction of a statute should in all cases be adopted where there is a doubt or uncertainty in regard to the legislative intent.

4. STATUTES \Leftrightarrow 241(1)—CONSTRUCTION—PENALTIES.

A statute awarding a penalty is to be strictly construed, and before a recovery can be had a case must be brought clearly within its terms.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Frank Osborne against the International Railway Company. From a judgment of the Appellate Division (177 App. Div. 709, 164 N. Y. Supp. 226) reversing a judgment of the Special Term which dismissed the complaint (98 Misc. Rep. 7, 161 N. Y. Supp. 1042), and affirming a judgment of the Municipal Court of the City of Buffalo for plaintiff, defendant appeals. Reversed and judgment of Special Term affirmed.

See, also, 178 App. Div. 950, 165 N. Y. Supp. 1102.

Harold S. Brown, of Buffalo, for appellant.

Harold J. Tillou, of Buffalo, for respondent.

McLAUGHLIN, J. This action was brought in the municipal court of the city of Buffalo to recover, under section 59 of the Railroad Law (Consol. Laws, c. 49) and subdivision 7 of section 49 of the Public Service Commissions Law (Consol. Laws, c. 48), a penalty of \$50. The plaintiff had a judgment, which was reversed and the complaint dismissed by the Special Term of the Supreme Court. He appealed therefrom to the Appellate Division, where the same was, by divided court, reversed, and the judgment of the Municipal

Court affirmed. By permission the defendant appeals to this court.

Section 59 of the Railroad Law provides that any railroad corporation which shall ask or receive more than the lawful rate of fare, unless such overcharge were made through inadvertence or mistake not amounting to gross negligence, shall forfeit \$50, to be recovered, with the excess so received, by the party paying the same.

At the conclusion of the trial the plaintiff consented, in so far as a recovery was sought under this section, that the complaint be, and the same was, dismissed. The judgment thereafter rendered was based solely upon the provisions of subdivision 7 of section 49 of the Public Service Commissions Law, which provides that:

"Until and except as the Public Service Commission shall otherwise prescribe as to any street railroad corporation or corporations pursuant to the provisions of this chapter, every street surface railroad corporation entering into a contract with another such corporation as provided in section seventy-eight of the Railroad Law shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this subdivision the corporation so refusing shall forfeit fifty dollars to the aggrieved party. * * *"

There was substantially no dispute between the parties as to the material facts involved, and their rights necessarily turn upon the construction to be put upon the statute quoted when applied thereto.

The defendant operates a system of street surface railroads in the city of Buffalo. It is made up of several different corporations operated under what is termed in the record the Milburn agreement. On the 12th of September, 1915, the plaintiff desired to go from the corner of Burgard place and Walden avenue to the corner of Elk and Sidway streets in the city of Buffalo. The shortest and most direct route between these two points is westward from Burgard place and Walden avenue, via a west-bound Sycamore street car to the corner of Fillmore avenue and Sycamore street; thence southerly upon a Fillmore avenue car to the corner of Abbott road and Smith street; thence westerly via an Abbott-South Park car to the corner of Elk and Sid-

way, to the point of destination. About 10:20 in the evening of the day mentioned the plaintiff boarded a Sycamore street car, asked for and received an Abbott-South Park car transfer, which he presented to the conductor on the south-bound Fillmore avenue car, and he then asked for and received a second transfer to the Abbott-South Park line. He put this second transfer in his pocket without examination. At the end of this line he boarded an Abbott-South Park car and presented the transfer last given to him. This transfer was accepted by the conductor, but he subsequently discovered the time within which it could be used had expired, and he then gave it back to plaintiff and told him he would have to pay his fare, which he did without objection or protest of any kind. The transfer was punched 10 o'clock, and when presented by plaintiff it was past 11 o'clock. Under the rules which had been adopted by defendant as to the use of transfers it could not be accepted by the conductor, as the time for its use had expired. It also appeared that this transfer was issued between 9:58 and 11 o'clock, during which period the conductor had issued 73 transfers, including that given to plaintiff, or an average of more than one every minute, besides attending to his other duties. The transfer should have been punched 11 o'clock instead of 10. The error, it is obvious, from the conceded facts, was due to the inadvertence and mistake of the conductor. This the plaintiff practically conceded at the trial when he consented that the complaint be dismissed so far as a recovery was sought under section 59 of the Railroad Law, since under that section a recovery could not be had if the overcharge "was made through inadvertence or mistake not amounting to gross negligence."

The question presented, therefore, is whether, upon the facts stated, defendant refused, within the meaning of subdivision 7 of section 49 of the Public Service Commissions Law, to give the plaintiff a transfer. The defendant had provided for a system of transfers, had supplied its conductors with the same, and was endeavoring, in good faith, to comply with the terms of the statute. The conductor gave the plaintiff a transfer, and had he examined it and called the attention of the conductor to the mistake, it is fair to assume it would have been immediately corrected.

[1-3] Can it be said, under a fair construction of the statute, upon the facts stated, that defendant refused to give plaintiff a transfer? I do not think it can. The ordinary signification of the word "refuse" is "to deny a request or demand." Refusal is active, while neglect is passive. The conductor did not refuse to give plaintiff a transfer; he neglected to give him a proper one, and, to

construe the statute as respondent contends, the word "refuse" must be construed in the sense of neglect. This I cannot believe the Legislature ever intended. The cardinal rule in the interpretation of statutes is to give effect to the intention of the legislative body which enacted them. This intention is primarily to be ascertained from the language used, giving thereto the ordinary meaning. *People ex rel. Onondaga County Savings Bank v. Butler*, 147 N. Y. 164, 41 N. E. 416. A reasonable construction should in all cases be adopted where there is a doubt or uncertainty in regard to the legislative intent. *Central Trust Co. v. N. Y. Equipment Co.*, 74 Hun, 406, 26 N. Y. Supp. 850. In *Murray v. N. Y. C. R. R. Co.*, 3 Abb. Dec. 339, the court held that the letter of a statute would be restrained by the spirit of the enactment, even though a liability imposed thereby was without qualification. In that case the obligation imposed by the statute was to make the railroad company liable for damages which should be sustained when fences alongside of its tracks were out of repair. The court held that, although the language was mandatory, it was intended thereby to impose a liability only in case of negligence.

The purpose of this statute is obvious. It is to compel railroads coming within its provisions to furnish to a passenger for a single rate of fare transfers over the line operated by such method, "to the end that public convenience may be promoted." It is not to promote the convenience of a single passenger, but the public generally. *Topham v. Interurban St. Ry. Co.*, 96 App. Div. 823, 89 N. Y. Supp. 298.

In the present case, as already indicated, the defendant is endeavoring, in the operation of its roads, to promote the public convenience by strictly complying with the terms of the statute.

[4] It would be, as it seems to me, a harsh, unjust, and unreasonable rule of construction to hold, upon the facts here presented, that defendant refused to give a transfer and thereby subjected itself to a penalty of \$50. A statute awarding a penalty is to be strictly construed, and before a recovery can be had a case must be brought clearly within its terms. *Chase v. N. Y. C. R. R. Co.*, 26 N. Y. 523; *Goodspeed v. Ithaca St. Ry. Co.*, 184 N. Y. 351, 77 N. E. 392.

I am of the opinion that defendant did not refuse to give a transfer within the meaning of the statute, and therefore the judgment appealed from should be reversed, and that of the Special Term affirmed, with costs in this court and in the Appellate Division.

CHASE, COLLIN, HOGAN, CRANE, and ANDREWS, JJ., concur. CUDDEBACK, J., not sitting.

Judgment reversed, etc.

(236 N. Y. 686)

DEYO et al. v. HUDSON et al.

(Court of Appeals of New York. May 20, 1919.)

1. APPEAL AND ERROR ⇐1062(2)—THEORY OF CASE BELOW—CHANGE ON APPEAL.

On appeal from a judgment of the Appellate Division reversing a judgment of the Trial Term, it was too late to plead that, because some of the allegations of complaint and some items of proof might properly belong to an action to trace stolen moneys, the basis of the action for fraud might be abandoned, and the plaintiffs permitted to adopt another theory of the case.

2. NEW TRIAL ⇐3—DIRECTION AFTER NON-SUIT.

There is no authority for directing a new trial after a motion for a nonsuit has been properly granted, as there then remains nothing to try.

3. LIMITATION OF ACTIONS ⇐130(12) — TERMINATION OF APPEAL—NEW ACTION.

Where the dismissal of a complaint in an action for fraudulent representations was not on the merits, plaintiffs, in view of Code Civ. Proc. § 406, may maintain a new action for the same cause of action within a year after the final determination of their appeal to the Court of Appeals.

Motion for reargument. Motion denied. For former opinion, see 225 N. Y. 602, 122 N. E. 635.

John G. Saxe, of New York City, for appellants.

Harvey D. Hinman, of Binghamton, for respondents.

PER CURIAM. Counsel for the moving party asserts that this court has misapprehended the nature of plaintiffs' action, overlooked material evidence and controlling decisions, and misapplied legal principles in deciding the appeal.

On three points the opinion will be somewhat amplified in order to state explicitly that which might without difficulty have been inferred.

[1] First. It is urged on this motion that the action may be considered as one to trace trust funds as well as an action to recover for deceit. If this theory is to prevail, the case has been tried under a misapprehension of its nature, and much that is said in the opinion is inapplicable. But no such mistake has been made. The judgment cannot be sustained on that theory. No escape is possible from the conclusion that deceit is the gist of the action. The complaint alleges in one of its concluding paragraphs that plaintiffs were injured "by reason of the defendants' false and fraudulent representations and of all the facts hereinbefore set forth." Counsel said in his opening to the jury,

"The basis of the action is fraud and deceit." The trial justice said in his opinion, "This action is based on fraud." The learned justice who wrote for plaintiffs in the Appellate Division said, "The action is for fraud and deceit." The action stands or falls on the false representations of defendants' agent. If the action had been brought on the theory that defendants received the stolen money with notice that it belonged to plaintiffs' clients, the issue would not have been confused. It would have been plainly stated in the complaint, made clear to the court, and submitted to and decided by the jury. It is now too late to plead that, because some of the allegations of the complaint and some of the items of proof may belong properly to an action to trace stolen moneys, the basis of this action may now be abandoned and the plaintiffs permitted to adopt another theory of the case.

Second. It is argued that the questions of proper care and proximate cause were for the jury. The inferences to be drawn from plaintiffs' facts are not doubtful. The evidence of freedom from fault and legal causation was insufficient, not unsatisfactory merely. *Queeney v. Will*, 225 N. Y. 374, 379, 122 N. E. 198, which counsel insists we overlooked, made no change in the rule which requires the plaintiff to prove his case. It was an action to recover damages for negligence and dealt only with direct cause and immediate effect. The opinion correctly stated the rule for submission of questions of fact to a jury. We said there that—

"Courts should not speak too confidently in determining as matter of law what facts may be ignored by prudent people whose duty it is to be reasonably careful for the personal safety of others."

Courts may well speak more confidently when dealing with the duty of lawyers to their clients in the protection of property rights. In *Bird v. St. Paul F. & M. Ins. Co.*, 224 N. Y. 47, 120 N. E. 86, cited in our opinion, we held as matter of law that a fire was not the proximate cause of an explosion, although the fire was a distant cause without which there would have been no explosion. The principles applied in disposing of these questions are familiar to the members of the legal profession.

[2, 3] Third. It is finally urged that great injustice was done because a new trial was not granted. This court said in *Ruback v. McCleary, Wallin & Crouse*, 220 N. Y. 188, 191, 115 N. E. 449, that—

"There is no authority for directing a new trial after a motion for a nonsuit has been [properly] granted. There then remains nothing to try."

The dismissal of the complaint herein was not on the merits. Plaintiffs may maintain a

new action for the same cause of action within a year after the final determination of the appeal in this court. Code Civ. Proc. § 405; *Wooster v. Forty-Second St. & G. St. Ferry R. R. Co.*, 71 N. Y. 471. This principle also is elementary and well understood.

The other points are fully discussed in the principal opinion.

The motion is denied, with \$10 costs and necessary printing disbursements.

All concur.

Motion denied.

(226 N. Y. 449, 569, 621)

**PLASS v. CENTRAL NEW ENGLAND
RY. CO.**

(Court of Appeals of New York. March 11, 1919. On Reargument, June 6, 1919.)

On Reargument.

**1. APPEAL AND ERROR ⇐1094(1)—REVIEW—
JURISDICTION OF COURT OF APPEALS.**

Under Const. art. 6, § 9, the Court of Appeals may, where decision at the Appellate Division was not unanimous review its determination to the extent only of ascertaining whether there was any evidence or reasonable inferences deduced from the testimony on which to base the decision.

2. MASTER AND SERVANT ⇐417(7)—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—INTERSTATE COMMERCE—REVIEW OF FINDINGS OF FACT.

In a proceeding under the Workmen's Compensation Act for the death of a section hand from contact with poison ivy while cutting weeds on the right of way, where there is some evidence to sustain a finding of the State Industrial Commission that deceased was not engaged in interstate commerce, on the theory that the weeds could stall trains, but that the weeds were cut solely to comply with Railroad Law, § 82, it will not be disturbed.

Collin, J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the claim of Jane Plass under the Workmen's Compensation Act against the Central New England Railway Company for the death of Peter Plass, an employé. An award of the State Industrial Commission was affirmed by the Appellate Division (172 N. Y. Supp. 614), and the employer appeals. Order affirmed.

An order of the Appellate Division of the Supreme Court in the Third Judicial Department (172 N. Y. Supp. 614), entered November 26, 1918, affirmed an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 87). Claimant's husband was employed as a section hand on defendant's railroad. While mowing grass and weeds along the

right of way he came in contact with poison ivy, resulting in blood poisoning and acute congestion of the lungs, from which he died. The only question was whether he was engaged in interstate commerce at the time of the accident. The State Industrial Commission held that he was not. It appeared that the road in question was a short line, consisting of about 23 miles of single-track road running from Rhinecliff, on the New York Central Railroad, to Silvernails, and from Silvernails to Boston Corners, 12 miles further, where there is a junction point on the Central New England. While some freight was shipped out of the state, the witness could not state of any train as a whole going out of the state during the six months prior to the accident. See, also, 172 App. Div. 916, 156 N. Y. Supp. 1141.

Edward R. Brumley and John M. Gibbons, both of New York City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, GUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

PER CURIAM. Motion for reargument granted.

On Reargument.

CRANE, J. When this case was here before, we sent it back to the commission to determine whether or not Plass, the deceased, was engaged in interstate commerce. 221 N. Y. 472, 117 N. E. 952. This question of fact had not been determined. Upon a rehearing it was found by the State Industrial Commission that he was not engaged in interstate commerce at the time he received the injury resulting in his death.

The award to the widow was affirmed by the Appellate Division and by this court. A reargument has been had, upon the assertion that the decision of New York Central Railroad Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. — (decided March 3, 1919), requires us to reverse our former decision.

[1] The powers of this court are limited by the Constitution of the state to a review of questions of law, except where the judgment is of death. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to support a finding of fact or a verdict not directed by the court shall be reviewed by the Court of Appeals. Const. art. 6, § 9.

As the Appellate Division decision was not unanimous in affirming this award, we are permitted to review its determination to the

extent only of ascertaining whether there be any evidence or reasonable inferences deduced from the testimony upon which to base it.

[2] Plass was engaged on the 8th day of August, 1914, as a section laborer in mowing grass upon the right of way of the Central New England Railway in the town of Red Hook, Dutchess county, N. Y. He contracted ivy poisoning, resulting in his death August 29, 1914.

The road was a short line of about 35 miles of single track, running from Rhinecliff, on the New York Central, to Boston Corners, where there is a connection with the Central New England Railroad. At times cars used for interstate shipment passed over this branch.

Section 82 of the Railroad Law (Consol. Laws, c. 49) reads as follows:

"Every railroad corporation doing business within this state, shall cause all Canada thistles, white and yellow daisies and other noxious weeds growing on any lands owned or occupied by it, to be cut down twice in each and every year, once between the fifteenth day of June and the twenty-fifth day of June, and once between the fifteenth day of August and the twenty-fifth day of August. If any such corporation shall neglect to cause the same to be so cut down, any person may cut the same, between the twenty-fifth day of June and the fifth day of July inclusive, and between the twenty-fifth day of August and the fifth day of September inclusive in each year, at the expense of the corporation on whose lands the same shall be so cut, at the rate of three dollars per day for the time occupied in cutting."

In compliance with this law the railroad once a year, perhaps twice, cut the weeds upon its right of way.

It was while doing this work that Plass was poisoned. For five feet each side of the tracks the roadbed was kept clean of weeds by shovels, so that it was between the fence alongside the right of way and this five feet that Plass was working.

Cuneen, the assistant superintendent, said:

"The nature and purpose of the work is to cut the weeds and grass along the right of way

in order to prevent fires to bridges and trestles and spreading to adjacent property. * * * To prevent the grass and weeds getting on the rails and stalling the trains."

There was no bridge or trestle within a mile of this place; in fact, there is no evidence to show that there is any bridge or trestle on the 35 miles of road, or, if so, what it is made of. Crilley, the "Rhinecliff branch" supervisor, testified that Plass "was mowing the right of way, cutting grass and bushes." It is fair to assume that the right of way referred to was the space from the rail to the fence. It is not likely he would mow between the rails.

The triers of fact were not obliged to believe that weeds growing here could or would stall trains. These witnesses for the railroad company, in view of all the circumstances, could reasonably be charged with some exaggeration. Whether or not the weeds on the right of way were cut solely to comply with the Railroad Law and prevent fire to adjoining property or to protect bridges and trains was a question of fact for the Industrial Commission, and we think there was some evidence or at least reasonable inferences to be drawn from the evidence to sustain its conclusion.

If this be so, we cannot pass upon the weight of evidence and say whether, in our opinion, this question of fact were rightly decided. In order to present the question we have taken the evidence most favorable to the respondent, which the commission might have believed.

The order appealed from should be affirmed, without costs.

HISCOCK, C. J., and CHASE, CUDDEBACK, HOGAN, and McLAUGHLIN, JJ., concur in opinion of CRANE, J.

COLLIN, J., dissents on authority of N. Y. C. & H. R. R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. —, decided March 8, 1919.

Order affirmed, etc.

MEMORANDUM DECISIONS

ADDER MACH. CO., Respondent, v. GERMAN FIRE INS. CO. OF PEORIA, ILL., Appellant. (Court of Appeals of New York. March 18, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (176 App. Div. 908, 162 N. Y. Supp. 1109), entered January 30, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover the amount of unearned premium on a canceled policy of fire insurance issued by the defendant insurance company to the plaintiff. Defendant contended that there was no proof that the policy had been surrendered or offered for surrender to the company. See, also, 222 N. Y. 520, 118 N. E. 1050. Arthur C. Mandel and S. J. Rosenblum, both of New York City, for appellant. Herbert M. Simon, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

ARMOUR v. MINOR et al. (Court of Appeals of New York. March 18, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (186 App. Div. 883, 172 N. Y. Supp. 878), entered November 1, 1918, which affirmed an order of Special Term denying a motion by plaintiff for an order overruling a demurrer to the complaint and for judgment in his favor on the pleadings and granting a cross motion by defendants, respondents, for an order sustaining their demurrer to the complaint and directing judgment dismissing the complaint. The action was in equity to obtain a construction of the will of Ella J. O. Armour, deceased. The court at Special Term held that "it is apparent from a reading of the will that the question between the parties merely relates to the administration of the estate. The will is clear and the rights of the parties easily ascertainable. I am therefore of the opinion there is no reason for this court entertaining this action; the questions involved can be passed upon by the probate court having jurisdiction." William H. Hamilton and Norman C. Conklin, both of New York City, for appellant. Thereon G. Strong and Charles Green Smith, both of New York City, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

In re BACON'S ESTATE. (Court of Appeals of New York. March 11, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (174 N. Y. Supp. 894), entered January 15, 1919, which modified and affirmed as

modified an order of the Orleans County Surrogate's Court refusing to assess a transfer tax upon certain property formerly belonging to Earl H. Bacon, deceased, but transferred by him before his death. The appraiser's report and the pro forma order confirming the same held that certain assignments of mortgages, gifts of certificates of deposit, certain deeds and other gifts were taxable as made in contemplation of death and intended to take effect in possession or enjoyment at or after the death of the decedent. The final order of the surrogate reversed the pro forma order in so far as it made the property transferred by the decedent in his lifetime liable to taxation and assessed a tax thereon and also held that the decedent did not die seized or possessed of any property mentioned in the appraiser's report and that none of said property, or any part thereof, was subject to transfer taxation. The Appellate Division modified the order appealed from by imposing a tax upon the transfer of a farm, in the deed of which the decedent had reserved a life use, but affirmed the order of the surrogate in all other particulars, holding that the balance of the transfers made by the decedent were not liable for a transfer tax. Charles G. Signor, of Albion, for appellant. Gerald B. Fuhner, of Albion, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

In re BARBOUR'S ESTATE. (Court of Appeals of New York. April 29, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (185 App. Div. 445, 173 N. Y. Supp. 276), entered December 13, 1918, which reversed an order of the New York County Surrogate's Court directing assessment of a transfer tax upon the estate of William Barbour, deceased, as upon the estate of a resident. The Appellate Division directed the estate to be assessed as that of a nonresident. The question was whether the transfer of the estate of the decedent was taxable under the provisions of the Transfer Tax Act (Consol. Laws, c. 60, §§ 220-245) as amended (Laws 1916, c. 551), he having dwelt or lodged in this state during the greater part of a period of 12 consecutive months in the 24 months next preceding his death, but being during said period and at the time of his death in fact a domiciled resident of the state of New Jersey. John B. Gleason and Lafayette B. Gleason, both of New York City, for appellant. John H. Corwin, Walter Moffat, and James O'Malley, all of New York City, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

BARKER, Respondent, v. FRANK G. SHATTUCK CO., Appellant. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (180 App. Div. 891, 166 N. Y. Supp. 1086), entered November 3, 1917, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. While leaving defendant's place of business plaintiff stepped into an open elevator shaft in the sidewalk and, as alleged, received the injuries complained of. Defendant contended that no negligence on its part was proved; that the injuries complained of were not connected with the accident by the testimony and that the verdict was not supported by the evidence. Walter L. Glenney and Bertrand L. Pettigrew, both of New York City, for appellant. Bernard Gordon, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

BEBELL et al. v. EERLICH et al. (Court of Appeals of New York. April 8, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (176 App. Div. 884, 161 N. Y. Supp. 1117), entered April 4, 1917, reversing a judgment in favor of defendants entered upon the report of a referee dismissing the complaint as to the plaintiff Bebell and granting a new trial. The action was brought by the plaintiffs to foreclose a mortgage upon certain real property situated in Queens and Nassau counties. Emeline Roffe, the appellant, holder of a subsequent mortgage on said premises, and the trustee in bankruptcy of the owner of the equity of redemption were the only defendants who answered. Each answer set up an affirmative defense of usury. At the close of the trial the defendant Roffe amended her answer by adding the defense of payment. The trustee in bankruptcy defaulted in appearance on the trial and no testimony was offered by him or on his behalf to sustain the allegations of his answer. The referee dismissed the complaint upon the merits as to the plaintiff Bebell, holding that the mortgage in so far as it was held by him was void. The mortgage in so far as it was held by the plaintiff Hodges was adjudged valid and judgment of foreclosure was entered accordingly. Bebell appealed to the Appellate Division from so much of said judgment as declared his interest in said mortgage void, and the Appellate Division reversed the judgment of the trial court, so far as appealed from, and granted a new trial on the grounds that the finding of usury and of payment were against the weight of evidence, that the defendant Roffe was incompetent to make the defense of usury, and that in any event, upon the evidence, plaintiff Bebell was entitled to a lien for the payments made by him of taxes and interest upon a prior mortgage. Mortimer Brenner, of New York City, Jacob Brenner, of Brooklyn, and Phineas

Lewinson, of New York City, for appellant. George A. Nagle, of Jamaica, for respondents.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

HISCOCK, C. J., and CHASE, COLLIN, HOGAN, and CRANE, JJ., concur. CUDDEBACK, J., not voting. McLAUGHLIN, J., not sitting.

BERGEN, Respondent, v. MORTON AMUSEMENT CO., Inc., Appellant, et al. (Court of Appeals of New York. May 20, 1919.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (178 App. Div. 400, 165 N. Y. Supp. 348), entered May 7, 1917, unanimously affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Defendant, preparatory to building, had caused an excavation to be made on its premises. Plaintiff, an occupant of adjoining premises, was walking upon a cement walk which led from the front to the rear thereof, and near the excavation on appellant's lot, when the earth on which the walk rested fell into the excavation, causing the walk to drop and causing her to fall into the excavation. Her recovery of damages was upon the theory that the bank of the excavation should have been supported by sheet piling, so as to prevent the earth from falling. Elijah W. Holt, of Buffalo, for appellant. Carl Sherman, of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

BERTOLINO, Respondent, v. LEHIGH VALLEY COAL CO., Appellant. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (180 App. Div. 925, 167 N. Y. Supp. 1088), entered November 24, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought under the anthracite mining laws of the state of Pennsylvania and also under the Employers' Liability Act of that state to recover damages for personal injuries claimed to have been sustained by the plaintiff, an employé, through the negligence of the defendant in a coal mine of the defendant known as the Westmoreland Colliery at Wyoming, in the state of Pennsylvania. The complaint alleged that while the plaintiff was engaged in blasting coal, explosive gases which had accumulated without his knowledge suddenly ignited and exploded, whereupon a charge of gunpowder or dynamite which plaintiff was loading and preparing was exploded and discharged, as a result of which explosion and conflagration of gases the plaintiff was injured. The answer was in effect a general denial and in addition there were set forth four separate defenses, one of contributory negligence in the ordinary form, one of a general release and

the other two based upon certain provisions of the anthracite mining laws of the state of Pennsylvania. Allan McCulloh and Edward W. Walker, both of New York City, for appellant. William S. Evans and Edward A. Kenney, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

BLANC, Respondent, v. NEW YORK CENT. R. CO., Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (172 N. Y. Supp. 880), entered November 19, 1918, affirming an award of the state industrial commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). The award included an allowance for facial disfigurement as permitted by subdivision 3 of section 15 of said statute. Defendant contended that no notice of injury was given to the employer; that the award for disfigurement was not for loss of earning power, but by way of damages, and, therefore, violative of the due process clause of the Fourteenth Amendment to the federal Constitution, and that such an award, being for damages rather than for loss of earning power, could be made only by a jury, under section 2 of article 1 of the Constitution of the state of New York. Robert E. Whalen, of Albany, for appellant. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs, on authority of *Matter of Sweeting v. American Knife Co.*, 226 N. Y. 199, 123 N. E. 82.

HISCOCK, C. J., and CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur. CHASE and HOGAN, JJ., vote to remit to Industrial Commission for further hearing.

In re BLANKEMEYER'S WILL. (Court of Appeals of New York. April 29, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (184 App. Div. 957, 171 N. Y. Supp. 1079), entered June 21, 1918, which unanimously affirmed a decree of the Queens County Surrogate's Court admitting to probate and construing the will of Sophie K. Blankemeyer, deceased. The testatrix and one Gustav Blankemeyer made wills by which each devised and bequeathed to the other all of their property. Gustav Blankemeyer predeceased the testatrix. His next of kin claimed that they succeeded to his rights under the will of the testatrix. The surrogate held that by his prior death the legacy to him, contained in the will of the testatrix, lapsed. Abner C. Surpless, of Brooklyn, for appellants. Francis B. Wood, of New York City, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

In re BLANKEMEYER'S WILL. (Court of Appeals of New York. May 27, 1919.)

PER CURIAM. Motion to amend remittitur denied, without costs. See 226 N. Y. —, 123 N. E. 856.

BLOOM, Respondent, v. LEVISON et al., Appellants. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment entered June 23, 1917, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (179 App. Div. 885, 165 N. Y. Supp. 1077), reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term and directing judgment in favor of plaintiff. The action was brought in equity to declare a promissory note, executed by the plaintiff, usurious and void, and to compel defendants to surrender and deliver up to the plaintiff his stocks and bonds pledged with them as collateral security for the payment of said note. The complaint declared in substance that on the 13th day of December, 1915, plaintiff was the owner of certain Russian, Hungarian and Chilean bonds and certain stock. On the 9th day of December, 1915, plaintiff applied to defendants for a loan of \$1,000, and on the 13th day of December, 1915, a corrupt and usurious agreement was entered into whereby the defendants undertook to loan and advance to the plaintiff the sum of \$800, reserving therefrom the sum of \$75 over and above six per cent. per annum on \$800 as a usurious bonus, and in pursuance of the contract defendants actually advanced to plaintiff the sum of \$725 and no more, and took the plaintiff's promissory note, wherein he promised to pay to the defendants or their order \$800, with interest at 6 per cent., in various installments, together with the stocks and bonds aforesaid as collateral security. The Appellate Division held that the note and the assignment of the securities as collateral thereto were null and void; that defendants by selling the securities wrongfully converted the same and that plaintiff was entitled to recover the proceeds with interest from the date of sale. Irving L. Ernst and T. B. Chancellor, both of New York City, for appellants. Meyer Kraushaar and Emanuel Celler, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

BOFFE et al., Appellants, v. CONSOLIDATED TELEGRAPH & ELECTRICAL SUBWAY CO., Respondent. (Court of Appeals of New York. May 2, 1919.) Appeal from a judgment entered February 19, 1916, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (171 App. Div. 392, 157 N. Y. Supp. 318), reversing a judgment in favor of plaintiffs entered upon a verdict and directing a dismissal of the complaint in an action to recover for the death of plaintiffs' intestate alleged to have been occasioned through the negligence of defendant. The Appellate Division directed a

dismissal of the complaint on the ground that at the time of the commencement of the action letters of administration had not been issued to the plaintiffs. Rosario Maggio, of New York City, for appellants. Thomas H. Beardsley and Charles I. Taylor, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

BOWDEN, Appellant, v. LEHIGH VALLEY R. CO., Respondent. (Court of Appeals of New York. April 29, 1919.) Appeal from a judgment entered May 18, 1917, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (178 App. Div. 413, 165 N. Y. Supp. 454), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. The action was brought to recover for personal injuries suffered by the plaintiff in a collision between a motorcycle on which he was riding, and a train owned by the Lehigh Valley Railroad Company, at the highway crossing at grade over the tracks of the Lehigh Valley Railroad Company at Mendon, N. Y. The complaint alleged that the accident was caused by the negligence of the defendant in not giving adequate warning of the approach of the train and that the plaintiff was himself free from contributory negligence. The answer denied all of the allegations of negligence and freedom from contributory negligence. The only questions upon the trial were whether the defendant gave adequate warning of the approach of the train, and whether the plaintiff himself was free from negligence contributing to the accident. The Appellate Division held that no negligence of the railroad company was established, and that plaintiff failed to prove the absence of negligence upon his part, and that he was not entitled to have that question submitted to the jury. William MacFarlane, of Rochester, for appellant. Clarence P. Moser, of Rochester, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

BOWDEN v. OWEN et al. (Court of Appeals of New York. April 15, 1919.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (173 N. Y. Supp. 901), entered January 9, 1919, which affirmed an order of Special Term directing distribution of the trust fund herein. The motion was made upon the ground that the appeal was frivolous and taken solely for purpose of delay. George H. Stenacher, of Saratoga Springs, for the motion. Robert W. Fisher, of Mechanicville, opposed.

PER CURIAM. Motion denied, with \$10 costs.

BRAUER, Respondent, v. LAWRENCE, Appellant. (Court of Appeals of New York. March 21, 1919.) Motion to dismiss an appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (185 App. Div. 932, 172 N. Y. Supp. 881), entered October 28, 1918, unanimously affirming a judgment in favor of plaintiff entered upon a verdict. The motion was made upon the ground that neither the notice of appeal nor the undertaking required to perfect the appeal were served or filed within 80 days after permission to appeal had been obtained, as required by section 1310 of the Code of Civil Procedure. William K. Hartpence, of New York City, for the motion. Benjamin R. Buffett, of New York City, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

BROOKLYN STRUCTURAL STEEL CORPORATION, Appellant, v. LEVY DAIRY CO. et al., Respondents. (Court of Appeals of New York. May 2, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 885, 163 N. Y. Supp. 1111), entered March 13, 1917, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien. On the 13th of November, 1913, the defendant Levy Dairy Company entered into an agreement with the defendant Rutan & Cooper, Incorporated, whereby that defendant agreed to provide the work and materials necessary and proper towards the erection of a certain building on or before April 15, 1914. By its terms time was declared to be of the essence of the contract and the sum of \$50 per day fixed as liquidated damages in case of delay in completion. The building was not finished until five months after the time stipulated in the contract and thereafter it was agreed between the contractor and the dairy company that the latter should retain \$4,500 of the contract price as its damages for delay. The plaintiff, a subcontractor, takes the position that such retention was not the equivalent of a payment and that, therefore, this amount is still due in the hands of the Levy Dairy Company and subject to its lien. George H. Taylor, Jr., of New York City, for appellant. Moses Feltenstein, of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

BURKHARDT, Appellant, v. ACKER, MERRALL & CONDIT CO. et al., Respondents. (Court of Appeals of New York. March 4, 1919.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (178 App. Div. 913, 164 N. Y. Supp. 1088), entered August 23, 1917, unanimously affirming a judgment in favor of plaintiff, entered upon

a verdict, as to the defendant Acker, Merrall & Condit Company, and reversing the said judgment and dismissing the complaint as to the other defendant. The appeal was taken from so much of the judgment as reversed the judgment against the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company and dismissed the complaint as to it. The motion was made by defendant Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company upon the ground that the plaintiff has been paid the full amount of his judgment, and therefore had no further interest in the controversy. William R. P. Malony, of New York City, for the motion. Walter G. Evans, of New York City, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

BUSE, Appellant, v. NATIONAL BEN FRANKLIN FIRE INS. CO. OF PITTSBURGH, PA., Respondent.

SAME, Appellant, v. NORTHWESTERN NAT. INS. CO. OF MILWAUKEE, WIS., Respondent.

SAME, Appellant, v. MILLERS' NAT. INS. CO. OF CHICAGO, ILL., Respondent. (Court of Appeals of New York. April 8, 1919.) Appeal, in each of the above-entitled actions, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (177 App. Div. 948, 164 N. Y. Supp. 1088), entered March 21, 1917, affirming a judgment in favor of plaintiff for a part only of the relief demanded in the complaint entered upon a decision of the court at a Trial Term without a jury. Each action was to recover upon a blanket policy of fire insurance covering six parcels of property. A fire occurred by which four of the parcels were damaged. Plaintiff also held another policy of insurance partially covering four of the parcels. The question at issue was as to the apportionment of the loss and as to the amount for which each company was liable. Frank Gibbons, of Buffalo, for appellant. Vernon Cole, of Buffalo, for respondents.

PER CURIAM. Judgment in each case affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

CAFFERTY, Respondent, v. SOUTHERN TIER PUB. CO., Appellant. (Court of Appeals of New York. April 15, 1919.)

PER CURIAM. Motion to amend remittitur. See 226 N. Y. 87, 123 N. E. 76. Motion granted and remittitur amended, so as to read as follows: "Judgments reversed, and judgment ordered overruling defendant's demurrer, with costs."

In re CALLAHAN'S ESTATE. (Court of Appeals of New York. March 11, 1919.)

PER CURIAM. Motion for reargument denied, with \$10 costs and necessary printing

disbursements. See 220 N. Y. 774, 116 N. E. 1038.

CARRIER v. CARRIER et al. (Court of Appeals of New York. June 6, 1919.)

PER CURIAM. Motion to amend remittitur denied, without costs. Motion for reargument denied, without costs. See 226 N. Y. 114, 123 N. E. 135.

CARVILL, Appellant, v. MIRROR FILMS, INCORPORATED, Respondent. (Court of Appeals of New York. May 20, 1919.) Appeal, by permission, from a judgment entered August 30, 1917, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (178 App. Div. 644, 165 N. Y. Supp. 676), which reversed a determination of the Appellate Term reversing a judgment of the Municipal Court of the city of New York in favor of defendant and directed reinstatement of said Municipal Court judgment. Defendant employed plaintiff for one year commencing January first. He worked for three weeks and was discharged. Thereafter he assigned that part of his damages accruing up to March 6th, reserving to himself the balance. The assignee sued and recovered the part of the damages assigned. Plaintiff brought this action to recover damages for the remainder of the term. The Appellate Division held that the first action having been brought in the Municipal Court which had no equitable jurisdiction, the present action was barred by the judgment therein. Paul N. Turner, of New York City, for appellant.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CHRISTGAN, Respondent, v. STANDARD FIRE INS. CO. OF NEW JERSEY, Appellant. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (178 App. Div. 948, 165 N. Y. Supp. 1080), entered May 9, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. The action was to recover upon a policy of fire insurance. The defense was that the property was fraudulently overvalued and failure to comply with the provisions of the policy requiring proofs of loss to be served within 60 days. Plaintiff contended that defendant had waived timely service of proofs of loss. Vernon Cole, of Buffalo, for appellant. Elijah W. Holt and Charles B. Moulthrop, both of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

CIARLA, Respondent, v. SOLVAY PROCESS CO., Appellant. (Court of Appeals of New York. March 11, 1919.) Appeal from an

order of the Appellate Division of the Supreme Court in the Third Judicial Department (184 App. Div. 629, 172 N. Y. Supp. 426), entered November 18, 1918, affirming an award of the state industrial commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). The only question in dispute was whether gifts made by the employer to the employé during the year prior to his accidental death should be considered as wages on which compensation to his dependents should be computed. H. Duane Bruce, of Syracuse, for appellant. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ. concur.

CITY OF NEW YORK, Appellant, v. BROOKLYN, Q. C. & S. R. CO., Respondent. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (179 App. Div. 198, 164 N. Y. Supp. 972), entered May 18, 1917, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term. This action was brought by the city to recover some \$800,000, representing percentages of about \$350,000 gross receipts from the operation of the defendant's railroads within the city of New York during the six years ending September 30, 1907, and penalties thereon amounting to about \$450,000, pursuant to the provisions of section 175 of the Railroad Law (Consol. Laws, c. 49) as enacted May 18, 1892. The first sentence of that section has read since May 18, 1892, as follows: "Every corporation building or operating a railroad or branch or extension thereof, under the provisions of this article, or of chapter 252 of the Laws of 1884, within any city of the state having a population of 1,200,000 or more, shall, for and during the first five years after the commencement of the operation of any portion of its railroad annually, on November 1st, pay into the treasury of the city in which its road is located, to the credit of the sinking fund thereof, three per cent. of its gross receipts for and during the year ending September 30th next preceding; and after the expiration of such five years, make a like annual payment into the treasury of the city to the credit of the same fund, of five per cent. of its gross receipts." Plaintiff claimed that assuming that respondent was not subject to this charge when it was incorporated in 1893 or for the period of 17 years thereafter, during which the population of Brooklyn was less than 1,200,000, it became subject to the charge automatically when the population reached that figure, and, similarly, even if this contention be unsound, respondent became liable to this charge when it extended its operations and entered the borough of Manhattan, for then it was operating a railroad in a city whose population exceeded 1,200,000. William P. Burr, Corp. Counsel of New York City (Terence Farley and William E. C. Mayer, both of New York City, of counsel), for appellant.

Charles A. Collin, John L. Wells, and Thomas L. Hughes, all of New York City, and Charles L. Woody and George D. Yecmans, both of Brooklyn, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur. COLLIN, J., not voting.

CITY OF NEW YORK, Respondent, v. JAMAICA WATER SUPPLY CO., Appellant. (Court of Appeals of New York. March 18, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (181 App. Div. 49, 167 N. Y. Supp. 763), entered December 7, 1917, which reversed an order of Special Term denying a motion for a peremptory writ of mandamus to compel defendant to install at its own expense an extension of its distribution system in Phraner avenue, borough of Queens, and granted said motion. The commission of water supply, gas, and electricity of the city of New York had theretofore made and served a written order directing the defendant to make such installation forthwith, but the direction had been ignored. The Appellate Division held that it was the duty of the defendant to supply the inhabitants of the designated locality with water and that it was within the power of the commissioner to make the order referred to, and therefore that a peremptory writ of mandamus should issue. George H. Francoeur, of New York City, for appellant. William P. Burr, Corp. Counsel, of New York City (Terence Farley and William E. C. Mayer, both of New York City, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

OLARK, Respondent, v. FLEISCHMANN et al., Appellants. (Court of Appeals of New York. March 18, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (185 App. Div. 944, 172 N. Y. Supp. 884), entered October 9, 1918, which affirmed an order of Special Term denying a motion by defendants for judgment on the pleadings. The action was based on a contract between husband and wife. It is claimed that this contract was void and against public policy because made for the purpose of stimulating or procuring a divorce and contrary to the spirit of section 21 of the Domestic Relations Law (Consol. Laws, c. 14) which provides that a husband and wife cannot contract to alter or dissolve a marriage. The following questions were certified: "(1) Is the agreement set forth in paragraphs II and IV of the first and second alleged causes of action of the amended complaint and attached to said amended complaint as Exhibit A, valid or enforceable? (2) Does the first alleged cause of action set forth in the amended complaint herein state facts sufficient to constitute a cause of action? (3) Does the second alleged cause of action set forth in the amended complaint herein state facts sufficient to constitute a cause of

action?" Gustav Lange, Jr., of New York City, for appellants. Arthur E. Sutherland, of Rochester, and Frank S. Coburn, of Auburn, for respondent.

PER CURIAM. Order affirmed, with costs; first question certified not answered; second and third questions answered in the affirmative.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

CLARK, Respondent, v. LESTER, Appellant. (Court of Appeals of New York. March 18, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (185 App. Div. 944, 172 N. Y. Supp. 884), entered October 9, 1918, which affirmed an order of Special Term denying a motion by defendants for judgment on the pleadings. The action was based on a contract between husband and wife. It is claimed that this contract was void and against public policy because made for the purpose of stimulating or procuring a divorce and contrary to the spirit of section 21 of the Domestic Relations Law (Consol. Laws, c. 14) which provides that a husband and wife cannot contract to alter or dissolve a marriage. The following questions were certified: "(1) Is the agreement set forth in paragraph I of the amended complaint valid or enforceable? (2) Does the amended complaint herein state facts sufficient to constitute a cause of action?" Gustav Lange, Jr., of New York City, for appellants. Arthur E. Sutherland, of Rochester, and Frank S. Coburn, of Auburn, for respondent.

PER CURIAM. Order affirmed, with costs; first question certified not answered; second question certified answered in the affirmative.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

In re COGAN'S WILL. (Court of Appeals of New York. June 3, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (184 App. Div. 198, 171 N. Y. Supp. 643), entered July 11, 1918, which reversed a decree of the Bronx County Surrogate's Court admitting to probate a paper propounded as the last will and testament of John H. Cogan, deceased. The alleged will consisted of three sheets of paper, two in the handwriting of the testator, dated November 1, 1915, and signed by him, but without witnesses, and the third as follows: "4/9/17. To Whom It may Concern: This is to certify that Mr. John H. Cogan, in sound mind, identified his cousin Mary Cullen as the one to whom he bequeathed his estate as specified in his last will dated Nov. 1st, 1915. Witnesses: Philip R. Zinn, M. D. Helen Hannigan." The Appellate Division held that the alleged will was not properly executed, and denied probate. Leo J. Hickey and Peter A. McCabe, both of Brooklyn, for appellant. Robert A. B. Dayton, of New York City, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

COLVIN, Appellant, v. POST MORTGAGE & LAND CO., Respondent. (Court of Appeals of New York. March 21, 1919.)

PER CURIAM. Motion to amend remittitur denied, with \$10 costs and necessary printing disbursements. See 225 N. Y. 510, 122 N. E. 454.

In re COOK'S WILL. (Court of Appeals of New York. March 11, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (185 App. Div. 914, 171 N. Y. Supp. 1025), entered September 23, 1918, which modified, and affirmed as modified, a decree of the Saratoga County Surrogate's Court refusing probate to a paper purporting to be the last will and testament of Amelia J. Cook, deceased, on the ground that at the time of the execution thereof the deceased was not of sound mind and did not understand the contents of said paper, and that proponent had not sustained the burden of proving that she was free from undue influence or restraint at the time of its execution. A. F. Walsh, of Saratoga Springs, for appellant. Benjamin P. Wheat, Edgar T. Brackett, and William E. Bennett, all of Saratoga Springs, for respondents.

PER CURIAM. Order affirmed, with costs payable out of the estate.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

CRAVER, Appellant, v. CRAVER, Respondent. (Court of Appeals of New York. April 22, 1919.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (186 App. Div. 847, 175 N. Y. Supp. 26), entered March 25, 1919, which reversed an order of Special Term granting a motion for alimony pendente lite and denied said motion. The motion was made upon the grounds that the order appealed from was not a final order and that permission to appeal had not been obtained. Chester G. Wager, of Troy, for the motion. Borden H. Mills, of Albany, opposed.

PER CURIAM. Motion granted, and appeal dismissed, without costs.

ORONIN, Appellant, v. O'LEARY, Respondent. (Court of Appeals of New York. April 15, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (178 App. Div. 909, 164 N. Y. Supp. 1089), entered April 10, 1917, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term. This action was brought to determine the conflicting claims of plaintiff and defendant to moneys paid into court by the supreme council of the Catholic Mutual Benefit Association upon the death of John O'Connor, who held a beneficiary certificate in the association for \$2,000. The trial court held that by virtue of a contract between John O'Connor, the member, and the defendant, Katherine O'Leary, his beneficiary, made in August, 1911, a vested right passed to the defendant in said beneficiary certificate to the extent of \$1,000, and that the

designation of Katherine O'Leary as beneficiary in that amount could not be changed without her consent. Judgment was entered directing payment to the defendant of \$1,000 of the beneficiary moneys paid into court, and the balance thereof to the plaintiff. Irving W. Cole and Hamilton Ward, both of Buffalo, for appellant. Thomas O. Burke and Lawrence J. Collins, both of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, CRANE, and ANDREWS, JJ., concur. POUND, J., not voting.

CROSBY, Appellant, v. BOARD OF EDUCATION OF CITY OF NEW YORK, Respondent. (Court of Appeals of New York. June 6, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (187 App. Div. 205, 175 N. Y. Supp. 373), entered April 5, 1919, which reversed an order of Special Term granting a motion for an alternative writ of mandamus to compel the defendant to reinstate the relator in the position of janitor engineer of Evander Childs High School in the city of New York. John E. O'Brien and Ernest H. Wells, both of New York City, for appellant. William P. Burr, Corp. Counsel, of New York City (Terence Farley and William E. C. Mayer, both of New York City, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

CROZIER, Appellant, v. RICHARDSON et al., Respondents. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (178 App. Div. 927, 165 N. Y. Supp. 1082), entered May 18, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. This is a taxpayer's action under section 51 of the General Municipal Law (Consol. Laws, c. 24), to recover for the town of Islip, in Suffolk county, the amount of two audited bills presented by the defendants Downs and Carey for necessary expenses and disbursements in the discharge of their duties as assessors of the town of Islip, in preparing the assessment rolls of said town for the years 1911 and 1912. The Appellate Division held that "in an action to enforce restitution and recovery, at the suit of a taxpayer for collusive audit or payment, collusion is the gravamen of the action. Collusion not being proved it is unnecessary in this action to decide the legality of the claims." Selah B. Strong, of Brooklyn, for appellant. Rowland Miles, of Northport, and Ralph C. Greene, of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

In re CURTIS et al. (Court of Appeals of New York. April 22, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (185 App. Div. 948, 172 N. Y. Supp. 886), entered October 12, 1918, which unanimously affirmed a decree of the Chautauqua County Surrogate's Court construing a clause of the will of Fred M. Curtis, deceased, which follows: "I hereby give, devise and bequeath unto my beloved wife, Clara Helen Curtis, the use and benefit of fifty thousand dollars, that is, the first fifty thousand dollars derived out of and from my estate. I hereby direct that said fifty thousand dollars shall be invested in bonds and mortgages or bonds or mortgages chosen by Cheston A. Price and Frank G. Curtis and the income from such bonds and mortgages or bonds or mortgages shall be turned over to and be given to my said wife as her property absolutely." The following questions were involved: "(1) Under the will of the testator, and in the light of the facts disclosed by the record upon this appeal, is Clara Price Curtis, the widow of testator, entitled to have the income upon the trust fund created by the will for her benefit computed and paid to her from the date of the death of the testator? (2) If not, should such computation and payment be from a year from such death? (3) If not, should such computation and payment be from the time of the execution of the contract for the sale of the corporate stock of the F. M. Curtis Company? (4) If not, should such computation and payment be from the time of the actual investment in bonds and mortgages, pursuant to the direction of the will, and include only income earned upon such investments when actually so made?" The surrogate held that the widow was entitled only to income arising from mortgage loans set aside or specifically made for her benefit. Arthur W. Kettle, of Jamestown, for appellant. Louis L. Thrasher, of Jamestown, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

DANISHEFSKY, Appellant, v. BORDEN'S CONDENSED MILK CO., Respondent. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment entered November 2, 1918, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (175 App. Div. 883, 160 N. Y. Supp. 1128), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff, a child 5½ years old, was playing on the sidewalk near one of defendant's wagons which was alongside the curb. The driver started the horse and plaintiff was caught by the step and dragged down between the wheel and the curb, causing the injuries complained of. The Appellate Division held that upon the evidence no negligence was shown on the part of the defendant's driver. John Brooks Leavitt and Harry M. Peyser, both of New York City,

for appellant. George O. Redington and Walter Engels, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, and ANDREWS, JJ., concur.
POUND, J., not voting. McLAUGHLIN, J., not sitting.

DELANO, Respondent, v. COLUMBIA MACHINE WORKS & MALLEABLE IRON CO., Appellant. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (179 App. Div. 153, 168 N. Y. Supp. 103), entered July 16, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the alleged wrongful discharge of plaintiff from employment by defendant prior to the expiration of the contract of employment. The answer by way of defense alleged that the contract of employment was for one year "provided your services are satisfactory to us," that the services of the plaintiff were unsatisfactory, and that consequently the employment was properly terminated. The Appellate Division held that on the evidence a question of fact was presented as to whether the dissatisfaction was genuine or feigned. **J. Sheldon Frost, of Albany, and Wallace R. Foster, of New York City, for appellant. David Vorhaus and Louis J. Vorhaus, both of New York City, for respondent.**

PER CURIAM. Judgment affirmed, with costs, on opinion of Shearn, J., below.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, and CRANE, JJ., concur. McLAUGHLIN, J., not sitting.

DEMAREST, Respondent, v. RICE et al., Appellants. (Court of Appeals of New York. June 6, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 883, 168 N. Y. Supp. 1113), entered February 13, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. The action was in ejectment. Plaintiff claimed to be the owner of the premises in question, as sole heir at law of his deceased father. The plaintiff was born December 26, 1890. His father died on August 22, 1894, leaving a last will and testament, dated August 29, 1889, by which his entire estate was given to his widow, Lillie Demarest. This will was subsequently admitted to probate. The widow remarried on April 19, 1897. The basis of the plaintiff's claim was that, as the will contained no provision in his favor, it was void as to him and that the decedent's entire estate descended to him by force of the statute, subject alone to the widow's right of dower and her rights in whatever personalty the decedent had left. The defendants Rice acquired the premises in question under a deed containing full covenants and a warranty of title, made by the plaintiff's mother in October, 1910. The plaintiff, who became of age on December 26, 1911, executed on that day a quitclaim deed of the premises to the defendants Rice, the purchasers from plaintiff's mother. Plaintiff introduced evidence tending to show that the deed was procured from him by deceit and without considera-

tion. **Philip S. Dean, of New York City, for appellants. Louis O. Van Doren and Herrick McClenbthen, both of New York City, for respondent.**

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

DE WAAL, Appellant, v. JAMISON et al., Respondents. (Court of Appeals of New York. April 29, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (176 App. Div. 756, 163 N. Y. Supp. 1045), entered March 30, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term in an action on contract. The complaint alleged that the plaintiff sold and delivered on August third 10,000 bags of raw sugar to the defendants at 2⁹/₃₂ cents per pound, cost and freight, the market price of the day and that in consideration of this sale and delivery the defendants promised to replace 10,000 bags to the plaintiff at the same price out of sugars to arrive by a steamer to be designated by the defendants. The complaint further alleged a designation of sugars by the defendants on August 11th; and a repudiation of the contract on August 17th, on which day the market price was 5¹/₂ cents per pound, cost and freight. The difference between the two prices for 10,000 bags is \$105,000, for which the plaintiff sued. In the court below it was held to be a contract for the sale of sugars and to be without a sufficient memorandum to satisfy the statute of frauds. **Joseph M. Proskauer and Wilbur L. Ball, both of New York City, for appellant. William N. Dykman, of Brooklyn, for respondents.**

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur. HISCOCK, C. J., absent.

DICKEY, Appellant, v. GORTNER, Respondent. (Court of Appeals of New York. April 15, 1919.)

PER CURIAM. Motion for reargument denied, without costs. See 223 N. Y. 531, 120 N. E. 860. See, also, 223 N. Y. 676, 120 N. E. 861; 123 N. E. 862.

DICKEY, Appellant, v. GORTNER, Respondent. (Court of Appeals of New York. May 27, 1919.)

PER CURIAM. Motion for reargument denied, with \$10 costs and necessary printing disbursements. See 223 N. Y. 531, 120 N. E. 860; 226 N. Y. —, 123 N. E. 862.

DICKEY, Appellant, v. GORTNER, Respondent. (Court of Appeals of New York. June 6, 1919.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 223 N. Y. 531, 120 N. E. 860; 226 N. Y. —, 123 N. E. 862.

DILLON, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (173 App. Div. 969, 159 N. Y. Supp. 1109), entered June 12, 1918, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant in failing to maintain its sidewalk upon the northerly side of East 165th street, near the Grand Boulevard and Concourse, in the borough of the Bronx, in a safe condition. It is alleged that the sidewalk was upon a steep incline, with an irregular and uneven surface, and that on January 22, 1911, plaintiff "stumbled and slipped and fell" by reason of the condition of the sidewalk. Defendant's answer denied the material allegations of the complaint. John T. Fenlon and John V. Judge, both of New York City, for appellant. William P. Burr, Corp. Counsel, of New York City (Terence Farley and Charles J. Nehrbaas, both of New York City, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur

DOCKWEILER, Respondent, v. AMERICAN PIANO CO., Appellant. (Court of Appeals of New York. May 27, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 912, 163 N. Y. Supp. 1115), entered March 13, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries and for injury to property alleged to have been occasioned plaintiff through the negligence of defendant, by reason of a collision between a motorcycle upon which he was riding and a motor truck driven by an employé of the defendant. The only question on appeal was whether the chauffeur, at the time of the accident, was acting within the scope of his employment. Earle W. Webb and John Force Crater, both of New York City, for appellant. Robert P. Levis and Jesse W. Tobey, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, CUDDEBACK, HOGAN, CRANE, and ANDREWS, JJ., concur. COLLIN and McLAUGHLIN, JJ., dissent.

DONOVAN, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. May 20, 1919.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (179 App. Div. 909, 165 N. Y. Supp. 1083), entered July 6, 1917, unanimously affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for alleged breach of contract. Plaintiff entered into a contract with defend-

ant to grade Lyman avenue in the borough of Richmond. He was to be paid 75 cents a cubic yard for excavating and a similar amount for filling. The line of the street crossed a bog or swamp and plaintiff alleged that he was compelled to dump 6,688 cubic yards of filling in order to obtain a solid foundation for the street. He sought in this action to recover the contract price for the amount of filling and for the amount of bog displaced thereby. The answer, besides putting in issue the material allegations of the complaint, plead as affirmative defenses: (1) Payment; (2) the finality and conclusiveness of the final certificate and the effect of the general release; and (3) that the contract, if given the construction sought to be placed upon it by the plaintiff, is ultra vires and void. John C. Wait and Howard G. Wilson, both of New York City, for appellant. William P. Burr, Corp. Counsel, of New York City (Terence Farley, William E. C. Mayer, and John F. Collins, all of New York City, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

DRAUGHT, Respondent, v. AMERICAN PIANO CO., Appellant. (Court of Appeals of New York. May 27, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 912, 163 N. Y. Supp. 1115), entered March 13, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, by reason of a collision between a motorcycle upon which she was riding and a motor truck driven by an employé of the defendant. The only question, on appeal, was whether the chauffeur, at the time of the accident, was acting within the scope of his employment. Earle W. Webb and Joseph Force Crater, both of New York City, for appellant. Robert P. Levis and Jesse W. Tobey, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, CUDDEBACK, HOGAN, CRANE, and ANDREWS, JJ., concur. COLLIN and McLAUGHLIN, JJ., dissent.

DRISCOLL v. HENRY GILLEN & SONS LIGHTERAGE, Inc., et al. (Court of Appeals of New York. March 11, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (173 N. Y. Supp. 825), entered January 29, 1919, affirming an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). The husband of claimant was employed by defendant Gillen & Sons as captain of a lighter. On the morning of December 31, 1917, he started for his boat intending to spend the day and night thereon. He was seen on shore about 6 o'clock in the evening carrying some food and stating he was on his way back to the boat. He was not seen thereafter until May 2, 1918,

when his body was found in the water near where the boat was moored. The State Industrial Commission found that he was drowned December 31, 1917, in the course of his employment. Appellants contended that there was no evidence that Driscoll's death was caused by an accident which arose either out of or in the course of his employment. E. C. Sherwood, William B. Davis, and Amos H. Stephens, all of New York City, for appellants. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CHASE, CUDEBACK, HOGAN, and CRANE, JJ., concur. HISCOCK, C. J., and COLLIN and McLAUGHLIN, JJ., dissent.

ELLOR et al. v. ASSOCIATED HAT MFRS. et al. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 908, 163 N. Y. Supp. 1115), entered April 4, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. The complaint alleged that the Associated Hat Manufacturers and the other defendants other than Milton Dammann, who is an attorney at law, improperly authorized, out of a settlement of certain actions in which Dammann appeared as attorney for the association, a fee of \$28,575 out of the total settlement of \$32,200; that this fee was far in excess of the reasonable value of services of Dammann and that Dammann had agreed that his services and those of the attorneys employed by him should not exceed one-third of the moneys collected. The complaint asked that Dammann return the alleged excess portion of the fee and that the members of the association should be compelled to account for the alleged excessive payment. Arnold Lichtig, of New York City, for appellant. William P. Maloney, Henry A. Stickney, and E. Crosby Kindleberger, all of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs to each of the respondents who appeared by separate counsel and filed separate briefs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

In re ENOS. (Court of Appeals of New York. March 4, 1919.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (171 N. Y. Supp. 1084), entered June 14, 1917, affirming a decree of the Queens County Surrogate's Court settling the accounts of the administrator of the estate of J. Roland Enos, deceased. The motion was made upon the ground that the Appellate Division had unanimously decided that there was evidence sufficient to sustain the findings of fact and that permission to appeal had not been obtained. Joseph H. Kutner and David C. Myers, both of New York City, for the motion. George Gordon Battle, Almuth O. Vandiver,

and Leon N. Futter, all of New York City, opposed.

PER CURIAM. Motion denied, with \$10 costs.

FAHEY et al., Respondents, v. CHARLES P. BOLAND & CO. et al., Appellants. (Court of Appeals of New York. April 22, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (172 N. Y. Supp. 890), entered November 25, 1918, which unanimously affirmed an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). Defendants contended that the claimants, mother, brothers and sisters, were not dependent upon the decedent at the time of the accident. Nelle F. Towner, of Albany, for appellants. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant, v. QUEENS COUNTY TRUST CO., Respondent. (Court of Appeals of New York. June 6, 1919.)

PER CURIAM. Motion for reargument denied, with \$10 costs and necessary printing disbursements. See 226 N. Y. 225, 123 N. E. 370.

FIRST NAT. BANK OF ANN ARBOR, MICH., Respondent, v. FARSON et al., Appellants. (Court of Appeals of New York. June 3, 1919.)

PER CURIAM. Motion for reargument denied, with \$10 costs and necessary printing disbursements. See 226 N. Y. 218, 123 N. E. 490.

FITCH, CORNELL & CO., Appellant, v. ATCHISON, T. & S. F. RY. CO., Respondent. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (170 App. Div. 222, 155 N. Y. Supp. 1079), entered December 10, 1915, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. This action was brought by the plaintiff against the defendant, a railroad corporation, for issuing a bill of lading wherein it was stated that 150 tubs of butter and 250 crates of eggs had been received for shipment to the plaintiff in New York by the defendant, when in fact no such property had been received for shipment. There was a draft drawn on plaintiff with this bill of lading attached and upon receipt of said bill of lading the plaintiff advanced the sum of \$3,000, solely depending upon the genuineness of said bill of lading. The trial court held "that since the passage of the so-called Carmack Amendment the liability of the carrier upon interstate bill of lading, or the validity of any such bill of lading, is governed by the said amendment as interpreted by the Supreme Court of the United States. Ad-

ams Express Co. v. Croninger Co., 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. The bill of lading in this case contained the clause: 'Agents have no authority to issue more than one original bill of lading and only for or to cover goods actually received for transportation.' It appears from the proof here that the goods recited in the bill of lading were not actually received. The rule of apparent scope of authority which obtains in this state does not apply, but the common law as interpreted by the federal court applies. There it is held that the agent has no authority to issue a receipt of this kind unless the goods are actually received. *Missouri Pacific R. R. Co. v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944." *C. E. Thornall*, of New York City, for appellant. *A. S. H. Bristow*, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and **CHASE, HOGAN, CARDOZO, POUND**, and **ANDREWS, JJ.**, concur. **McLAUGHLIN, J.**, not sitting.

FORTY-SECOND ST., M. & ST. N. AVE. RY. CO., Respondent, v. **UNITED STATES WOOD PRESERVING CO.**, Appellant. (Court of Appeals of New York. June 6, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 885, 163 N. Y. Supp. 1116), entered February 21, 1917, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. Defendant entered into a written contract with plaintiff by which it agreed to pave that portion of the roadway of 110th street between Fifth avenue and Lenox avenue in the city of New York, which is commonly known as the railway area, and to maintain the said pavement in repair for five years from the completion and acceptance thereof by the plaintiff. The roadway having become defective within the term specified, plaintiff notified defendant to repair and it having failed to do so made the repairs at its own expense and brought this action to recover the amount thereof. Defendant contended that the contract only guaranteed good materials and workmanship, so that the pavement would withstand in good condition and repair all the traffic which might come upon it during the period of maintenance; and that the defects were not the result of any failure in that respect, but were caused solely by a new, unusual and defective method which the plaintiff had required the defendant to use in laying the original pavement. *William W. Niles*, of New York City, for appellant. *Herbert J. Bickford* and *Joseph H. Choate, Jr.*, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and **COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE**, and **ANDREWS, JJ.**, concur.

GALLAGHER v. ANCIENT ORDER OF HIBERNIANS OF NEW YORK COUNTY et al. (Court of Appeals of New York. May 20,

1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (175 App. Div. 980, 162 N. Y. Supp. 1120), entered December 29, 1916, affirming a judgment in favor of plaintiff and defendants, respondents, entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien. The claim is in quantum meruit for the reasonable value of the work done by plaintiff under a building contract with the Ancient Order of Hibernians. The plaintiff agreed to build a theater for them at a cost of about \$140,000. The contract of the parties provided for payment by installments as the work progressed. Plaintiff agreed to accept notes in part payment for a number of these installments beginning with the second. By a letter, which was dated the same day as the formal contract, and which, upon the findings of the trial court, modified that contract, Mr. Gallagher "at the request of the trustees" wrote to say that, if the society could not meet these notes at maturity, "I will arrange to have them renewed for a period of two or three months." The Ancient Order of Hibernians, before the first of these notes fell due, tendered a renewal note at three months. Plaintiff declined to grant a renewal for three months, but offered to give one for two months only. Such a note the Hibernians refused to give. Some weeks later plaintiff abandoned the work altogether. The trial court held plaintiff justified in so doing upon the theory that the option was his as to how long the period of renewal should be. The question whether the option as to the length of the renewal period lay with plaintiff or with the Order of Hibernians is the vital issue in the case. *Nathan L. Miller*, of Syracuse, and *Walter H. Pollak* and *Saul S. Myers*, both of New York City, for appellants. *William F. Kimber*, of New York City, for respondent *Gallagher*. *J. Power Donnellan*, *J. Archer Hodge*, *Joab H. Banton*, *Walter L. Bunnell*, *J. Charles Weschler*, and *Frank M. Avery*, all of New York City, for other respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and **COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE**, and **ANDREWS, JJ.**, concur.

GALLIN, Appellant, v. **ALLEMANNA FIRE INS. CO. et al.**, Respondents. (Court of Appeals of New York. March 11, 1919.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (184 App. Div. 876, 172 N. Y. Supp. 662), entered November 30, 1918, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. The motion was made upon the ground of failure to serve the required undertaking. *Guy C. Heater*, of New York City, for the motion. *David Goldstein*, of New York City, opposed.

PER CURIAM. Motion granted, unless appellant within 20 days after entering order serves the undertaking in the form required to perfect appeal under section 1326 of the Code of Civil Procedure, and pays to the respondent \$10 costs, in which case, motion denied.

Architectural Iron Works v. City of Brooklyn,
85 N. Y. 652.

GARCONE, Respondent, v. THOMAS & BUCKLEY HOISTING CO., Appellant. (Court of Appeals of New York. May 2, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 885, 163 N. Y. Supp. 1117), entered March 1, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through the negligence of defendant. Defendant was operating a "hoist" in a building under construction in New York City. Plaintiff, an employee of another contractor, was engaged in placing a loaded wheelbarrow on the hoist, when it started upward without warning, catching the plaintiff and crushing him between the platform of the hoist and the ceiling of the first floor of the building, causing the injuries complained of. The defense was contributory negligence. Also that the hoist was started by the defendant's operator upon his receiving the proper signal from one of plaintiff's fellow-servants, James S. Darcy, Charles H. Bailey, and Edward D. Loughman, all of New York City, for appellant. S. F. Peavey, Jr., of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, and CRANE, JJ., concur. **McLAUGHLIN, J.,** not sitting.

GILMORE, Respondent, v. HIRSCHMAN, Appellant, et al. (Court of Appeals of New York. June 3, 1919.) Appeal from so much of an order of the Appellate Division of the Supreme Court in the Second Judicial Department (174 N. Y. Supp. 904), entered February 7, 1919, as directs a resettlement of a prior order of said Appellate Division. Respondent contended that the Court of Appeals had no jurisdiction to entertain the appeal. See, also, 171 App. Div. 594, 157 N. Y. Supp. 727, 176 N. Y. Supp. 787. Jerome E. Malino and A. S. Gilbert, both of New York City, for appellant. John Brooks Leavitt and N. Otis Rockwood, both of New York City, for respondent.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and COLLIN, CUDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

GLEASON v. NORTON et al. (Court of Appeals of New York. May 20, 1919.) Appeal from a final judgment entered December 30, 1916, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (173 App. Div. 1002, 159 N. Y. Supp. 1115), modifying and affirming as modified an interlocutory judgment of Special Term in an action of partition. The action required a construction of the will of Martha Gleason, deceased. She devised to her brother all of her right, title and interest in certain real property and by a residuary clause gave the

remainder of her property both real and personal to a nephew. At the time of making the will she owned an undivided one-fourth part of the property in question. Subsequently she purchased another undivided one-fourth part. The trial court held that her entire interest in the property at the time of her death passed under the devise to her brother. The Appellate Division held that only the part she owned at the time of making her will passed under such devise and the subsequently acquired part passed under the residuary clause to the nephew. A. H. Cowie, of Syracuse, for appellant. Frank T. Miller, of Syracuse, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur. **ANDREWS, J.,** not sitting.

GOELTZ v. KEEPSDRY CONST. CO. et al. (Court of Appeals of New York. April 15, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 882, 163 N. Y. Supp. 1117), entered February 28, 1917, affirming a judgment in favor of plaintiff and defendants, respondents, entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien for work done and materials furnished by plaintiff's assignor in the construction of a public bath in the city of New York under a subcontract from the Keepsdry Construction Company, the general contractor for such work. Joseph M. Proskauer, Carlisle J. Gleason, and Frederick Mellor, all of New York City, for appellants. Joseph Nicchia and George P. Foulk, both of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDEBACK, POUND, CRANE, and ANDREWS, JJ., concur. **CARDOZO, J.,** not voting.

GOELTZ v. KEEPSDRY CONST. CO. et al. (Court of Appeals of New York. May 27, 1919.)

PER CURIAM. Motion by respondent A. Pardi Tile Company to amend remittitur denied, without costs. See 226 N. Y. —, 123 N. E. 866.

GOVERS, Appellant, v. CITY OF NEW ROCHELLE, Respondent. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (177 App. Div. 934, 164 N. Y. Supp. 1093), entered July 16, 1917, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term. In form the action was brought under section 1638 of the Code of Civil Procedure to determine an adverse claim. The real object of the action was to set aside an assessment against the plaintiff's property for a portion of the cost of opening and grading Division street between Main and Hu-

guenet streets, in the city of New Rochelle. Plaintiff attacked the assessment upon the ground that the defendant's council did not include within the area of assessment all the property in the city of New Rochelle which was benefited by the improvement. Michael J. Tierney, of New Rochelle, for appellant. Walter G. C. Otto, Corp. Counsel, of New Rochelle, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

GRAEBER, Appellant, v. SWARTWOUT et al., Respondents. (Court of Appeals of New York. May 27, 1919.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (173 App. Div. 969, 159 N. Y. Supp. 1115), entered June 12, 1918, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term. The motion was made upon the grounds of unreasonable delay in prosecuting the appeal and that the exceptions were frivolous. F. Robert Swartwout, of New York City, for the motion. George H. D. Foster, of New York City, opposed.

PER CURIAM. Motion granted and appeal dismissed, with costs and \$10 costs of motion, unless within 10 days appellant serves three printed copies of case on appeal, in which case motion is denied, without costs.

GREGORY, Respondent, v. MANHATTAN BRIAR PIPE CO., Appellant. (Court of Appeals of New York. March 11, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (174 App. Div. 106, 160 N. Y. Supp. 916), entered October 2, 1918, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action by a landlord against a tenant to recover the expense of making certain alterations, ordered by the public authorities, in the building on the demised premises. It was alleged that by the terms of the lease the tenant had agreed to keep the property in repair and to comply with all orders of the municipal authorities. Lyttleton Fox, Junius Parker, and Ernest Rhea Early, all of New York City, for appellant. James K. Foster, of Brooklyn, and Alfred T. Davison, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

In re GROOT'S ESTATE. (Court of Appeals of New York. March 18, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (173 App. Div. 436, 159 N. Y. Supp. 1008), entered July 17, 1918, which affirmed a decree of the Albany County Surrogate's

Court sustaining the validity of the will of Cathelina E. Groot, deceased, by paragraph "tenth" of which the testatrix gave, devised and bequeathed her residuary estate to a trustee in trust to invest and reinvest the same and from the principal and income "from time to time make such reasonable charitable donations, contributions or gifts, to such persons, corporations, associations or institutions in the town of Guilderland, Albany county, N. Y., as may, in the judgment of my said trustee be in need and worthy thereof, he having been fully advised of my purpose and inclinations in that respect." Michael D. Reilly and William E. Woollard, both of Albany, for appellant. Charles D. Newton, Atty. Gen. (Alex T. Selkirk, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

GUARANTY TRUST CO. OF NEW YORK, Respondent, v. UNITED STATES STEEL CORPORATION, Appellant. (Court of Appeals of New York. June 8, 1919.) Appeal, by permission, from two orders of the Appellate Division of the Supreme Court in the First Judicial Department (174 N. Y. Supp. 904), entered January 31, 1919, which affirmed two orders of Special Term, one granting plaintiff's motion for judgment in its favor upon the pleadings and the other denying defendant's cross-motion and overruling its demurrer to the complaint. The complaint alleged that plaintiff is trustee under the will of David P. Barhydt, deceased; that part of the estate consists of shares of the preferred stock of defendant corporation; that by the will the trustee is given permission to retain such securities but elected to sell them and for that purpose presented to defendant the properly indorsed certificate of stock standing in the plaintiff's name as trustee under the will of David P. Barhydt together with a certified copy of the will, receipts for the payment of transfer taxes and other necessary papers and requested that the transfer be made to the purchaser, which transfer the defendant corporation refused to make on the sole ground that it did not appear conclusively that the plaintiff had the right and power as a matter of law to sell the stock without obtaining authority from the court. The following question was certified: "Does the amended complaint state facts sufficient to constitute a cause of action?" See, also, 176 N. Y. Supp. 402. William Averell Brown and William W. Corlett, both of New York City, for appellant. Lee McCanliss and Edward R. Greene, both of New York City, for respondent.

PER CURIAM. Orders affirmed, with one bill of costs, and question certified answered in the affirmative.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

GUNN, Appellant, v. LACKAWANNA STEEL CO., Respondent. (Court of Appeals of New York. May 2, 1919.) Appeal from a

judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (177 App. Div. 277, 164 N. Y. Supp. 318), entered April 3, 1917, affirming a judgment in favor of defendant entered upon an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a motion for a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. The plaintiff was a blacksmith employed by the defendant in its forge shop connected with its steel manufacturing plant in the city of Lackawanna, in the county of Erie. In the early hours of the morning, while the plaintiff was engaged in the use of a steam hammer and was holding the heated end of a bar of steel between the dies of the hammer by means of tongs clutched to the cold end of the bar, as claimed by him, at a stroke of the hammer the bar and tongs were thrown back, and the handles of the tongs penetrated his right leg just above the knee. In the wound thus caused blood poisoning developed and the leg was amputated above the knee. The complaint alleged that the steam hammer leaked steam; that it leaked water, which ran down and came in contact with the hot metal, and thereby produced clouds of steam; that the dies were not properly set, in that the upper die overlapped the lower die; that the forge shop in the locality of this steam hammer, where the plaintiff was at work, was inadequately lighted; that the defendant was negligent in failing to give plaintiff a safe place in which to work, and to keep the same in safe condition, and in failing to inspect the same from time to time, and to warn and instruct the plaintiff concerning the condition of the dies, and to furnish the plaintiff with a suitable and safe steam hammer. The answer admitted the accident, but denied the alleged negligence of the defendant, and averred that plaintiff was guilty of contributory negligence and assumed the risk of the accident. Irving W. Cole and Hamilton Ward, both of Buffalo, for appellant. Herbert W. Huntington, of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

GUTMAN v. LIVINGSTON et al. (Court of Appeals of New York. March 21, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (173 App. Div. 670, 160 N. Y. Supp. 243), entered November 13, 1916, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage on real property. Plaintiff held the mortgage through various assignments. Defendants, appellants, held subsequent mortgages. They interposed an answer setting up as a defense that the mortgage sought to be foreclosed had been paid and discharged, and alleging fraud and conspiracy. Louis H. Levin, of New York City, for appellants. Reuben

Rodecker and Samuel Levy, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

HAMBURGER, Respondent, v. CORNELL UNIVERSITY, Appellant. (Court of Appeals of New York. April 22, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (184 App. Div. 403, 172 N. Y. Supp. 5), entered September 27, 1918, which reversed an order of Special Term sustaining a demurrer to the complaint and directing a dismissal thereof. The action was to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The complaint alleged that plaintiff was a pupil in the defendant university and while performing an experiment in chemistry required as a part of her course under the direction of defendant's instructors and with chemicals obtained from defendant's employé, an explosion occurred causing the injuries complained of. The Special Term sustained the demurrer on the ground that defendant was administering a government activity or function and was, therefore, absolved from liability for the negligence of its servants and agents. The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?" Oliver L. McCaskill and Mynderse Van Cleef, both of Ithaca, for appellant. Nash Rockwood and Harry P. Pendrick, both of Saratoga Springs, and Charles A. Winter, of New York City, for respondent.

PER CURIAM. Order affirmed, with costs, and question certified answered in the affirmative.

CHASE, COLLIN, CUDDEBACK, HOGAN, CARDOZO, McLAUGHLIN, and ANDREWS, JJ., concur.

In re HART'S WILL. (Court of Appeals of New York. April 22, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (185 App. Div. 940, 172 N. Y. Supp. 896), entered October 25, 1918, which unanimously affirmed a decree of the Westchester County Surrogate's Court admitting to probate the will of Lemuel M. Hart, deceased. Objections were filed to the effect that the alleged will was not the will of decedent, that it was not his free and unconstrained act, that it was not duly executed in conformity with the statute, and that said decedent was not of sound mind and memory or understanding. Clinton T. Taylor, Arthur I. Strang, and Henry P. Griffin, all of White Plains, for appellants. Frederick P. Close, of Tuckahoe, for respondents.

PER CURIAM. Order affirmed, with costs.

CHASE, HOGAN, CARDOZO, POUND, and ANDREWS, JJ., concur. HISCOCK, C. J., and McLAUGHLIN, J., dissent.

In re HELLMAN'S ESTATE. (Court of Appeals of New York. June 3, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (174 N. Y. Supp. 905), entered February 21, 1919, which unanimously affirmed an order of the New York County Surrogate's Court confirming the tax fixed against the appellants for the interest which the deceased had in the good will of the firm of Jacob S. Bernheimer & Brother, of which deceased at the time of his death was a member, and the appellants are the surviving members. A. Stern, of New York City, for appellants. Schuyler C. Carlton and Lafayette B. Gleason, both of New York City, for respondent.

PER CURIAM. Order affirmed, with costs. HISCOCK, C. J., and COLLIN, CUDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

HIGGINS, Appellant, v. CARTER'S INK CO., Respondent. (Court of Appeals of New York. April 29, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (178 App. Div. 889, 164 N. Y. Supp. 1095), entered April 9, 1917, affirming a judgment in favor of defendant entered upon a verdict directed by the court. The action was brought by a landlord against his tenant to recover for breach of a covenant in the lease requiring the defendant "at its own cost * * * during the whole of said term, to comply with all the laws, rules, orders, ordinances, requirements and regulations, ordinary and extraordinary, of the state and city of New York, their departments and bureaus, so far as they affect the said premises or the care and use thereof," and also for breach of a further covenant in the lease that defendant would "during the entire term, keep the demised premises and all appurtenances thereto in good repair, making all repairs whatever that might become necessary." The breach complained of was the defendant's failure to comply with certain requirements set forth in a letter from the state commissioner of labor, requiring the provision of additional means of exit, extension of stairway, and inclosure of interior stairways with partitions of fire-resisting material, covering the well hole of the elevator, and providing a new seat in a water closet, all matters specified by section 79b of the Labor Law, adopted in 1913 (Consol. Laws, c. 31), approximately a year after the execution and commencement of the lease. Selden Bacon, of New York City, for appellant. Theodore L. Frothingham, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, McLAUGHLIN, and ANDREWS, JJ., concur. POUND, J., not voting.

HIRSH & SCHOFIELD, Inc., Appellant, v. GUSMER, Respondent. (Court of Appeals of New York. May 2, 1919.) Appeal from a judgment entered July 13, 1917, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (179 App. Div. 347, 165 N. Y. Supp. 555), reversing a

judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint. The action was brought by the plaintiff against a former employé to enjoin and restrain the latter from selling or dealing in a product known as "Mammut" and to enjoin and restrain him from receiving, collecting or in any manner disposing of or interfering with the moneys due or to become due to the plaintiff from sales of Mammut, which were made by the defendant while in the employ of the plaintiff. Benjamin Reass, Hugo Hirsh, and Emanuel Newman, all of Brooklyn, for appellant. Louis Salant, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

HOGAN, Respondent, v. EDWARD ENGINEERING CO. et al., Appellants. (Court of Appeals of New York. March 11, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (186 App. Div. 921, 172 N. Y. Supp. 897), entered November 25, 1918, affirming an award of the state industrial commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). Claimant's son was employed by defendant Edward Engineering Company as a passenger elevator operator. Desiring to go to the basement of the building he opened the gate to a freight elevator, pulled the cable and the car coming up struck him on the head causing his death. This particular elevator was the only means by which to get from the ground floor to the basement except an emergency ladder leading from the sidewalk to the basement, but the regular way to reach the basement when the elevator was down was to ring the bell and wait for the chief engineer to bring the elevator up. Appellant contended that the accident did not arise out of, or in the course of, the employment of the deceased, but that by his own actions he exposed himself to a distinctly new and additional peril which was not in the contemplation of the employer when it entered into the contract of employment with him, and that he was not simply doing his work in a negligent or careless manner, but was entirely outside of his employment. Bertrand L. Pettigrew and W. L. Glenney, both of New York City, for appellants. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

HUDSON BUILDING, Appellant, v. COMPAGNIE GENERALE TRANSATLANTIQUE, Respondent. (Court of Appeals of New York. May 2, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (178 App. Div. 889, 164 N. Y. Supp. 1096), entered April 12, 1917, affirming a judgment in favor of defend-

ant entered upon a verdict. The action was to recover rent alleged to be due under a written lease. The defense was that the plaintiff after having received payment in advance for the premises, without notice to the defendant, sublet a portion of the premises, and thereby evicted the defendant therefrom. J. A. Edwards and Jarvis P. Carter, both of New York City, for appellant. Joseph P. Nolan, of New York City, for respondent.

PER CURIAM. Judgment affirmed with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

HUDSON HOSTELRY COMPANY, Appellant, v. MITCHEL, Mayor of City of New York, et al., Respondents. (Court of Appeals of New York. March 4, 1919.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 908, 163 N. Y. Supp. 1120), entered March 14, 1917, unanimously affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. The motion was made upon the ground that the questions involved are academic only. William P. Burr, Corp. Counsel, of New York City (Terence Farley, of New York City, of counsel), for the motion. Robert H. Elder, of New York City, opposed.

PER CURIAM, Motion denied with \$10 costs.

HUDSON HOSTELRY CO., Appellant, v. MITCHEL, Mayor of City of New York, et al., Respondents. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 908, 163 N. Y. Supp. 1120), entered March 14, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. The action was for damages and an injunction restraining defendants "from in any manner assigning, stationing, placing or posting, or causing to be assigned, stationed, placed, posted or maintained, in and about the private premises of the plaintiff herein, the Hotel Plymouth, at No. 257-9 West Thirty-Eighth street, New York City, any police officer, * * * and from informing guests, prospective guests, visitors or other persons having lawful business upon the premises, when such persons enter, or attempt to enter, or leave the premises, that the said hotel is a disorderly house, or an alleged disorderly house, or that said persons are liable to arrest, or to be objects of a raid, or remain at the premises at their peril, or in any other manner threatening or intimidating them, or otherwise interfering with the lawful business of the plaintiff, and of the lawful use, occupation and enjoyment of the premises." In opposition to the application, it was shown that the hotel was a disorderly house; that it was frequented by women of loose morals who took men there for illicit purposes; that the hotel management was cognizant

of such practices; and that, from the class of persons who were permitted to engage rooms, the hotel had an extremely bad reputation in the neighborhood. Robert H. Elder and Otho S. Bowling, both of New York City, for appellant. William P. Burr, Corp. Counsel, of New York City (Terence Farley, John F. O'Brien and George P. Nicholson, all of New York City, of counsel), for respondents.

PER CURIAM. Judgment affirmed with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and ANDREWS, JJ., concur. CRANE, J., dissents.

HUGHES, Respondent, v. ROACHE, Appellant. (Court of Appeals of New York. March 21, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (177 App. Div. 897, 163 N. Y. Supp. 1120), entered February 21, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. The complaint alleged that defendant agreed to purchase for plaintiff at public auction 100 shares of stock and deliver them to him upon payment of the bid price; that the defendant purchased the said stock at \$50 per share, but has refused to turn the same over to plaintiff, although the latter had tendered the amount of the purchase price. Judgment was demanded for the difference between the bid price of the stock and its market value. Charles L. Craig, of New York City, for appellant. John L. Wells, of New York City, for respondent.

PER CURIAM. Judgment affirmed with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

HURLEY, Respondent, v. PITTSBURGH PLATE GLASS CO., Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (178 App. Div. 927, 165 N. Y. Supp. 1092), entered May 26, 1917, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury and directing judgment in favor of plaintiff. The action was brought to recover as for money had and received the amount received by the defendant on an interest in a bond and mortgage assigned to it by the plaintiff as collateral security for the payment of an indebtedness due by the plaintiff to the defendant arising out of an agreement of guaranty. The defendant had filed a mechanic's lien, and the action was brought on the theory that the satisfaction of this lien by the defendant for a less amount than that stated in the face of the lien released the guarantor and that the moneys received by the defendant for the interest in the bond and mortgage were received for the benefit of the plaintiff, the guarantor. John J. Scanlan and Sidney G. De Kay, both of New York City, for appellant. Hugo

Hirah, Emanuel Newman, and Benjamin Reass, all of Brooklyn, for respondent.

PER CURIAM. Judgment affirmed with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

HYNES v. HAGEVILLE REALTY CO. et al. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment entered October 10, 1917, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (180 App. Div. 903, 166 N. Y. Supp. 1009), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. The action was for the alleged conversion of personal property, consisting of hotel furniture and furnishings. The complaint was in short form, with an annexed list or schedule of the chattels claimed to have been converted. The answer of the defendant Adolph A. Hageman was a general denial. The answer of the defendant Hageville Realty Company contained a general denial and alleged as a defense that the plaintiff was a tenant of the defendant Hageman at No. 61 West Thirty-Ninth street, in the borough of Manhattan, city of New York, and had in his possession there the chattels mentioned in the complaint, which were subject to a chattel mortgage in favor of the defendant Hageville Realty Company for the face amount of \$1,500; that plaintiff used these premises for the purposes of prostitution and was dispossessed for that reason by the defendant Hageman in summary proceedings in the Municipal Court; that after plaintiff had been dispossessed and had abandoned the property covered by the chattel mortgage, on which \$1,200 was still due, the Hageville Realty Company, deeming the property unsafe and at great risk, took possession thereof under the provisions of the chattel mortgage, and after due notice to the plaintiff sold them at public auction for \$1,200, the full value of the property. S. Goodelman, of New York City, for appellant. Claude V. Pallister, of New York City, for respondents.

PER CURIAM. Judgment affirmed with costs.

CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

INTERSTATE CHEMICAL CORPORATION et al., Appellants, v. DUKE, Respondent. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (176 App. Div. 684, 163 N. Y. Supp. 1035), entered April 2, 1917, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term. The complaint charged that the defendant, while occupying confidential relations with the plaintiffs, and engaged with them in a joint venture, fraudulently acquired and now owns all the properties brought to his attention by the plaintiffs in connection with the adventure, except the property of the plaintiffs, in the acquisition of which their entire profit rested, with the re-

sult that the plaintiffs can neither themselves conduct the contemplated enterprise nor submit it to others; that the fraud was accomplished by a series of written contracts fraudulently prepared, and their execution fraudulently secured by the defendant acting in collusion with his attorney, who utilized his position of acting for joint adventurers to accomplish what he knew to be the fraudulent purpose of his client. Relief was demanded annulling and canceling two written contracts executed by and between the plaintiffs and the defendant on November 15, 1913, upon the ground that their execution by the plaintiffs had been procured by false and fraudulent representations made by the defendant and Ambrose H. Burroughs, his attorney; that the defendant be directed to specifically perform a contract which it is alleged in the complaint was partly in writing and partly oral, and which contract is alleged to have been made prior to November 15, 1913; that it be adjudged that the defendant holds certain water powers on the Saguenay and Shipshaw rivers in Canada and certain real estate adjacent to such water powers and a certain patented process for the manufacture of fertilizers and combining ammonia and phosphoric acid and denominated the "Willson Process" in trust for the plaintiffs to the extent of a one-fifth interest therein. D. Cady Herick and John C. Tomlinson, both of New York City, for appellants. Charles F. Brown, of New York City, Z. V. Taylor, of Charlotte, N. C., and Edward J. Patterson, of New York City, for respondent.

PER CURIAM. Judgment affirmed with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, and CRANE, JJ., concur. McLAUGHLIN, J., not voting.

IROQUOIS RUBBER CO. v. GRIFFIN. (Court of Appeals of New York. June 3, 1919.)

PER CURIAM. Motion for argument denied, with \$10 costs and necessary printing disbursements. See 226 N. Y. 297, 123 N. E. 369.

J. B. KEPNER CO., Appellant, v. HUTTON et al., Respondents. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (179 App. Div. 130, 166 N. Y. Supp. 408), entered August 23, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury. The action was brought by the appellant corporation, to recover money paid to the defendants on checks signed in the name of the corporation by its president, J. B. Kepner, and its treasurer and delivered to the defendants by the president in payment of his individual indebtedness. It appeared that prior to April 10, 1912, said J. B. Kepner carried on business individually as a cotton converter and as sales agent for certain cotton mills. In 1912 he caused the plaintiff corporation to be organized with a capital of \$5,000 divided into 50 shares, of which 49 were issued to Kepner's wife and one to Kepner himself. To this corporation

was transferred the good will of the business formerly carried on by Kepner individually and said corporation continued to carry on the same business under Kepner's management. During the whole period covered by the transactions complained of in the complaint Kepner and his wife owned all the capital stock, and they, together with the bookkeeper, a man named Donohue, who held nominally one qualifying share, were the sole directors. During all that period Kepner alone managed and controlled the corporation, his wife and Donohue not interfering in any way. Prior to the incorporation of the plaintiff and when Kepner, as an individual, was doing the same business (turned over to the company as aforesaid), he had personal bank accounts, but after the incorporation of the plaintiff company the said Kepner had no individual bank account, and no attempt was made by the corporation, or by Kepner, to distinguish between the personal funds of Kepner and the funds of the corporation; and all checks received by him, personally, or made out to the order of the corporation, were indorsed by him and deposited in the bank account standing in the corporation's name. From the time the said company was incorporated, the plaintiff company made a practice of paying J. B. Kepner's individual debts and obligations by checks drawn from the corporation's bank account. John E. Brady and Francis C. Schwab, both of New York City, for appellant. Sumner B. Stiles and William F. S. Hart, both of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDEBACK, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HOGAN, J., not voting.

JEFFERSON, Appellant, v. BANGS et al., Respondents. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (169 App. Div. 102, 154 N. Y. Supp. 439), entered July 15, 1915, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. The action was to recover possession of a farm. By the will of William King, who died in 1856, a life interest in one-third of the property was given to his widow, a life interest in two-thirds to his adopted son and the fee to the plaintiff, a daughter of said adopted son. The property was subject to a mortgage. The son thereafter took an assignment of the mortgage and after the death of the widow foreclosed the same and bid in the property for less than the amount of the mortgage. He thereafter first mortgaged and then sold the property to defendants' predecessor in title. It was found that the present owner had no notice of the plaintiff's title and purchased the same in good faith depending upon a clear record title coming down from the foreclosure sale. The court held that when a bona fide purchaser of real estate, the record title of which is clear, pays a valuable consideration, without notice of a prior unrecorded title or claim or equity, his title takes precedence over the unrecorded interest. See 197 N. Y. 35, 90 N. E. 109, 134 Am. St. Rep. 856.

J. J. McGuire, of Ithaca, for appellant. Clayton R. Lusk, of Cortland, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

JOHNSTON HEATING CO., Appellant, v. BOARD OF EDUCATION, UNION FREE SCHOOL DIST. NO. 6, MANHASSET, TOWN OF NORTH HEMPSTEAD, NASSAU COUNTY, Respondent. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment entered December 7, 1916, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (175 App. Div. 140, 161 N. Y. Supp. 867), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. This action was brought to recover profits which plaintiff would have made in the performance of a certain contract with the defendant had it been allowed to enter into and perform that contract. Plaintiff was the lowest bidder for the work and the defendant board of education adopted a resolution accepting the bid. Thereafter the board rescinded its resolution of acceptance and let the contract to another. The Appellate Division held that in the absence of an authorized notice of acceptance of plaintiff's bid the board was within its right in rescinding its resolution, and that plaintiff could not recover. Lynn W. Thompson, of New York City, for appellant. James L. Dowsey and Erastus J. Parsons, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur. HISCOCK, C. J., not sitting.

JOSEPH WALKER CONST. CO., Appellant, v. DELAWARE & H. CO., Respondent. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (179 App. Div. 469, 165 N. Y. Supp. 931), entered October 3, 1917, affirming a judgment in favor of defendant entered upon a verdict. The complaint alleged that plaintiff applied to the defendant railroad company to furnish a car to transport plaintiff's steam road roller from Beekmantown, N. Y.; that defendant furnished and placed such car and while plaintiff was engaged in moving said roller upon the property of defendant for the purpose of placing the same upon said freight car so placed, the defendant, its officers, agents and servants carelessly and negligently moved a train of cars and engine over its tracks, striking and destroying said roller. The answer of the defendant denied any negligence on its part or of its officers and agents and alleged that the damage to the steam roller of the plaintiff was caused by the negligence of the plaintiff, its agents and servants. John N. Carlisle, of Al-

bany, for appellant. Lewis E. Carr, of Albany, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In re JUDGE'S ESTATE. (Court of Appeals of New York. June 3, 1919.) Appeal by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (184 App. Div. 962, 170 N. Y. Supp. 1090), entered June 5, 1918, which affirmed a decree of the Oswego County Surrogate's Court adjudging the second clause of the will of Patrick Judge, deceased, to be void. The clause in question was as follows: "To my wife, Elizabeth Judge, I give, bequeath and devise her inchoate right of dower, as by law provided, and in personal distribution." The surrogate held the wording "so indefinite and uncertain that extrinsic evidence should not be considered in attempting a construction of the clause in question." John L. Mournighan and Avery S. Wright, both of Oswego, for appellant. J. T. McCaffrey, Edwin J. Mizen, D. P. Morehouse, Jr., Charles N. Bulger and Joseph H. Gill, all of Oswego, for respondent.

PER CURIAM. Order affirmed, with costs to each set of parties appearing on argument hereon by separate counsel, costs of special guardian payable out of estate.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

KAISER et al., Appellants, v. PARKER et al., Respondents. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (178 App. Div. 894, 164 N. Y. Supp. 1098), entered May 24, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term and directing judgment in favor of defendants upon the counterclaim set up in the answer. The action was brought to reform certain executory contracts for the purchase of real estate to conform to the alleged actual agreements made between the parties. The counterclaim demanded specific performance of the contracts. The reply set up as separate defenses: (1) That the written agreements on which the counterclaim was based were not the actual agreements, but that the actual agreements, stating their terms, were made by the parties prior to the alleged written agreements, and that in reducing the agreements to writing, the scrivener of the defendants, by mistake or inadvertence, failed to correctly set out the terms of the agreements as actually made. (2) That the defendants could not convey a good title to the lots in question, free from all incumbrances other than those excepted in the alleged agreements, for the reason that the premises are burdened with telephone poles, telegraph poles and trolley poles with their usual wires and connections, erected upon the highways adjacent to said lots. Sterling St. John, of New York City, for appellants.

John Delahunty and John J. Kirby, both of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

KINLEN, Appellant, v. RUNYON et al., Respondents. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (176 App. Div. 931, 162 N. Y. Supp. 1126), entered January 17, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term. The complaint alleged that defendants' predecessors, owners of the Communipaw Coal Company, by which plaintiff was employed, promised to give him, as a reward for past services and an inducement for future faithful services, a certain number of shares of stock of said company; that plaintiff performed the services on his part; that defendants, on succeeding to ownership of said corporation, ratified and assumed the aforesaid agreement; and that plaintiff continued to perform his share of the agreement, but that defendants have refused to perform theirs or to pay him accrued dividends on the shares in question. The answer was a general denial and set up separate defenses of the statute of frauds and payment. Augustus Van Wyck and Pierre M. Brown, both of New York City, for appellant. Abram J. Rose, Alfred C. Petté, and Philip M. Brett, all of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, POUND, CRANE, and ANDREWS, JJ., concur. CARDOZO, J., not voting.

KLING, Appellant, v. TOBIAS, Respondent. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment entered February 6, 1917, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (176 App. Div. 947, 162 N. Y. Supp. 1126), reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The complaint alleged the incorporation of the Corning News Company, under the laws of the state of New York, on or about July 30, 1906; that the plaintiff became a stockholder owning 25 shares of stock, on or about February 28, 1907; that the defendant since prior to May 9, 1913, had been the treasurer and chief financial officer of the said corporation; and that on May 10, 1913, at Corning, N. Y., the plaintiff made a written request to the defendant for a statement of its affairs, pursuant to section 69 of the Stock Corporation Law (Consol. Laws, c. 59). It is further alleged that the defendant refused and neglected to comply with the said request and that by reason thereof forfeited to the plaintiff \$8,490, and judgment was demanded for that amount, with costs. The Appellate Division held: "(1) There is a failure of proof that the person served with notice under the Business Corporation Law (Consol. Laws, c. 4) was the

treasurer or financial officer of the corporation at the time of service of the notice. (2) The proof shows that the plaintiff was not a stockholder in the corporation. See *Haggoods v. Lusch*, 123 App. Div. 23, 107 N. Y. Supp. 331." James O. Sebring, of Corning, for appellant. Thomas F. Rogers, of Corning, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

KLUMPP, Respondent, v. NEW YORK CENT. R. CO., Appellant. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (179 App. Div. 278, 166 N. Y. Supp. 333), entered July 13, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]) to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. The complaint alleged that the plaintiff was engaged in interstate commerce; that it was necessary for the train upon which the plaintiff was a brakeman to pick up a car upon the side track near the village of Angola; that the plaintiff assisted in this movement, and the engine was cut off from the main portion of the train, and the said car, together with several others, which were on the side track, were taken out to the main track for the purpose of making a flying switch of the said car; that plaintiff turned the switch for this movement, and that the said car was sent with considerable force against the main portion of the train which was standing on one of the main tracks; that the said car which collided with the main portion of the train did not couple automatically by impact, but started backward in the direction from which it was sent, and toward the engine and other cars which at that time were going in on the side track; that the plaintiff, when he observed that said car was backing down and having knowledge that the lives of the crew on said engine were in danger, gave a stop signal to the engineer whose engine and cars were headed toward the side track, and that immediately thereafter his foot became caught between the guard rail and one of the rails of the track, and that while in that position and while struggling to loosen himself, he continued his efforts to warn the engineer, but that said engine and cars were backed down on him and over him, causing the injuries complained of. The defense was contributory negligence and assumption of risk. H. W. Huntington, of Buffalo, for appellant. Hamilton Ward, of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

KOLB v. BRUMMER et al. (Court of Appeals of New York. March 18, 1919.) Appeal from an order of the Appellate Division of the

Supreme Court in the Third Judicial Department (185 App. Div. 835, 173 N. Y. Supp. 72), entered November 14, 1918, reversing, as to the respondent New Amsterdam Casualty Company an award made under the Workmen's Compensation Law (Consol. Laws, c. 67). On August 31, 1916, a policy of workmen's compensation insurance was issued to Richard Brummer by the New Amsterdam Casualty Company, expiring August 31, 1917. On June 28, 1917, Richard Brummer died, leaving all his property to his wife, Meta Brummer, who continued his business in her own name without probating the will. The policy of insurance was transferred by indorsement thereon to Meta Brummer on August 22, 1917. On the day prior to such transfer the claimant sustained the injuries for which the award was made while in the employ of Meta Brummer. The Appellate Division held that the policy was not in force at the time of the accident. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for appellant. Frederick Mellor, of New York City, for respondent.

PER CURIAM. Order affirmed, with costs against Industrial Commission.

HISCOCK, C. J., and CHASE, COLLIN, and McLAUGHLIN, JJ., concur. HOGAN, CUDDEBACK, and CRANE, JJ., dissent.

KRAWCZYK v. MacNAMARA et al., Appellants. (Court of Appeals of New York. March 11, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (173 N. Y. Supp. 912), entered January 29, 1919, affirming an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). Michael Krawczyk was a street sweeper by occupation and employed by James MacNamara, who cleaned the streets of Dunkirk under contract. Just prior to the accident Krawczyk had swept Park avenue to the eastern end of the pavement on that street. At the eastern end of Park avenue and running across it, is a railroad switch, the ends of the ties of this switch being within two feet of the end of the pavement. This switch is usually occupied by a string of box cars and it was so occupied at the time of the accident. It is stipulated that the decedent stepped between two of the box cars, presumably to urinate. At that moment the cars were bumped only enough to move them about five feet but enough to injure Krawczyk so seriously that he died from the effect of the injuries that same day. The appellants contended that the accident did not arise out of the employment. E. C. Sherwood, William B. Davis, and Amos H. Stephens, all of New York City, for appellants. J. L. Hurlbert, of Dunkirk, for respondent Krawczyk. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent State Industrial Commission.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

KRUG, Appellant, v. BLISS, Respondent. (Court of Appeals of New York. April 15, 1919.) Motion to dismiss an appeal from a

judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (171 App. Div. 976, 160 N. Y. Supp. 1136), entered December 22, 1915, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury. The motion was made upon the ground that certain findings of fact and conclusions of law had been omitted from the record on appeal. Walter N. Renwick, of Cuba, for the motion. James O. Sebring, of Corning, opposed.

PER CURIAM. Motion denied, with \$10 costs, but without prejudice to the right to renew the same on papers which shall include copies of the findings of fact and conclusions of law said to have been omitted from cases served on appeal and a copy of the Appellate Division order said to have been made requiring such findings and conclusions to be incorporated in the case on appeal.

KRUG, Appellant, v. BLISS, Respondent. (Court of Appeals of New York. May 2, 1919.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (171 App. Div. 976, 160 N. Y. Supp. 1136), entered December 22, 1915, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury. See 226 N. Y. —, 123 N. E. 874. The motion was made upon the ground that the appeal books served upon respondent did not contain a true record of the proceedings in the courts below. Walter N. Renwick, of Cuba, for the motion.

PER CURIAM. Motion denied, without costs.

LANDES, Respondent, v. LANDES, Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (178 App. Div. 917, 165 N. Y. Supp. 1095), entered May 31, 1917, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for a separation. Defendant contended that the complaint was based upon insufficient and frivolous grounds; that the findings of fact were insufficient to sustain the judgment; that the action could not be maintained by reason of an existing separation agreement between the parties, and that the award of alimony was excessive. Louis J. Vorhaus and Charles Goldzier, both of New York City, for appellant. Max D. Steuer, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

LATRONICA v. SOUTHERN BOULEVARD R. CO. et al. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department

(179 App. Div. 891, 165 N. Y. Supp. 1095), entered July 6, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendants. The defendant Richard Carvel Company was engaged in constructing part of a subway through and along Southern boulevard in New York City for some distance north and south of 141st street under a contract between it and the city of New York. The street was torn up and a temporary pavement laid. Plaintiff was driving a wagon and while turning from Southern boulevard east into 141st street, the right wheel of his cart, which was on the outside of the westerly rail of the south-bound track of the Southern Boulevard Railroad Company, went into a depression on the outside of the rail, slid along about three or four feet, hit some place, and the plaintiff fell off, sustaining the injuries for which this suit was brought. Abram I. Elkus, Carlisle J. Gleason, and Frank L. Weil, all of New York City, for appellant. Louis B. Brodsky and Louis G. Hamburger, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, and ANDREWS, JJ., concur. CHASE and McLAUGHLIN, JJ., dissent.

LAURINO, Respondent, v. DONOVAN et al., Appellants. (Court of Appeals of New York. June 3, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (186 App. Div. 387, 173 N. Y. Supp. 619) entered January 15, 1919, unanimously affirming an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). The claimant and one William Earl were employed as chauffeurs by John E. Donovan. They had been that afternoon directed by him to clean up the garage and cars. The premises of the employer consisted of a garage, dock, stable, blacksmith shop and machine shop. Laurino and other employees of Donovan had been hauling coal to the dock that forenoon. There was a pile of coal on the dock, about 200 feet from the garage. Earl found an explosive cap with a copper wire attachment in the pile of coal. He brought it into the garage and was attempting to remove the wire from the cap, when it exploded and struck Laurino, who was passing in the performance of his work, in the right eye, destroying the sight. Appellants contended that the injury did not arise out of the employment. El. C. Sherwood, William B. Davis, and Amos H. Stephens, all of New York City, for appellants. Charles D. Newton, Atty. Gen. (El. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs. COLLIN, CUDDEBACK, CARDOZO, POUND, and CRANE, JJ., concur. HISCOCK, C. J., and ANDREWS, J., dissent.

LAZENBY v. INTERNATIONAL COTTON MILLS CORPORATION et al. (Court of Appeals of New York. April 29, 1919.) Cross-

appeals from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (174 App. Div. 906, 160 N. Y. Supp. 1) entered November 28, 1916, modifying, and affirming as modified, a judgment in favor of defendants entered upon the report of a referee. The action was brought to set aside the voluntary dissolution of the New York company, which was consummated under the provisions of section 221 of the General Corporation Law (Consol. Laws, c. 23), of the state of New York; declare void and set aside a sale of the assets of the New York company made by the directors of that company, acting as trustees in liquidation thereof to the International Cotton Mills, a Massachusetts corporation; enjoin and direct a retransfer to the New York company of the assets and cash sold and transferred to the Massachusetts corporation by the directors of the New York company; require the Massachusetts corporation and the individual defendants to account for the property and assets of the New York company which were so transferred; enjoin and restrain the defendants from selling, disposing of, incumbering or in any way interfering with or exercising any ownership over the property so transferred or the proceeds or increases thereof. The complaint was dismissed upon the merits, provided that the defendants tender to the plaintiff and to the intervening plaintiffs, except Allein W. Bates, a total of 1,613.46 shares of common stock of the defendant International Cotton Mills of Massachusetts. The Appellate Division modified the judgment by providing that plaintiffs should have an option, if they so desired, to take in cash the value of their stock in the International Cotton Mills Corporation of New York at the time of the reorganization, instead of the stock directed in the judgment to be tendered to them. In case the plaintiffs, or any of them, elected to take such value the same was to be determined by an appraisal under section 17 of the Stock Corporation Law (Consol. Laws, c. 59). William H. Page, of New York City, William L. Marbury, of Baltimore, Md., and Powell C. Groner, of New York City, for interveners. Irwin Untermeyer, of New York City, for defendants.

PER CURIAM. Judgment affirmed, without costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, and CRANE, JJ., concur. HISCOCK, C. J., absent. McLAUGHLIN, J., not sitting.

In re LEOPOLD. (Court of Appeals of New York. June 3, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (186 App. Div. 872, 175 N. Y. Supp. 188), entered March 28, 1919, which modified, and affirmed as modified, an order of Special Term, in summary proceedings, directing an attorney to pay over certain moneys collected in an action. John C. Wait, of New York City, for appellant. Abraham Wieler, of New York City, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and COLLINS, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

LEWIS, Appellant, v. MOSES et al., Respondents. (Court of Appeals of New York. May 20, 1919.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (179 App. Div. 958, 166 N. Y. Supp. 774), entered July 24, 1917, unanimously affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. The plaintiff and the original defendants, Adriance, Green and Lynch, were, on and prior to July 3, 1915, stockholders of the Savage Arms Company, a corporation manufacturing firearms and ammunition at its plant near Utica, N. Y. The plaintiff owned 82 shares. Prior to 1915 the market value of the stock was about \$100 a share. On or about that date, July 3, 1915, the plaintiff, with others, authorized said Adriance, Green and Lynch to sell his said stock, by executing a certain written agreement. The complaint alleged that thereafter the defendants sold stock, including that of the plaintiff, for the sum of \$5,300,000, but only distributed among the owners of the stock \$3,550,000, keeping \$1,750,000 for themselves. Plaintiff brought this action to recover his proportionate share of the latter sum. Defendants contended that the stock was sold for the sum of \$3,550,000 and that the sum in suit was paid to them individually for entering into a contract to refrain from competition with the purchasers. See, also, 123 N. E. 876. W. A. Matteson, of Utica, for appellant. James F. Hubbell and Emerson M. Willis, both of Utica, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

LEWIS, Appellant, v. MOSES et al., Respondents. (Court of Appeals of New York. May 20, 1919.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (179 App. Div. 958, 166 N. Y. Supp. 774), entered July 24, 1917, unanimously affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. The action was brought to determine the plaintiff's interest in 1,794 shares of stock in the Savage Arms Company and to compel defendants Adriance, Green, Lynch and Symonds to account for and pay over to plaintiff the sum of \$31,363, balance alleged to be due and owing from the sale of said stock. See, also, 123 N. E. 876. W. A. Matteson, of Utica, for appellant. James F. Hubbell and Emerson M. Willis, both of Utica, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

LYNCH et al., Respondents, v. ORIENT INS. CO., Appellant, et al. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Su-

preme Court in the Fourth Judicial Department (178 App. Div. 953, 165 N. Y. Supp. 1097), entered May 25, 1917, affirming a judgment in favor of plaintiffs and defendant, respondent, entered upon a verdict in an action to recover upon a policy of fire insurance. The complaint alleged that the loss exceeded the amount of insurance; that two of the appraisers were incompetent and not disinterested; that plaintiffs had protested against any further proceeding being taken by them and that the appraisal had thereupon been abandoned. The answer alleged that after the action was commenced two of the three appraisers had made an award by which the loss was fixed at less than claimed in the complaint. Hiram R. Wood, of Rochester, for appellant. W. Smith O'Brien, of Geneva, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

LYNN, Appellant, v. McCANN, Respondent, et al. (Court of Appeals of New York. May 2, 1919.) Appeal from a judgment entered July 13, 1917, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (179 App. Div. 305, 166 N. Y. Supp. 274), reversing a judgment, in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury and directing a dismissal of the complaint as to the defendant, respondent. The action was to recover for legal services alleged to have been rendered in an action of ejectment brought against the respondent's codefendants. During the pendency of the action said codefendants conveyed their interest in the property in suit to the respondent. The plaintiff successfully defended the action and seeks to recover for his services, against defendant, respondent, on the theory of an implied promise. The Appellate Division held that under the circumstances she could elect to join in defending the ejectment action or remain passive and stand on her deed for indemnity, and where she chose the latter course she could not be held liable for the expense of defending the action. Joseph McSweeney, of Rochester, for appellant. C. D. Kiehel, of Rochester, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

McEWEN BROS., Respondent, v. BILLINGS, Appellant, et al. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (171 App. Div. 974, 156 N. Y. Supp. 1132), entered December 10, 1915, affirming a judgment in favor of plaintiff entered upon a verdict. The complaint alleged that the plaintiff was a domestic corporation; that in or about the month of July, 1905, the defendants and one Frank B. Whitney were engaged in operating a certain oil lease in the town of

Wirt, Allegany county, N. Y., on premises known as the David Deyoe and Ellsha Hyde farms, as copartners, under the firm name and style of "the Billings Oil Company," and engaged in the business of drilling for and producing petroleum oil and gas; that on the 21st day of July, 1905, the plaintiff sold to the defendants and said Whitney, under the name of the Billings Oil Company, at Bolivar, N. Y., goods, wares and merchandise consisting of oil well supplies for the said lease on the Hyde and Deyoe farms for the value and agreed price of \$385.54, for which they promised and agreed to pay, but that no part thereof had been paid though due and owing before the commencement of the action and that defendants were the sole survivors of the Billings Oil Company. The defendant Billings by his answer admitted the corporate entity of the plaintiff but denied each and every other allegation of the complaint. M. B. Jewell, of Olean, for appellant. Frank B. Church, of Wellsville, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

McGILL, Appellant, v. McGILL, Respondent. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment entered July 24, 1917, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (179 App. Div. 343, 166 N. Y. Supp. 397), reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint. Plaintiff brought this action to annul his marriage with defendant, alleging that the same was procured by force, duress and fraud exercised and perpetrated by defendant upon plaintiff whereby plaintiff was forced and induced to enter into the marriage contract with defendant. Plaintiff alleged that defendant threatened to kill plaintiff and herself unless plaintiff would marry her. The alleged fraud was based upon the fact that at the time of such marriage defendant was an epileptic and that she concealed such infirmity from plaintiff. Defendant denied the exercise of any force and denied any fraud upon plaintiff. William F. Canough, of Syracuse, for appellant. Albert C. Jordan, of Yonkers, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

MAIRA v. FRIEDMAN et al. (Court of Appeals of New York. June 6, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (171 App. Div. 887, 155 N. Y. Supp. 1123), entered November 20, 1915, affirming a judgment in favor of plaintiffs, and defendants-respondents, entered upon a decision of the Monroe County Court on trial without a jury in an action to foreclose a mechanic's lien. The defendant, appellant, contended that plaintiff wrongfully abandoned and failed to

complete the work he had contracted to perform. William MacFarlane, of Rochester, for appellant. George E. Warner, of Rochester, for respondent Maira. Eugene Raines, of Rochester, for respondents Hartung and others.

PER CURIAM. Judgment affirmed, with costs to each set of respondents appearing by separate attorney.

HISCOCK, C. J., and COLLIN, CUDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

MARTIN, Respondent, v. SECURITY INS. CO., Appellant. (Court of Appeals of New York. April 29, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (178 App. Div. 949, 165 N. Y. Supp. 1098), entered May 10, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action upon a policy of fire insurance. The complaint alleged the issuance of the policy of insurance, the occurrence of the fire, and the loss of property, and also alleged that the defendant waived provisions of the policy having reference to the insurance of a building on leased land and of personal property owned conditionally, and to the furnishing of sworn proofs of loss within 60 days after the occurrence of the fire. The answer of the defendant admitted the issuance of the policy of insurance and the occurrence of the fire, but denied the waiver of any provision of the policy or of any requirement on the part of the plaintiff and set up as an affirmative defense the absence of compliance with the provisions of the policy in the respects, above mentioned and also the giving of an assignment of the proceeds of said policy by the plaintiff to the Clark Music Company of Syracuse, N. Y., a corporation not a party to the action. Emmett E. B. McDonald, of Brooklyn, for appellant. Thomas J. McNamara, of Rome, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

MAY, Respondent, v. HETTRICK BROS. CO., Appellant. (Court of Appeals of New York. March 21, 1919.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (181 App. Div. 3, 167 N. Y. Supp. 966), entered January 3, 1918, affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The plaintiff is one of the officers of A. B. Kirschbaum Company, a Pennsylvania corporation, with its principal office in Pennsylvania, and he brought this action in equity, as the assignee of said corporation, to compel the defendant to account for certain profits alleged to have been realized as the result of a contract for the sale by the defendant to certain foreign contractors of 100,000 tents. The action was brought upon the theory that between the plaintiff's assignor and the defendant there existed a fiduciary or confidential relationship, and the trial court has

so found. Defendant maintained that no such relationship of trust or confidence, either as joint adventurers or as principal and confidential agent existed and that, therefore, no basis for an accounting in equity was presented. The following questions were certified: "(1) Was there any joint adventure or quasi partnership between Kirschbaum Company and defendant with respect to the transactions referred to in the complaint herein? (2) Was there any fiduciary relationship between Kirschbaum Company and defendant with respect to the transactions referred to in the complaint herein? (3) Was the plaintiff entitled to an interlocutory judgment for an accounting? Frederick N. Van Zandt and Joseph A. Burdeau, both of New York City, and Harrison C. Glorie, of Brooklyn, for appellant. Benjamin G. Paskus and Alfred L. Rose, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs, and each of the questions certified answered in the affirmative.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

In re MEGRUE. (Court of Appeals of New York. June 3, 1919.)

PER CURIAM. Motion for reargument or to amend remittitur denied, with \$10 costs and necessary printing disbursements. See 224 N. Y. 284, 120 N. E. 651.

MIESTO, Appellant, v. COMMERCIAL UNION ASSUR. CO., LIMITED, OF LONDON, ENGLAND, Respondent. (Court of Appeals of New York. April 22, 1919.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (182 App. Div. 922, 169 N. Y. Supp. 1104), entered February 21, 1918, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial. The motion was made upon the ground of failure to perfect the appeal. Robert C. Poskanzer, of Albany, for the motion. Harold M. Phillips, of New York City, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion, unless within 10 days appellant makes, files and serves copy with notice of filing of undertaking necessary to perfect appeal, in which case motion is denied, without costs.

MILLBROOK CO. v. GAMBIER et al. (Court of Appeals of New York. May 20, 1919.) Cross-appeals from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (176 App. Div. 870, 163 N. Y. Supp. 1025), entered May 16, 1917, modifying, and affirming as modified, a judgment entered upon a decision of the court on trial at Special Term. The plaintiff, as assignee of the City and County Contract Company, a New York corporation, sues in equity to rescind on the ground of mistake a contract made March 8, 1909, between the defendant Gambier and others as vendors, and contract company as purchaser, and to recover

upon such rescission the sum of \$4,000 paid by contract company to Gambier as a first payment under said contract. The contract was for the sale of a parcel of real estate which defendant Gambier claimed to own. Defendant Strong is joined as a defendant in the action because he asserted ownership of the property, and claimed that he was entitled to the said sum of \$4,000. Defendant Gambier counterclaimed for use and occupation of the premises. The trial court awarded judgment rescinding the contract and directing that plaintiff have recovery against Gambier for the amount demanded in the complaint, with interest and costs. It dismissed Gambier's counterclaim. The Appellate Division, by a divided court, modified this judgment by reducing the amount of plaintiff's recovery. Ralph Polk Buell and George S. Graham, both of New York City, for plaintiff Millbrook Co. Emory R. Buckner, Clinton Combes, and John McG. Goodale, all of New York City, for defendants.

PER CURIAM. Judgment affirmed, without costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur. HISCOCK, C. J., absent.

MILLER, Respondent, v. BARKER, ROSE & OLINTON CO., Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (179 App. Div. 948, 165 N. Y. Supp. 1099), entered July 13, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The action was brought to recover for injuries claimed to have been sustained by the plaintiff on account of the negligence of the defendant. The complaint alleged that on September 25, 1913, plaintiff, a contractor and builder, went to defendant's store in the city of Elmira, to purchase building materials and was there given a written order for these goods and directed to go to the defendant's storehouse to obtain them; that plaintiff went to said storehouse, entered through an open door, and while in the building as a customer, and in the exercise of due care, fell into an unguarded elevator shaft and was severely and permanently injured; that the automatic gate for protecting this elevator shaft was out of repair and had been nailed or fastened up so that it would not close when the elevator was not at the floor level, which condition had long existed, and that the defendant had left the shaft wholly unguarded and unprotected, no light, warning or other means of protection being provided. The defendant denied practically all of the complaint, except its own incorporation and its possession of the building and that the plaintiff was injured therein. H. D. Bailey, of Troy, for appellant. W. W. Gregg, of Elmira, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, and CRANE, JJ., concur. McLAUGHLIN, J., not sitting.

MONROE BREWING CO., Respondent, v. BARTELS, Appellant. (Court of Appeals of New York. June 6, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (173 App. Div. 917, 158 N. Y. Supp. 1123), entered March 24, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. The complaint contained two causes of action: (1) To recover a balance alleged to be due upon a promissory note; (2) to recover an alleged overpayment of salary. The first cause of action was admitted by the answer. The second cause of action was denied. As a counterclaim, and affirmative cause of action, the defendant alleged his employment as president of the plaintiff for a period of one year from May 15, 1909, at a salary of \$4,200; that he was wrongfully discharged on February 11, 1910, and he asked for the amount of his salary from March 1, 1910, to May 15, 1910, less \$157.24 earned by him in other employment and less the amount conceded to be due on the promissory note. At the opening of the trial the plaintiff withdrew its second cause of action, and the first cause of action being admitted the trial proceeded upon defendant's counterclaim. Edgar N. Wilson, of Syracuse, for appellant. Stewart F. Hancock, of Syracuse, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, and CRANE, JJ., concur. ANDREWS, J., not sitting.

MORSMAN et al., Appellants, v. BLACK et al., Respondents. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (177 App. Div. 951, 164 N. Y. Supp. 1103), entered April 4, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. The action was in equity to set aside a deed conveying certain premises to the defendants herein upon the grounds of mental incapacity of the grantor, and undue influence exerted by the defendants, and that there was no delivery and acceptance of the deed in question. H. B. Butterfield, of Buffalo, for appellants. Carlton E. Ladd, of Buffalo, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

MURRAY, Appellant, v. NEW YORK TELEPHONE CO., Respondent. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment entered March 8, 1916, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (170 App. Div. 17, 156 N. Y. Supp. 151), reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and directing a dismissal of the complaint. The action was in equity, to regulate the charge to be made by the defendant for service and the kind of service to

be furnished to plaintiff over defendant's telephone lines in the city of Syracuse. Plaintiff contended that by the terms of the franchise granted to defendant's predecessor it was restricted to a charge of \$48 a year for single party "direct line business service." Walter W. Magee and Stewart F. Hancock, Corp. Counsel, both of Syracuse (Ray B. Smith and William Rubin, both of Syracuse, of counsel), for appellant. William Nottingham, of Syracuse, and Charles T. Russell and Robert F. Jones, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, HOGAN, CARDOZO, POUND, and McLAUGHLIN, JJ., concur. HISCOCK, C. J., and ANDREWS, J., not sitting.

MUTUAL LIFE INS. CO. OF NEW YORK v. ROTHSCHILD et al. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 883, 163 N. Y. Supp. 1124), entered March 15, 1917, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage upon real property. The judgment awarded a deficiency judgment against the defendants, appellants, personally. The appeal was from so much and such part of said judgment as directs that said defendants pay to the plaintiff the amount of any deficiency, and also from so much and such part of said judgment as specifies and directs the manner and method of computing such deficiency, the appellants contending that there was an extension by the mortgagee of the time for the payment of the mortgage debt, entered into after the conveyance by the mortgagor bondsman of the mortgaged premises and without his knowledge or consent. The trial court held that the defendants, appellants, by the original agreement in the bond consented in advance to whatever extension agreements might thereafter be made between any owner of the property and the plaintiff. Everett B. Heymann and Jacob Schnebel, both of New York City, for appellants. Frederick L. Allen and Charles L. Griffin, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

NATIONAL SURETY CO. et al. v. STALLO. (Court of Appeals of New York. June 6, 1919.) Cross-appeals from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (171 App. Div. 206, 156 N. Y. Supp. 988), entered March 28, 1917, affirming a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury. The action was to recover premiums alleged to be due on two surety bonds. The trial court held that the provision in the written contracts that the defendant should continue liable for premiums on the bonds until the plaintiffs should be fur-

nished with competent written legal evidence of their discharge from liability, was not intended to apply to the case where the sureties procured an order, on their own initiative, terminating their further liability thereunder, regardless of the consent or wish of the principal; and that, therefore, the plaintiffs were entitled to recover only a proportionate share of the premium payable on each bond for the first year, covering the period from the date of execution of said bond to the date of the entry of the order relieving the plaintiffs from further liability thereof. Allen Everts Foster and Howard Mansfield, both of New York City, for plaintiffs. Charles A. Winter, of New York City, for defendant.

PER CURIAM. Judgment affirmed, without costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

NICHOLS, Respondent, v. WHARTON, Inc., Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (179 App. Div. 62, 166 N. Y. Supp. 51), entered July 19, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. The plaintiff, the assignee of one Edwin Arden, a moving picture actor, brought this action for damages alleged to have been sustained by reason of a breach of an oral contract of employment claimed to have been entered into by Arden and this defendant. It was a theatrical engagement, and provided for services to be rendered by Arden as a moving picture actor in a production to be entitled "Hazel Kirke." That an agreement was entered into was not disputed, but there was a conflict in the testimony respecting its terms. The plaintiff claimed that Arden was hired for a definite term of four weeks at a weekly salary of \$750, whereas the defendant maintained that Arden was hired only until the picture was completed. Edwin M. Simpson and William G. Philippeau, both of New York City, for appellant. Paul N. Turner, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

NIELD, Appellant, v. JUPITER et al., Respondents. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (175 App. Div. 732, 162 N. Y. Supp. 465), entered March 1, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action of ejectment. The premises in question were conveyed on August 13, 1908, by Emma Willey to Jesse J. Nield. In the deed was this clause: "It is understood and agreed that Elisha L. Nield shall be the trustee of the premises hereby conveyed to Jesse J. Nield, and that the same shall be at his disposal and

under his control during his lifetime, unless sooner sold under the direction of the said Elisha L. Nield." Elisha L. Nield was the father of Jesse. Jesse knew nothing about the transaction at the time, took no part in it and paid no part of the consideration. The deed was delivered to the father, was put on record by him and he took immediate possession of the premises and assumed complete control over the same. About two months afterwards, October 20, 1908, Elisha, as trustee of Jesse, conveyed to Zimrick, and Zimrick, on January 4, 1910, conveyed to defendant Tillie Jupiter. Ward De Silva, of Liberty, for appellant. George H. Smith, of Monticello, Henry Willis Smith, of New York City, and Eugene H. Bouton, of Livingston Manor, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

NOBLE, Appellant, v. KENDALL, Respondent, et al. (Court of Appeals of New York. March 4, 1919.)

PER CURIAM. Motion to amend remittitur denied, with \$10 costs. See 225 N. Y. 673, 122 N. E. 223.

NOLL, Respondent, v. STANDARD OIL CLOTH CO., Appellant. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (175 App. Div. 901, 160 N. Y. Supp. 1139), entered October 14, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant, his employer. The complaint alleged that defendant failed to comply with the provisions of the Labor Law (Consol. Laws, c. 81) with respect to the guarding of shafting and that by reason of this neglect he sustained the injuries complained of. The answer alleged that the shafting in question was properly guarded and that the injury was due to the negligence of plaintiff himself. Frank Verner Johnson and Amos H. Stephens, both of New York City, for appellant. John F. Carew, of Brooklyn, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

PEOPLE, Respondent, v. BOEHM, Appellant. (Court of Appeals of New York. June 6, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (178 App. Div. 401, 163 N. Y. Supp. 22), entered January 16, 1917, which affirmed a judgment of the Onondaga County Court revoking the suspension of execution of a sentence of imprisonment theretofore rendered against the defendant and ordering the execution of said judgment. Ray B. Smith, of Syracuse, for appellant. John H.

Walrath, Dist. Atty., of Syracuse (James J. Barrett, of Syracuse, of counsel), for the People.

PER CURIAM. Judgment affirmed.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

PEORLE, Respondent, v. DAVIS, Appellant. (Court of Appeals of New York. March 18, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (183 App. Div. 274, 171 N. Y. Supp. 157), entered May 18, 1918, which affirmed a judgment of the Onondaga County Court rendered upon a verdict convicting the defendant of the crime of grand larceny in the first degree. Henry R. Follett and Daniel T. Scully, both of Syracuse, for appellant. John H. Walrath, of Syracuse, for the People.

PER CURIAM. Judgment affirmed.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

PEOPLE, Appellant, v. DEINHARDT, Respondent. (Court of Appeals of New York. April 22, 1919.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (179 App. Div. 228, 166 N. Y. Supp. 502), entered July 31, 1917, which reversed a judgment rendered at a Trial Term upon a verdict convicting the defendant of the crime of grand larceny in the first degree and directing a dismissal of the indictment. It was stipulated that the appeal be dismissed. Felix Reifschneider, Jr., of Brooklyn, for the motion.

PER CURIAM. Motion granted, and appeal dismissed.

PEOPLE, Respondent, v. GLEEKSMAN, Appellant. (Court of Appeals of New York. April 22, 1919.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (178 App. Div. 882, 164 N. Y. Supp. 224), entered April 5, 1917, which affirmed a judgment of the Court of Special Sessions of the City of New York convicting the defendant of the crime of unlawfully possessing an indecent book. The motion was made upon the ground of failure to file the return. Edward Swann, Dist. Atty., of New York City (Felix C. Benavenga, of New York City, of counsel), for the motion.

PER CURIAM. Motion granted, and appeal dismissed.

PEOPLE, Appellant, v. JEFFREY, Respondent. (Court of Appeals of New York. April 29, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (181 App. Div. 966, 167 N. Y. Supp. 1119), entered December 5, 1917, which reversed a judgment of the Jefferson County Court rendered upon a verdict convicting the defendant of the crime of grand

larceny in the second degree and granted a new trial upon the ground that the verdict of the jury was against the weight of evidence. Jerome B. Cooper, Dist. Atty., of Watertown, for the People. J. F. La Rue and Delos M. Cosgrove, both of Watertown, for respondent.

PER CURIAM. Appeal dismissed.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, and McLAUGHLIN, JJ., concur. ANDREWS, J., not voting.

PEOPLE, Respondent, v. KELLER, Appellant. (Court of Appeals of New York. May 2, 1919.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (186 App. Div. 534, 174 N. Y. Supp. 301), entered February 7, 1919, which affirmed a judgment of the Kings County Court convicting the defendant of the crime of grand larceny in the first degree. The motion was made upon the ground of failure to file the return. Harry E. Lewis, Dist. Atty., of Brooklyn (Ralph E. Hemstreet, of Brooklyn, of counsel), for the motion.

PER CURIAM. Motion granted, and appeal dismissed.

PEOPLE, Respondent, v. POLSTEIN, Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (184 App. Div. 260, 171 N. Y. Supp. 501), entered July 11, 1918, which affirmed a judgment of the Bronx County Court rendered upon a verdict convicting the defendant of the crime of manslaughter in the second degree. Leo H. Klugherz and Abraham Levy, both of New York City, for appellant. Francis Martin, Dist. Atty., of New York City (Charles B. McLaughlin and Seymour Mork, both of New York City, of counsel), for the People.

PER CURIAM. Judgment affirmed.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

PEOPLE, Respondent, v. MALTBIIE, Chamberlain of City of New York, Appellant. (Court of Appeals of New York. April 29, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (184 App. Div. 743, 172 N. Y. Supp. 483), entered November 25, 1918, which unanimously affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the chamberlain of the city of New York "to forthwith pay over and transfer to the treasurer of the state of New York any and all sums of money belonging to intestate estates paid into court pursuant to the provisions of the Revised Statutes of the state of New York, part 2, chapter 6, title 6, article first, and successor statutes, including chapter 230 of the Laws of 1898, which sums of money have remained in the hands of the city chamberlain of the city of New York for a period of 20 years, after deducting therefrom his legal fees; and the

said chamberlain of the city of New York, on making such payment and transfer, shall furnish to the state comptroller and to the state treasurer, each, a certificate under his hand and official seal showing in detail for each intestate account the title, the ledger and register folio and page, the date when funds were received by the city chamberlain and the amount thereof, for whom deducted as best known, the amount of fees deducted, and the amount transferred to the state treasurer." William P. Burr, Corp. Counsel, of New York City (Terence Farley and William A. Walling, both of New York City, of counsel), for appellant. Charles D. Newton, Atty. Gen. (C. T. Dawes, of Albany, of counsel), for the People.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

PEOPLE, Respondent, v. PELLEGRINO, Appellant. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (183 App. Div. 940, 169 N. Y. Supp. 1107), entered April 5, 1918, which affirmed a judgment of the Kings County Court rendered upon a verdict convicting the defendant of the crime of endangering life by maliciously placing explosive near a building in violation of section 1895 of the Penal Law (Consol. Laws, c. 40). Edward J. Reilly, of Brooklyn, for appellant. Harry E. Lewis, Dist. Atty., of Brooklyn (Ralph E. Hemstreet and Harry G. Anderson, both of Brooklyn, of counsel), for the People.

PER CURIAM. Judgment affirmed.

CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE, Respondent, v. RANDOZZO, Appellant. (Court of Appeals of New York. April 22, 1919.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (174 App. Div. 858, 159 N. Y. Supp. 1134), entered June 16, 1916, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York, rendered upon a verdict convicting the defendant of the crime of kidnapping. The motion was made upon the ground of failure to file the return. Edward Swann, Dist. Atty., of New York City (Charles W. Gould, of New York City, of counsel), for the motion.

PER CURIAM. Motion granted, and appeal dismissed.

PEOPLE, Respondent, v. RODGERS, Appellant. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (184 App. Div. 461, 171 N. Y. Supp. 451), entered July 13, 1918, which affirmed a judgment of the court at an Extraordinary Trial Term for the county of New York rendered upon a verdict convicting defendant of the crime of attempt to commit robbery in the first degree as a second

offense. **W. Bourke Cockran**, of New York City, for appellant. **Edward Swann**, Dist. Atty., of New York City (**Robert S. Johnstone**, **Robert D. Petty**, and **Felix C. Benvenga**, all of New York City, of counsel), for the People.

PER CURIAM. Judgment affirmed.

CHASE, **COLLIN**, **CUDEBACK**, **CRANE**, and **ANDREWS, JJ.**, concur. **HOGAN** and **McLAUGHLIN, JJ.**, dissent.

PEOPLE, Respondent, v. **TRIBELHORN**, Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (171 App. Div. 852, 156 N. Y. Supp. 1139), entered January 8, 1916, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendant of the crime of keeping a disorderly house in violation of section 1146 of the Penal Law (Consol. Laws, c. 40). See, also, 118 N. E. 1073. **William S. Gordon** and **Julian T. Abeles**, both of New York City, for appellant. **Edward Swann**, Dist. Atty., of New York City (**Don Carlos Buell**, of New York City, of counsel), for the People.

PER CURIAM. Judgment affirmed.

CHASE, **HOGAN**, **CARDOZO**, **POUND**, **McLAUGHLIN**, and **ANDREWS, JJ.**, concur. **HISCOCK, C. J.**, not sitting.

PEOPLE, Respondent, v. **VOLLERO**, Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Supreme Court rendered April 1, 1918, at a Trial Term for the county of Kings, upon a verdict convicting the defendant of the crime of murder in the first degree. **James W. Osborne** and **Edwin W. Willcox**, both of New York City, for appellant. **Harry E. Lewis**, Dist. Atty., of Brooklyn (**Ralph E. Hemstreet**, of Brooklyn, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed under section 542 of Code of Criminal Procedure.

HISCOCK, C. J., and **COLLIN**, **CUDEBACK**, **CARDOZO**, **CRANE**, and **ANDREWS, JJ.**, concur. **POUND, J.**, dissents, on authority of **People v. Molineux**, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

PEOPLE ex rel. **BOARD OF SUP'RS OF COUNTY OF ROCKLAND**, Respondent, v. **TRAVIS**, State Comptroller, Appellant. (Court of Appeals of New York. June 6, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (184 App. Div. 730, 172 N. Y. Supp. 520), entered January 2, 1919, which annulled, on certiorari, a determination of the state comptroller rejecting the relator's claim for taxes on lands owned by the state and remitted said claim to the comptroller for audit at the full amount claimed. Chapter 149 of the Laws of 1911 provides that the state of New York shall pay taxes upon all lands owned by the state in Rockland county, and that assessments shall be made by the local assessors on such lands in the same manner

as upon land owned by individuals, and further provides that the assessed valuation shall not be reduced below that at which such lands were assessed at the time the state acquired same. Tax bills were presented to the comptroller by the treasurer of Rockland county showing that the assessors had increased the valuation upon various parcels of land owned by the state, subsequent to the acquisition by the state. The comptroller refused to audit said tax bills at the amounts as presented, claiming that the assessors, under said chapter 149 of the Laws of 1911 could not increase the valuation on said lands above what they were assessed at the time the state acquired same. **Charles D. Newton**, Atty Gen. (**Wilber W. Chambers**, of Albany, of counsel), for appellant. **E. W. Hofstatter**, of Nyack, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and **COLLIN**, **CUDEBACK**, **CARDOZO**, **POUND**, **CRANE**, and **ANDREWS, JJ.**, concur.

PEOPLE ex rel. **BROWN**, Respondent, v. **PURDY** et al., Commissioners of Taxes and Assessments of City of New York, Appellants. (Court of Appeals of New York. April 29, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (186 App. Div. 54, 173 N. Y. Supp. 782), entered January 10, 1919, which affirmed an order of Special Term reducing an assessment upon real property of relator for the purpose of taxation for the year 1915. The property assessed was part of the bed of a closed street. Relator contended that the land in the bed of said street is or may be subject to easements in favor of abutting owners on said street within the permanent block in which said land lies, as shown by the final maps of the city of New York, and not having been subjected to an assessment for benefit in connection with the extinguishment of such easements is now of nominal value and should be assessed for taxation accordingly. **William P. Burr**, Corp. Counsel, of New York City (**William H. King** and **Isaac Phillips**, both of New York City, of counsel), for appellants. **Harold Swain**, of New York City, for respondent.

PER CURIAM. Order affirmed, with costs, on opinion of **Shearn, J.**, below.

HISCOCK, C. J., and **CHASE**, **HOGAN**, **CARDOZO**, **POUND**, **McLAUGHLIN**, and **ANDREWS, JJ.**, concur.

PEOPLE ex rel. **COMMISSIONER OF PUBLIC CHARITIES OF CITY OF NEW YORK**, Respondent, v. **SKIDMORE**, Appellant. (Court of Appeals of New York. April 29, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (182 App. Div. 897, 168 N. Y. Supp. 1123), entered January 18, 1918, which affirmed an order of the Court of Special Sessions of the city of New York adjudging the defendant to be the father of a bastard child and directing him to pay for the support and maintenance of said child and to file a bond conditioned for the performance of

said order. John M. Wilson, of New York City, for appellant. William P. Burr, Corp. Counsel, of New York City (Terence Farley, of New York City, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

PEOPLE ex rel. NEW YORK EDISON CO., Appellant, v. PRENDERGAST, City Comptroller, Respondent. (Court of Appeals of New York. March 18, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (185 App. Div. 461, 172 N. Y. Supp. 849), entered December 14, 1918, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel defendant to consider, under section 246 of the charter of the city of New York, as added by Laws 1907, c. 601, § 1, the relator's claim for a refund of a portion of taxes assessed against certain real property owned by relator and paid for the years 1905 to 1914 inclusive, in which assessments, it was claimed, there was erroneously included the value of machinery owned, not by the relator, but by its lessee. It was admitted that relator knew of the error. The Appellate Division held that whether the assessment was illegal or whether it was merely erroneous, the action of the commissioners was subject to correction by certiorari proceedings, and that section 246 of the charter was not intended to and does not include the right to procure reimbursement by resort to the comptroller and the board of estimate and apportionment in any such case. Edward J. McGuire and James M. Vincent, both of New York City, for appellant. William P. Burr, Corp. Counsel, of New York City (William H. King and Jesse F. Orton, both of New York City, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

PEOPLE ex rel. NEW YORK STEAM CO., Respondent, v. STRAUS et al., Public Service Commission, First District, Appellants. (Court of Appeals of New York. June 6, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (186 App. Div. 787, 174 N. Y. Supp. 868), entered March 7, 1919, which annulled, on certiorari, a determination of the Public Service Commission for the First District directing the relator, the New York Steam Company, to file an amendment to its rate schedules which became effective on June 1, 1917, so as to separately classify certain outstanding term contracts made in the form prescribed in its previous schedules, which contracts the company claimed had been abrogated by its own act in filing a new schedule fixing higher rates and different forms of contracts. Godfrey Goldmark, of New York City, for

appellants. George Zabriskie, of New York City, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

PEOPLE'S NAT. BANK OF HACKENSACK, Respondent, v. RICE et al., Appellants. RICE et al., Appellants, v. OLIVER BROS. PURCHASING CO. et al., Respondents. (Court of Appeals of New York. April 8, 1919.) Appeal in the first above-entitled action from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (175 App. Div. 892, 160 N. Y. Supp. 1142), entered October 25, 1916, affirming a judgment in favor of plaintiff entered upon the report of a referee. Appeal in the second above-entitled action from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered October 25, 1916, affirming a judgment in favor of defendants entered upon the report of a referee. Action No. 1 was begun March 26, 1908, by the People's National Bank of Hackensack, a banking corporation, against Rice and Hunter upon a certain promissory note for \$2,500 made by them to the order of Oliver Brothers Purchasing Company and discounted by the plaintiff bank. This note was one of two notes, each in the sum of \$2,500 due in six months and a year respectively, given March 9, 1907, by Rice and Hunter as the consideration for \$15,000 par value of capital stock of the East Asian Mercantile Company. The six months' note was paid when due. On November 9, 1911, action No. 2 was brought by Rice and Hunter against the Oliver Brothers Purchasing Company and Thomas E. Oliver, James H. Oliver and Frank J. Oliver individually, claiming damages for fraud in the sale of said stock. The defense pleaded by Rice and Hunter in action No. 1 and the cause of action set up in their complaint in action No. 2 are the same, namely, that on March 9, 1907, when the stock was delivered and the notes given therefor, Thomas E. Oliver and Frank J. Oliver made affirmative false and fraudulent statements of facts with respect to said company. The referee found that there was no fraud in the transaction. Elisha B. Powell, of Oswego, E. J. Page, of Syracuse, and Robert B. Knowles, of New York City, for appellants. Henry W. Unger and Herbert B. Shoemaker, both of New York City, for respondents.

PER CURIAM. Judgment in each case affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, and ANDREWS, JJ., concur. McLAUGHLIN, J., not sitting.

In re PEOPLE'S SURETY CO. OF NEW YORK. (Court of Appeals of New York. June 3, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (186 App. Div. 663, 175 N. Y. Supp. 74), entered March 7, 1919, which affirmed an order of Special Term, denying the motion of the receivers of the People's Surety Company of New York to offset against the indebtedness of it to the Union Bank

of Brooklyn, a liquidation dividend declared upon 150 shares of the capital stock of the People's Surety Company held by the Union Bank of Brooklyn. The following question was certified: "Should the receivers of the People's Surety Company be allowed to set off \$7,500 or any part thereof, out of the \$34,786.99 due from the Union Bank of Brooklyn, against a dividend of \$50 per share payable out of the assets of the People's Surety Company upon 150 shares of its stock, or any lesser number of shares thereof, held by the Union Bank of Brooklyn?" Charles F. Brown and Henry C. Willcox, both of New York City, for appellants. Joseph G. Deane and Philip A. Walter, both of New York City, for respondents.

PER CURIAM. Order affirmed, with costs, and question certified answered in the negative.

HISCOCK, C. J., and COLLIN, CUDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

PHONVILLE, Respondent, v. NEW YORK & CUBA MAIL S. S. CO. et al., Appellants. (Court of Appeals of New York. April 8, 1919.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (173 N. Y. Supp. 919), entered January 28, 1919, modifying, and affirming as modified, an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). The motion was made on the ground that the appeal could not be taken as of right to the Court of Appeals and that permission to appeal had not been obtained. See, also, 174 N. Y. Supp. 917; 123 N. E. 258. Pope B. Billups, of New York City, for the motion. E. C. Sherwood, of New York City, opposed.

PER CURIAM. Motion denied, without costs.

PIERSON, Respondent, v. INTERBOROUGH RAPID TRANSIT CO., Appellant. (Court of Appeals of New York. May 27, 1919.) Motion to dismiss an appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (184 App. Div. 678, 172 N. Y. Supp. 492), entered November 13, 1918, unanimously affirming a judgment in favor of plaintiff entered upon a verdict. The motion was made upon the ground that the appeal raised no question of law; that the exceptions were frivolous, and the appeal without merit and taken solely for the purpose of delay. John O. Robinson, of New York City, for the motion. Frederick J. Moses, of New York City, opposed.

PER CURIAM. Motion denied, without costs.

PRATT et al., Respondents, v. CITY OF SCHENECTADY, Appellant. (Court of Appeals of New York. May 2, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (178 App. Div. 944, 165 N. Y. Supp. 1107), entered May 8, 1917, affirming a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury. The action was on contract to recover

extra compensation due to changes and alterations in plans for the construction of a sewage disposal plant. The defense was that the extra work had not been previously authorized by written order of the engineer as required by the terms of the contract. See, also, 222 N. Y. 711, 119 N. E. 1073. John D. Miller, Corp. Counsel, of Schenectady (Maurice B. Flinn, of Schenectady, of counsel), for appellant. John Alexander and William Dewey Loucks, both of Schenectady, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

PRENDERGAST, City Comptroller, Appellant, v. COHALAN et al., Surrogates of New York County, Respondents. (Court of Appeals of New York. April 29, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (179 App. Div. 883, 166 N. Y. Supp. 268), entered June 29, 1917, which affirmed an order of Special Term denying a motion for a writ of mandamus to compel the defendants to cause to be maintained in the office of said surrogates daily time reports of each employé in said office, except such heads of divisions or bureaus therein as may be excused by said surrogates from the duty of making such reports; monthly service records of each of said employés required to make daily time reports; and cause to be compiled in said office and furnished once a month to the comptroller of the city of New York monthly statements and reports showing functional and unit costs of the work of the office of the surrogates of New York county, said reports, records and statements to be compiled, maintained and furnished in accord with the forms theretofore submitted to the surrogates of New York county on or about March 27, 1916, by said comptroller, but subject to any modification of said forms as may be mutually agreed upon by said surrogates on the one hand and by the said comptroller on the other. The Special Term held that section 149a of the charter of New York City (Laws 1906, c. 190), which provides for the furnishing of detailed reports as required by the comptroller, was not applicable to the surrogates of New York county, inasmuch as the surrogates were not county but judicial officers of the state and, therefore, both the surrogates and their employés are state officers and employés. Lamar Hardy, Corp. Counsel, of New York City (Terence Farley and Elliot S. Benedict, both of New York City, of counsel), for appellant. George L. Ingraham, Robert Ludlow Fowler, and Arthur T. O'Leary, all of New York City, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

PUBLIC SERVICE COMMISSION, SECOND DISTRICT, et al., Appellants, v. IROQUOIS NATURAL GAS CO., Respondent. (Court of Appeals of New York. March 21,

1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (184 App. Div. 285, 171 N. Y. Supp. 379), entered July 2, 1918, which reversed an order of Special Term granting an injunction, under section 74 of the Public Service Commissions Law (Consol. Laws, c. 48), restraining the defendant from collecting or demanding for any natural gas furnished by it in the city of Buffalo, or certain other municipalities named in the petition, any price in excess of 32 cents gross or 30 cents net per thousand cubic feet until it shall have been duly authorized by the Public Service Commission, Second District, of the state of New York, so to do either in the proceeding or proceedings now pending before such commission or otherwise. Ledyard P. Hale, of Albany, for appellant Public Service Commission. William S. Rann, Corporation Counsel, of Buffalo (Frederic C. Rupp, of Buffalo, of counsel), for appellant city of Buffalo. Daniel J. Kenefick, of Buffalo, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, and McLAUGHLIN, JJ., concur. HOGAN and CRANE, JJ., dissent.

In re QUICK et al. (Court of Appeals of New York. April 22, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (173 N. Y. Supp. 919), entered December 6, 1918, which affirmed a decree of the Kings County Surrogate's Court disallowing a claim presented by one of the executors of Mary B. Couch, deceased, for services alleged to have been performed by him for the decedent in her lifetime. Allen S. Wrenn, of New York City, for appellant. C. W. Wilson, Jr., of Brooklyn, and Herman S. Hertwig and J. Stacy Brown, both of New York City, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

RAYMOND HADLEY CORPORATION, Respondent, v. BOSTON & M. R. R. et al., Appellants. (Court of Appeals of New York. June 6, 1919.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (186 App. Div. 341, 174 N. Y. Supp. 342), entered February 7, 1919, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. The motion was made upon the ground of failure to file the required undertaking. Neil P. Cullom, of New York City, for the motion. H. E. J. MacDermott, of Mineola, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion, unless within 10 days an undertaking as required by the Code be filed and served, in which case the motion is denied, without costs.

RENDINO, Respondent, v. CONTINENTAL CAN CO. et al., Appellants. (Court of Appeals of New York. March 11, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (186 App. Div. 924, 172 N. Y. Supp. 916), entered November 12, 1918, affirming an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). Claimant, a boy 17 years of age, was employed by defendant Continental Can Company to dip cans in a liquid. On the day of the accident, having finished his own work he attempted to operate a stamping machine in violation of orders of his employer and received the injuries complained of. The Industrial Commission held that although claimant violated orders, nevertheless, that did not bar him from compensation. The appellants contended that the claimant entirely departed from the sphere of his employment and exposed himself, by voluntary act, to a risk which was not contemplated in the contract of employment, and, therefore, the alleged accident did not arise out of and in the course of his employment. Bertrand B. Pettigrew and Walter L. Glenney, both of New York City, for appellants. Charles D. Newton, Atty. Gen. (R. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order of Appellate Division and determination of Industrial Commission reversed and claim dismissed, with costs against the Industrial Commission in this court and in the Appellate Division, on ground there is no evidence to sustain the finding that the claimant's injury arose out of the course of his employment, within the authority of Di Salvio v. Menihan Co., 225 N. Y. 123, 121 N. E. 766.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

ROBERTS, NASH & CO., Respondent, v. NASSAU & S. LIGHTING CO., Appellant. (Court of Appeals of New York. June 6, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (174 App. Div. 883, 159 N. Y. Supp. 1139), entered June 9, 1918, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to foreclose a mechanic's lien. Plaintiff entered into a contract to erect a building for defendant and agreed therein that if the building was not completed by a certain date \$10 per day should be deducted from the contract price. The building was not completed within the time stipulated. The referee found that as the defendant itself caused delay by failing to perform some of its work, it was not entitled to enforce the penalty clause in the contract, but was only entitled to general damages. Frederic C. Scofield and James M. Vincent, both of New York City, for appellant. William J. Pape and Emil A. Williams, both of Brooklyn, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

ROSS, Appellant, v. RODGERS & HAGER-TY, Inc., Respondent. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment entered May 9, 1917, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (178 App. Div. 904, 164 N. Y. Supp. 1112), reversing a judgment in favor of plaintiff, entered upon a verdict and directing a dismissal of the complaint in an action under the Employers' Liability Law (Consol. Laws, c. 81, §§ 200-204) to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff was employed by defendant, a contractor engaged in the construction of a sewer, as one of a gang of workmen engaged in discharging gravel and dirt from cars, and was injured through the dumping of one of the cars towards the side where he was standing. The theory of negligence submitted to the jury was that Richards, the defendant's foreman, negligently gave the order to dump the second car at a time, and under such circumstances, that a reasonably prudent man, exercising ordinary care, would have anticipated that one or more members of the gang would reasonably conclude that the order was directed to them, and would dump the car from left to right, at a time when plaintiff was in a position on the other side of the car where he must necessarily be injured, if they, or either of them, did so dump the car. Sydney A. Syme, of Mt. Vernon, for appellant. Frank Verner Johnson, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, CARDOZO, McLAUGHLIN, and ANDREWS, JJ., concur. HOGAN and POUND, JJ., dissent.

RUCIENSKI, Appellant, v. LIVERPOOL & LONDON & GLOBE INS. CO., Respondent. SAME, Appellant, v. NORTH BRITISH & MERCANTILE INS. CO. OF LONDON & EDINBURGH, Respondent. (Court of Appeals of New York. April 15, 1919.) Motions to dismiss appeals in each of the above-entitled actions from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (171 App. Div. 914, 155 N. Y. Supp. 1138), entered November 28, 1915, affirming a judgment in favor of defendant entered upon a verdict. The motions were made upon the grounds of failure to perfect and prosecute said appeals. Robert C. Poskanzer, of Albany, for the motion.

PER CURIAM. Motions granted, and appeals dismissed, with costs, and \$10 costs of motion in each case.

SABARSKY, Appellant, v. DREW et al., Respondents. (Court of Appeals of New York. March 4, 1919.) Appeal from a judgment, entered January 17, 1917, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (176 App. Div. 80, 162 N. Y. Supp. 505), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint, which

alleged that the plaintiff and defendants had entered into an agreement in writing, whereby the defendants were to furnish the plaintiff with sufficient work for his establishment for a period beginning June 18, 1913, and ending June 1, 1915; that the plaintiff established a factory and was reasonably able to turn out at least 500 dozen shirts a week; but that the defendants in violation of their agreement refused to furnish the plaintiff with the quantity of shirts that the plaintiff could reasonably manufacture, and instead furnished a lesser quantity, to the plaintiff's damage and expense, and that the defendants further in violation of their agreement refused to furnish the plaintiff with any work at all. Nathan Kelmenson, of New York City, for appellant. Lewis F. Glaser and Abraham B. Keve, both of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDERBACK, HOGAN, CRANE, and ANDREWS, JJ., concur. McLAUGHLIN, J., not sitting.

SALZANO, Respondent, v. MARINE INS. CO., Limited, Appellant. (Court of Appeals of New York. March 21, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (178 App. Div. 948, 165 N. Y. Supp. 1111), entered May 7, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover upon a policy insuring an automobile, therein described, against loss or damage by fire. The answer denied that the insurance policy covered the automobile referred to in the complaint and set up for defenses that the plaintiff was not the owner of the automobile and had no insurable interest therein; that in order to induce the defendant to issue the policy of insurance the plaintiff falsely and fraudulently stated and represented that the automobile referred to in the complaint was built in 1908, that the original price was \$3,500 and that the plaintiff had purchased it second-hand at an expense of \$2,300, and that the date of purchase was May 8, 1911; that as a matter of fact the automobile was built in the year 1907, instead of 1908; that the original cost was much less than \$3,500, and that the plaintiff paid, not \$2,300, but \$850. Frank Gibbons, of Buffalo, for appellant. Wallace Thayer, of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDERBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

SANDERS, Respondent, v. NATIONAL BISCUIT CO. et al., Appellants. (Court of Appeals of New York. March 11, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (186 App. Div. 930, 172 N. Y. Supp. 917), entered December 9, 1918, affirming an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). The claim was for loss

of an eye through injury thereto from a chip from a sledge hammer which claimant was using in the course of his employment. The appellants contended that written notice of the injury was not given within 10 days. The Industrial Commission excused the failure to give written notice on the ground that it appeared that verbal notice was given to the foreman to whom it was proper to report accidents. Bertrand L. Pettigrew and Walter L. Glenney, both of New York City, for appellants. Charles D. Newton, Atty. Gen. (E. O. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

SASSANO, Respondent, v. PAINO et al., Appellants. (Court of Appeals of New York. June 3, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (186 App. Div. 927, 172 N.Y. Supp. 918), entered November 25, 1918, affirming an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). The employer was a sewer contractor. The deceased employé was a timberman, whose duty was to brace the trenches. At the time of the accident the work for the day was over, but the injured man was detained by the employer to unload some material. Some sections of concrete sewer pipe were delivered by a driver named Montgomery, in the employ of the Lock-Joint Pipe Company. Some of this pipe was broken and the employer desired Montgomery to return a broken section. The employer asked him to sign a receipt for this section and Montgomery demanded a receipt for two new sections without regard to the section which he was willing to take back. The employer refused to sign such a receipt, which refusal led to a fight and the driver, Montgomery, threw a brick at the employer and his men came to his assistance and also threw bricks. The deceased employé was hit in the skull by a brick and his skull fractured, as a result of which he died. Appellants contended that the injuries did not arise out of and in the course of the employment. William Warren Dimmick and William Dike Reed, both of New York City, for appellants. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

SASSE, Appellant, v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Respondent. (Court of Appeals of New York. May 20, 1919.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (179 App. Div. 927, 166 N. Y. Supp. 1113) entered July 19, 1917, unanimously affirming a judgment in favor of defendant, entered upon an order of the court at a Trial Term setting aside a verdict in favor of plain-

tiff and directing a dismissal of the complaint on the merits. The action was to recover the amount of a death benefit provided for in defendant's constitution to be paid to a designated beneficiary upon death of a member through accident. The complaint was dismissed upon the ground that the plaintiff had failed to give notice to the defendant of the death within the time required by its constitution. Frederick Hulse, of New York City, for appellant. H. B. Bradbury, of New York City, for respondent.

PER CURIAM. Judgments modified, by striking out provision "on the merits," and, as so modified, affirmed, without costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

SASSE, Respondent, v. TRAVELERS' INS. CO., Appellant. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (179 App. Div. 927, 166 N. Y. Supp. 1113), entered July 30, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action upon a policy of accident insurance against bodily injuries effected directly and independently of all other causes through external, violent and accidental means. The plaintiff's intestate on August 10, 1912, while walking down a flight of steps at the Grand Central Station, New York City, fell and injured himself. With the aid of a porter he walked up the steps and was taken in a wheel chair to the Emergency Hospital in the Grand Central Station. After remaining there some time, he went to his home and got to bed. He never got out of bed, but 11 days afterward died suddenly. The evidence on the part of the plaintiff shows that up to the time of his injury he was a man in good health. It was claimed by the defendant that his death resulted from disease. William J. Moran, of New York City, for appellant. Frederick Hulse, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

SCHWERTFEGER, Appellant, v. SCANDIAN AMERICAN LINE, Respondent. (Court of Appeals of New York. June 3, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (186 App. Div. 89, 174 N. Y. Supp. 147), entered January 24, 1919, which reversed an order of Special Term overruling a demurrer to the complaint and directed a dismissal of the complaint in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. The accident occurred in New Jersey. By the laws of that state an action for death by negligence must be commenced within two years. Before the expiration of the two years plaintiff commenced an action, but made a mistake and selected the wrong forum; and the action was dismissed for want of jurisdic-

tion. Within one year after the first action was dismissed, but more than two years after the death of plaintiff's intestate, the present action was commenced. The defendant demurred upon the ground that the action had not been commenced within two years after the death of plaintiff's intestate as provided by the New Jersey law. Joseph A. Shay and Leonard F. Fish, both of New York City, for appellant. Walter L. Glenney and Bertrand L. Pettigrew, both of New York City, for respondent.

PER CURIAM. Order affirmed, with costs, on opinion of Shearn, J., below.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

SHANAHAN, Appellant, v. STATE, Respondent. (Court of Appeals of New York. May 2, 1919.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (175 App. Div. 961, 161 N. Y. Supp. 1145), entered January 17, 1917, affirming a judgment of the Court of Claims. The motion was made upon the ground of failure to file the required undertaking. Charles D. Newton, Atty. Gen. (B. F. Sturgis, of Albany, of counsel), for the motion.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

SHAROT, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment entered May 25, 1917, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 869, 164 N. Y. Supp. 804), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The complaint alleged that on the night of May 6, 1914, plaintiff was lawfully riding on a tandem motorcycle along the highway, in an easterly direction, on the right-hand or southerly side of the Pelham parkway, east of the bridge over the New Haven road and that the motorcycle was overturned by reason of the unsafe and dangerous condition of the highway, causing the injuries complained of. By its answer the defendant put in issue the material allegations of the complaint. Frederic O. Scofield and Frederick W. Blagood, both of New York City, for appellant. William P. Burr, Corp. Counsel, of New York City (Terence Farley, of New York City, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

SHIEBLER, Appellant, v. SMITH et al., Board of Sup'rs, Respondents. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of

the Supreme Court in the Second Judicial Department (178 App. Div. 925, 165 N. Y. Supp. 1112), entered May 14, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. This was a taxpayer's action under section 51 of the General Municipal Law (Consol. Laws, c. 24) against the defendants both in their capacity as the board of supervisors of Suffolk county and in their individual capacity, for the purpose of annulling the audit of the bill of the defendant Redfield for alleged services to the county of Suffolk in copying and extending the tax roll of the town of Southampton for the year 1915; holding the individual members of the board of supervisors personally responsible for the amount of said bill, \$5,079.16, as moneys paid out on a collusive audit and to restore said sum to the county by judgment against the defendant Redfield primarily and against the other defendants for so much as should not be collectible from Redfield. Percy L. Housel, of Riverside, R. I., for appellant. Nathan O. Petty, of Riverhead, and John R. Vunk, of Patchogue, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur. HISCOCK, C. J., not sitting.

SINSHEIMER, Respondent, v. UNDERPINNING & FOUNDATION CO., Appellant. (Court of Appeals of New York. April 29, 1919.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (178 App. Div. 495, 165 N. Y. Supp. 645) entered June 12, 1917, unanimously affirming a judgment in favor of plaintiff entered upon a verdict. The plaintiff, the lessee and occupant of the store, basement, and subbasement of the premises No. 593 Broadway, in the borough of Manhattan, New York City, brought this action against the defendant, which was engaged in the erection of a portion of the subway along Broadway, to recover damages sustained by reason of the erection, maintenance, and operation by the defendant on the street and sidewalk in front of plaintiff's premises of certain structures employed in the work of excavation and construction, and operated as a station from which to conduct the work of construction and excavation to a considerable distance north and south of plaintiff's premises, thereby interfering with plaintiff's easements of light, air and access, and also imposing an undue and excessive burden upon plaintiff's premises as against other premises along the section of the subway served by such structures. The answer alleged substantially a general denial and a defense that the structures complained of were authorized by the public service commission and were merely temporary and incidental to a work of public necessity, performed without negligence, in the construction of a portion of the Rapid Transit Railroad, pursuant to a contract between the defendant and the city of New York. Herman Aaron, of New York City, and Hersey Egginton, of Brooklyn, for appellant. Na-

than L. Miller, of Syracuse, and Louis J. Vorhaus, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

SKRODANES et al., Respondents, v. KNICKERBOCKER ICE CO., Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (177 App. Div. 891, 163 N. Y. Supp. 254), entered February 15, 1917, affirming a judgment in favor of plaintiffs entered upon a verdict in an action to recover for the death of plaintiffs' intestate alleged to have been occasioned through the negligence of defendant, his employer. Joseph Skrodanes was in the employ of the defendant at one of its icehouses situated at West Camp, Ulster county, and was engaged as one of a gang of men in hoisting into position an ice slide, known as a "Merrimac," which was used to run ice down from a door in the side of the icehouse. The end of this slide is hoisted up the side of the icehouse by a block and tackle, having two blocks at the upper end, which blocks approach each other more closely as the end is hoisted. When the end of the slide had been raised to such a position that the two blocks were about a foot apart, the foreman in charge of the work gave orders to pull the blocks together; the men hauled on the end of the rope, the blocks came together, and the rope broke, causing the whole apparatus to fall to the ground. Part of it struck Skrodanes on the head inflicting injuries from which he died. The action was brought under the Employers' Liability Act and the notices claim failure to inspect, and worn out, rotten and defective condition of all parts of the apparatus. Frank R. Savidge and Frederick M. Thompson, both of New York City, for appellant. Charles Morschauer, of Poughkeepsie, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur. HISCOCK, C. J., and CHASE and COLLIN, JJ., dissent.

SMITH et al., Respondents, v. SMITH et al., Appellants. (Court of Appeals of New York. April 29, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (177 App. Div. 218, 163 N. Y. Supp. 863), entered March 13, 1917, affirming a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury. The action was brought under sections 1638-1650 of the Code of Civil Procedure to determine the title to certain real property in the town of Horicon, Warren county. The trial court gave judgment barring the defendants from any and all claims to the property mentioned. The defendants claimed title to a great part of the premises in question by a deed to their father from his brother Richard in August, 1863. At

the time of the conveyance, and ever since, Richard and his descendants have been in possession of the property, and possession was never delivered under the deed. There is no explanation why possession was not given, or why the deed was given. The Appellate Division held that "the production of the deed and its record, under such circumstances, are not much evidence of title. Evidently there is something wanting, some fact which has been lost in the long lapse of time. The case, therefore, invites the statute of repose." Edgar T. Brackett, of Saratoga Springs, and Daniel J. Finn, of Glens Falls, for appellants. Joseph A. Kellogg, of Glens Falls, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, and CRANE, JJ., concur. McLAUGHLIN, J., not voting.

In re SNITKIN. (Court of Appeals of New York. March 4, 1919.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (173 N. Y. Supp. 923) entered January 16, 1919, which disbarred the appellant herein from practice as an attorney and counselor at law in the state of New York. The motion was made upon the ground that the order of the Appellate Division was unanimous and that permission to appeal had not been obtained. Einar Ohrystie, of New York City, for the motion. Elijah N. Zoline, of New York City, opposed.

PER CURIAM. Motion granted, and appeal dismissed.

SPRINGFIELD L. I. CEMETERY SOC., Respondent, v. HERMAN et al., Appellants. (Court of Appeals of New York. May 2, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (177 App. Div. 895, 163 N. Y. Supp. 1131), entered February 7, 1917, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon the report of a referee in an action for trespass. The defense was right of way. Howard G. Wilson and John C. Wait, both of New York City, for appellants. Lynn C. Norris, of Brooklyn, and Arthur P. Hilton, of Jamaica, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

STANTON, Respondent, v. CRAIG, City Comptroller, Appellant. (Court of Appeals of New York. April 22, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (186 App. Div. 481, 174 N. Y. Supp. 551), entered February 21, 1919, which affirmed an order of Special Term denying a motion to vacate and set aside an order appointing a referee to take depositions. Respondent contended that the Court of Appeals had no jurisdic-

tion to entertain the appeal for the reasons that the order sought to be reviewed was not a final order and that permission to appeal had not been obtained. William P. Burr, Corp. Counsel, of New York City (Terence Farley and William E. C. Mayer, both of New York City, of counsel), for appellant. Douglas Mathewson and Henry H. Spitz, both of New York City, for respondent.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

STEINBERG v. DOSCHER et al. (Court of Appeals of New York. June 3, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (172 App. Div. 923, 156 N. Y. Supp. 1146), entered January 7, 1916, which affirmed an order of Special Term, vacating and setting aside a judgment of foreclosure and sale and the deed of conveyance thereunder. Respondent contended that the relief granted was within the discretion of the courts below. Louis J. Halbert, of Brooklyn, for appellant. Richard F. Adams, of Long Island City, for respondent.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

STENZLER, Appellant, v. STANDARD GASLIGHT CO. OF CITY OF NEW YORK, Respondent. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment entered November 9, 1917, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (179 App. Div. 774, 167 N. Y. Supp. 282), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, as the result of a collision between an automobile truck belonging to defendant and a wagon on which plaintiff was riding. Frank Kelly, a superintendent in the employ of the defendant, testified, without contradiction, that the automobile truck had been loaned on the day of the accident to the "Gas Companies' Employes' Mutual Aid Society," an organization composed of employes of the defendant and other gas companies, and of which he himself was a member, for an excursion to College Point, L. I. Kelly returned with other members of the party to Fifty-Ninth street and the bridge, and told the driver of the truck to go back to the garage on 110th street and First avenue, after he had taken two other members of the party home. The driver, however, disobeyed these instructions and went to his own home at 407 West 152d street, whence he drove with his two brothers-in-law, his brother, and two unidentified strangers back to the garage. It was on this trip that he collided with the wagon in which the plaintiff was riding. The Appellate Division held that, at

the time of the accident, the chauffeur was not engaged in the business of the defendant. Jacob Zelenko and Leon Sanders, both of New York City, for appellant. Chauncey B. Garver and John A. Garver, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

STEVENS, Respondent, v. CONSOLIDATED ICE CO. OF HUNTINGTON et al., Appellants. (Court of Appeals of New York. June 8, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (173 N. Y. Supp. 924), entered January 18, 1919, affirming an award of the State Industrial Commission made under the Workmen's Compensation Act (Consol. Laws, c. 67). Claimant's husband, in the performance of his work strained his back. Several days later he took cold and died a month later of myelitis. Appellants contended that death was not the result of the accident. See, also, 174 N. Y. Supp. 922. Charles W. Strong, of Buffalo, Clifford S. Bostwick, of New York City, and John H. Brogan, of Buffalo, for appellants. Charles D. Newton, Atty. Gen. (E. O. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

TAISHOFF et al., Appellants, v. ELKEMA et al., Respondents. (Court of Appeals of New York. March 18, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (175 App. Div. 974, 161 N. Y. Supp. 1147), entered December 9, 1916, which affirmed a final judgment in favor of defendants entered upon an order of Special Term sustaining a demurrer to and directing a dismissal of the complaint. Defendants are substituted trustees of the estate of Mary A. Buskirk, deceased. The complaint alleged that their predecessors as trustees entered into a contract with plaintiffs to lease to them a certain part of the trust estate, but breached said contract and demanded damages for said breach. The question was whether defendants were personally liable for the breach of their predecessor trustees. Max Schleimer, of New York City, for appellants. William A. Purrington, of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, and CRANE, JJ., concur. McLAUGHLIN, J., not sitting.

TIEDEMANN, Respondent, v. TIEDEMANN, Appellant. (Court of Appeals of New York. May 2, 1919.) Motion for reargument denied, with \$10 costs and necessary printing

disbursements. See 225 N. Y. 709, 122 N. E. 892.

TITUS et al., Appellants, v. DU BOIS et al., Respondents. (Court of Appeals of New York. May 2, 1919.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (182 App. Div. 914, 169 N. Y. Supp. 1116) entered February 15, 1918, which affirmed an order of Special Term sustaining a demurrer to the complaint. The motion was made upon the ground that the order of the Appellate Division was unanimous, that permission to appeal had not been obtained, and that the appeal had not been perfected by filing the required undertaking. W. H. L. Edwards, of New York City, for the motion.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

In re TONE'S WILL. (Court of Appeals of New York. June 3, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (186 App. Div. 361, 174 N. Y. Supp. 391), entered February 10, 1919, which affirmed a decree of the New York County Surrogate's Court admitting to probate the will of Catherine A. Tone, deceased. The will was contested by a grandchild of testatrix on the ground that by its provisions more than one-half of the whole estate was given to a religious and charitable institution. The Appellate Division held that where a testator dies leaving him surviving neither wife, child nor parent, a devise of more than half of his estate to the corporations or any of them enumerated in section 17 of the Decedent Estate Law (Consol. Laws, c. 13) is valid, although the testator may be survived by descendants in a remoter degree than a child. William Barnes and Abraham Greenberg, both of New York City, for appellant. Daniel Daly, of New York City, for respondent.

PER CURIAM. Order affirmed, with costs payable out of the estate, on opinion of Page, J., below.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

TRAPP, Respondent, v. INTERNATIONAL RY. CO., Appellant. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (178 App. Div. 954, 165 N. Y. Supp. 1116), entered June 1, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The jury found that while the plaintiff was attempting to alight from one of the defendant's street cars, the car was suddenly started and the plaintiff was thrown and injured. This finding of the jury is not questioned upon this appeal. The only contention made by the defendant in this court is that the trial court

committed substantial, prejudicial and reversible error by receiving evidence under the complaint in this action that plaintiff sustained a displacement of the uterus as a result of her fall from defendant's car. James O. Sweeney, of Buffalo, for appellant. Carlton E. Ladd and William C. White, both of New York City, for respondent.

PER CURIAM. Judgment reversed, and new trial granted, costs to abide event, on authority of *Kurak v. Traiche*, 226 N. Y. 266, 123 N. E. 877.

CHASE, COLLIN, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. CUDDEBACK, J., not sitting.

In re TRAVIS. In re FRASER. (Court of Appeals of New York. March 4, 1919.)

PER CURIAM. Motion to amend remittiturs granted in each case upon stipulation, without costs. See 224 N. Y. 598, 599, 121 N. E. 894.

TREPEL, Respondent, v. DEAUVILLE BATHING CO., Inc., Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (177 App. Div. 890, 163 N. Y. Supp. 1133), entered March 2, 1917, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. This action was brought by plaintiff, as assignor of his wife, to recover of the defendant the value of certain jewelry deposited with defendant when plaintiff's wife went in bathing. The defendant denied that it was liable for the amount claimed in the complaint and set up by its answer that said jewelry was left with defendant upon the express understanding and agreement that in no event was the liability of the defendant to exceed twenty-five dollars. Clarence E. Thornall and Edward V. Thornall, both of New York City, for appellant. John Bogart and Abraham P. Wilkes, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur. HISCOCK, C. J., not sitting.

TROMBLEE, Respondent, v. NORTH AMERICAN ACCIDENT INS. CO., Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (173 App. Div. 174, 158 N. Y. Supp. 1014), entered May 5, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover upon a policy of accident insurance. The complaint alleged, among other things, that on the 29th day of December, 1914, the insured slipped and fell to the ground, receiving injuries covered by said policy and from the effect of and as a direct result of which, he subsequently died. The issues raised by defendant's answer were whether the insured, on the 29th day of December, 1914, received

a bodily injury through accidental means that resulted in his death directly, independently and exclusively of all other causes; whether four consecutive yearly renewal premiums of said policy were paid in advance, and whether notice of death and proof of loss were furnished as required by the policy. Walter A. Chambers, of Glens Falls, for appellant. C. E. Fitzgerald and James McPhillips, both of Glens Falls, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, and CRANE, JJ., concur. McLAUGHLIN, J., not voting.

In re VANDERBILT'S ESTATE. (Court of Appeals of New York. April 29, 1919.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (184 App. Div. 661, 172 N. Y. Supp. 511), entered December 27, 1918, which unanimously affirmed an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Alfred G. Vanderbilt, deceased. The decedent by his will made provision for payment to his widow of an amount due her by the terms of an antenuptial agreement. The question was whether said amount was subject to a transfer tax. Schuyler C. Carlton and Lafayette B. Gleason, both of New York City, for appellant. Roy O. Gasser and Henry B. Anderson, both of New York City, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

VAUGHN, Respondent, v CLARE KNITTING CO., Inc., et al., Appellants. (Court of Appeals of New York. April 8, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (172 N. Y. Supp. 924), entered November 19, 1918, affirming an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). The award included an allowance for facial disfigurement, as permitted by subdivision 3 of section 15 of said statute. Defendant contended that the statute is unconstitutional, in that it assesses damages without the right of a trial by jury, in addition to providing compensation for disability; that it is contrary to the Constitution of the United States and to the Constitution of the state of New York, in that it takes property without due process of law; and that the Compensation Law of the state of New York being a compulsory act, compensation cannot be awarded for disability and additional compensation for damages for disfigurement in violation of the Constitution of the United States and the Constitution of the state of New York. William H. Foster, of Syracuse, for appellants. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs, on authority of Matter of Sweeting v. American Knife Co., 226 N. Y. 199, 123 N. E. 82.

HISCOCK, C. J., and CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur. CHASE and HOGAN, JJ., vote to remit to Industrial Commission for further hearing.

VENNER, Appellant, v. NEW YORK CENT. & H. R. R. CO. et al., Respondents. (Court of Appeals of New York. March 21, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (177 App. Div. 296, 164 N. Y. Supp. 626), entered March 14, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. The action was brought for the purpose of preventing and, so far as accomplished, of undoing a consolidation (agreement executed April 29, 1914) of the New York Central & Hudson River Railroad Company, whose railroad began at New York City and ended at Buffalo, with the Lake Shore & Michigan Central Railway Company, whose line began at Buffalo and ended at Chicago and other Western points, and of nine other railroad companies owning branch lines, all of them together representing a capitalization of over \$900,000,000, which consolidation had been approved by all the Public Service and Public Utilities Commissions whose approval was required, and by the Interstate Commerce Commission. The basis of the plaintiff, appellant's attack was that the consolidation was in violation of the federal Anti-Trust Acts (Act July 2, 1890, c. 647, 26 Stat. 209; Act Oct. 15, 1914, c. 323, 38 Stat. 730), and various constitutional provisions and acts of the states through which the railroads of the consolidated company extend, forbidding the consolidation of parallel and competing lines of railroad, and forbidding the creation of monopolies. Elijah N. Zoline, of New York City, for appellant. Walter C. Noyes, Albert H. Harris, Alexander S. Lyman, and Charles C. Paulding, all of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

VER DINE, Respondent, v. JOHNCOX, Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (177 App. Div. 952, 164 N. Y. Supp. 1117), entered April 8, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. The action was to recover for injuries to plaintiff's horse through its being struck by defendant's automobile while being driven along a road in Ontario Center, Wayne county. The only point raised on appeal was that the verdict was a compromise and was not based on the evidence. J. S. Albright, of Rochester, for ap-

pellant. Clyde W. Knapp, of Lyons, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

VETAULT, Respondent, v. KENNEDY, Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (178 App. Div. 228, 165 N. Y. Supp. 203), entered May 29, 1917, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon the report of a referee. The action was to recover for merchandise, labor and material alleged to have been furnished defendant by plaintiff at her request. The answer consisted of a general denial and a separate defense setting up the statute of limitations. Defendant contended that the claim should have been made against her husband and not against her. The referee held that the defendant was bound by the acts of her husband, who in the transactions covered by the complaint was her agent and that payments on account had taken the case out of the statute of limitations. See, also, 223 N. Y. 556, 119 N. E. 1083. Frank A. Gaynor and John Thomas Smith, both of New York City, for appellant. Harry G. Stephens, of Easthampton, L. I., for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, and CRANE, JJ., concur.

VILLAGE OF LARCHMONT, Respondent, v. WHITE et al., Appellants. (Court of Appeals of New York. April 22, 1919.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (172 N. Y. Supp. 924), entered December 6, 1918, which affirmed an order of Special Term denying a motion for an order amending nunc pro tunc as of April 8, 1918, a previous order granting an injunction restraining the defendants from using the public highways of the plaintiff with and by an automobile truck, carting filling material to the property of the defendant White, the hauling being done by the defendant Miele, because it alleged such use injured the surface of the highway. Michael J. Tierney, of New Rochelle, for appellants. Clarence De Witt Rogers, of New York City, for respondent.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

In re WEED et al. In re BARNETT. (Court of Appeals of New York. June 3, 1919.) Appeal from an order of the Appellate Division

of the Supreme Court in the Second Judicial Department (182 App. Div. 928, 168 N. Y. Supp. 1133), entered February 26, 1918, which modified, and affirmed as modified, an order of the Kings County Surrogate's Court opening a former decree settling the accounts of the executors of Charlotte Barnett, deceased, and restating said accounts, so as to surcharge said executors with the amount of a legacy by the terms of the will payable to the petitioner herein when she should arrive at the age of 21 years, but, as shown by said accounts, paid to the petitioner's father in her infancy. Alexander S. Bacon, of New York City, for appellant. John D. Armstrong, of Brooklyn, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, and ANDREWS, JJ., concur. CRANE, J., not voting.

WESTERN NEW YORK WATER CO., Respondent, v. CITY OF NIAGARA FALLS et al., Appellants. (Court of Appeals of New York. May 20, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (176 App. Div. 944, 162 N. Y. Supp. 1149), entered February 23, 1917, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The action was brought for the purpose of obtaining a judgment permanently restraining and enjoining the defendants from continuing to discharge the wash water effluent from its filtration plant into the waters of Niagara river. The plaintiff alleged that the effluent so discharged polluted the waters of the river, thereby damaging and injuring its business. The defendants, in their answer, denied that the effluent discharged polluted the waters of the river, and upon the trial claimed that nothing was placed in the river of an injurious character which had not been taken therefrom in the first instance and in this respect denied all the allegations of the complaint. Robert J. Moore, of Niagara Falls, for appellants. Edward H. Letchworth and Thomas R. Wheeler, both of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

WIKOFF, Respondent, v. NEW AMSTERDAM CASUALTY CO., Appellant. (Court of Appeals of New York. April 8, 1919.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (177 App. Div. 951, 164 N. Y. Supp. 1118), entered March 30, 1917, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover upon a policy of accident insurance. The issue tendered by the defense presented the inquiry whether or not the decedent violated the following clause of the policy: "If the as-

sured shall sustain any loss covered hereby while in an occupation classed by the company as more hazardous than that stated in the said schedule, or while doing an act or thing pertaining to any occupation so classed, except ordinary duties about his residence or while engaged in recreation, this policy shall not be forfeited thereby, but the liability of the company hereunder shall be only for the amount of insurance that the premium paid would purchase in such more hazardous class, according to the table of rates and classification of risks filed with the insurance department of the state wherein this policy is issued or delivered prior to the occurrence of the injury for which claim is made." It was established by the evidence that the assured was killed by the explosion of a stick of dynamite in his hands which was being used in the excavation of a well. James Coupe, of Utica, for appellant. Almet Reed Latson, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, and ANDREWS, JJ., concur. HISCOCK, C. J., and CHASE and McLAUGHLIN, JJ., dissent.

WINTER, Appellant, v. PETER DOELGER BREWING CO., Inc., Respondent. (Court of Appeals of New York. March 21, 1919.) Appeal, by permission, from a judgment, entered February 27, 1917, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (175 App. Div. 796, 162 N. Y. Supp. 469), reversing a determination of the Appellate Term, which reversed a judgment of the Municipal Court of the City of New York in favor of defendant, and affirming said Municipal Court judgment. The action was to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. The complaint was dismissed upon the ground that the plaintiff had a complete remedy under the Workmen's Compensation Law (Consol. Laws, c. 67). Anthony J. Ernest, John J. McBride, and Walter A. Swett, all of New York City, for appellant. Frank J. O'Neill, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

END OF CASES IN VOL. 123

